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b-solutions

FINAL REPORT BY THE EXPERT

Advice Case: 183 days rule obstructing cross-border mobility

Advised Entity: Oost-Vlaanderen Province - Euregio Scheldemond, BE-NL

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I. Description of the Obstacle

I.a The Analysis of Existing Obstacles presented by the Euregio Scheldemond

This first section is the analysis of the obstacles as understood by the Euregio Scheldemond and presented in the request. The original parts are in italics. Given the complexity of tax law and the legal background of this case, formulating first assumptions about the nature of the problem is rather difficult. There were also some misunderstandings or incorrect estimates in the analysis of the problem described by the Euregio Scheldemond. These are discussed in the following. This seems useful, since this also illustrates the difficulty to get a grip on the nature of a particular problem on the side of cross-border practitioners in the field.

> Description by Euregio Scheldemond: "*Zeeland Seaports and the Port of Ghent merged into North Sea Port on the 6th of December 2017. Because of this merger, North Sea Port became a top-notch port in North-Western Europe, thus a substantial player in the world trade. Another result of this merger is the creation of a cross-border port and literally a multinational company. Although being a best practice and inspiration for cross-border cooperation, several obstacles came to attention.*"

In order to analyse current and potential difficulties of North Sea Port as an integrated cross-border company, the Dutch Ministry of the Interior and the Province of Zeeland commissioned an investigation to summarise these obstacles, which was executed by the Institute for Transnational and Euregional cross-border cooperation and Mobility (ITEM) in 2018/2019.[1] In the course of the research, many meetings were held with North Sea Port in order to find out what particular problems the company is facing due to the cross-border situation. The tax problem (and in particular the so-called "183-days rule") related to cross-border work within the company has been one problem on the list chosen by the Euregio Scheldemond for this particular follow-up research.

> Description by Euregio Scheldemond *"Some of these obstacles concern a specific company located in the port, that has issues with crossing the borders for its services.… Many obstacles have an effect on the daily business regarding employment-issues such as location, taxation and mobility. The (…) collected obstacles have a negative effect on the functioning of North Sea Port as a smoothly running enterprise. However, a couple of these obstacles are more*

[1] ITEM, Eindrapport (projectfase 1), "Inventarisatie Grensoverschrijdende Knelpunten: North Sea Port", Project rapport 4 maart 2019, 14 accessible at file:///C:/Users/niesten/Downloads/ITEM%20project%20rapport_inventarisatie%20knelpunten%20North%20Sea%20Port_04032019final%20(1).pdf.

obstructive than others. More in specific, regarding cross-border labour mobility, the notorious '183-days-rule' probably is the most disadvantageous for the enterprise and its employees."

This remark refers primarily to the restrictive meaning of the 183-days rule in article 15 of the Belgian-Netherlands Tax Treaty of 2001, and secondly to the meaning under article 15, par 2 with respect to the rules related to the posting of workers. This will be analysed in detail in Section I.b.

In the previous ITEM analysis, it was already concluded that the cross-border structure of the company North Sea Port leads to higher administrative burden compared to a harbour company that is situated only in one State. Employer and employees have to follow administrative procedures to proof how much time they worked across the border. As already mentioned, working across the border is not an exemption but the rule and has been the purpose of the merger. However, today this means related to income tax, employer and employee have to carry out time writing. The 183-days rule *inter alia* lays down provisions with respect to the question, which State has the right to levy income tax. This means that employer and employees have to carefully monitor the time individual staff members are working across the border, even if that means just a meeting with colleagues from the same holding in a building across the border. The question of taxes is only one out more restrictions. The administrative complexity is higher than for a company in a pure national situation, because related to social security contributions (in addition to the rules of the tax treaty), the employer has to fill in forms and take account of the time spend abroad as an obligation under EU legislation.

Because of the complexity of the rules and administrative burden North Sea Port faces restrictions to the flexibility of employees with respect to joined teams from the two national parts of the company. It also means with respect to the human resource management of the company that employees are facing restrictions with respect to a certain vacancy or function in the company. The selection today cannot entirely be based on expertise and work experience but may be dependent on the question where staff members live and where the office of the new position would be located. In this respect, from an employee's point of view accepting a position that requires working in two countries in a specific combination may be not attractive due to practical or financial disadvantages. Since the integrated cooperation of both cross-border parts of the company is the raison d'être of North Sea Port, the future of the model "cross-border" company also depends on smart solutions for the specific situation of a cross-border pioneer.

Description by Euregio Scheldemond:

"For instance, a Dutch employee of the Dutch part of the enterprise has a meeting with his Flemish colleagues in the Belgian part of the enterprise. If this occurs for more than 183 days,

> *the Dutch employee is considered a cross-border worker[2] and has to pay taxes and social security in Belgium.[3]*

This is for instance a misunderstanding in the problem description of Euregio Scheldemond. The question "cross-border worker" or not, does not depend on compliance with the 183-days rule. In the first place, a "cross-border worker" is not (or no longer) defined by the bi-lateral tax treaty. The 183-days rule has an impact on the potential transfer of taxation to the State where the work takes place. If the 183-days limit is exceeded, the State of employment will have the power to levy taxes and the State of residence will have to prevent double taxation. The misunderstanding is not surprising, since "cross-border worker" or "frontier worker" is defined in the EU legislation, namely the EU Regulation 883/2004 on the coordination of social security.[4]

According to Euregio, there are financial disadvantages for employees who have to pay taxes in two countries due to the 183-day rule. The problem description by the Euregio states that:

> *"they have to pay taxes on the percentage of work in the Netherlands and in Belgium. These taxes overlap and this results in an extra costs for which the compensation, if there is any, will come two years after the taxation."*

In this respect, the statement has to be nuanced. The Dutch-Belgian tax treaty includes a compensation scheme for Dutch residents (art. 27) who could face this type of disadvantage. This means that financial advantages and disadvantages cannot be described in general but are very much dependent on the particular situation of the employee. Nevertheless, as ITEM's experience with cross-border work shows: the uncertainty about the future financial situation and the complexity of provisions do constitute an obstacle with respect to cross-border mobility. This effect also plays a role within North Sea Port, as it has been communicated in several meetings.

[2] Correction ITEM: "cross-border worker" does not depend on compliance with the 183-days rule. Whether or not the 183-day rule is met has only an impact on the transfer of taxation to the work state. Moreover, the term "cross-border worker" is not (or no longer) defined in the tax treaty, but in Regulation 883/2004.

[3] Correction ITEM: 183 days of rule has no impact on social security. Different rules apply in social security law (see Regulation 883/2004).

[4] The official definition in the regulation is described in article 1 (f): “"frontier worker" means "any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a
rule daily or at least once a week".

I.b Analysis of Existing Obstacles by the Adviser

Overview of the problem

Working across borders in the North Sea Port poses a number of important administrative and practical problems. Many of these problems can be traced back to the operation and application of the 183-day rule in Article 15 of the Belgian-Dutch tax treaty. [5] The ITEM study on the Identification of Cross-border Bottlenecks has shown that the administrative burden is already perceived as a particular obstacle in the daily operation of the North Sea Port.[6] For example, North Sea Port applies its personnel policy to meet as much as possible jointly from both subsidiaries. The crew of a ship experiences difficulties as the ship sails daily up and down between Ghent and Terneuzen. This makes it impossible to predict how much time will be spent in which State. In practice, this is difficult to implement. It also appears that employees in managerial positions have to manage a joint team on both sides of the border. Moreover, there is a lack of clarity as to whether the calculation method used means that a short period of working across the border (e.g. 15 minutes or half an hour) should be counted as half a day's work.

The core of these problems lies in the tax field (high administrative burden due to the 183-day rule) and the social security field (differences in labour costs due to subjection to the social security regulations of the State of residence) as well as the (dis)coordination between the two fields.[7] We will take a closer look at these problems.

Tax obstacles - The 183-day rule, as contained in Article 15(2) of the OECD Model Tax Convention, determines the State to which the remuneration of EU cross-border economically active persons is taxed and, consequently, the State which may levy income tax. The criterion for determining whether the cross-border worker crosses the 183-day limit is physical presence. All calendar days on which the worker has been present in the State of work are taken into account. Parts of a day count as full days. Days not worked (weekends/vacation days) or day parts are also counted. For tax purposes, employees must keep track of how much time was spent in which State. [8] By having to keep careful and accurate records of how much time (hours and minutes on the basis of real time expenditure) is worked daily in the State other than the State of residence, the cross-border worker is confronted with a high

[5] We understand that this paper focuses on the problems associated with the '183-day rule'. Other obstacles, e.g. the problems associated with the interpretation of the concept of "employer" (in the material or formal sense of the word), are, in principle, not dealt with in their entirety in the present memorandum. In short, the problem lies in the fact that, in the absence of a definition of the term "employer" in the tax treaties, recourse must be had to national law (unless the context requires a different interpretation).

[6] ITEM, Eindrapport (projectfase 1), "Inventarisatie Grensoverschrijdende Knelpunten: North Sea Port", Project rapport 4 maart 2019, 14 accessible at file:///C:/Users/niesten/Downloads/ITEM%20project%20rapport_inventarisatie%20knelpunten%20North%20Sea%20Port_04032019final%20(1).pdf.

[7] ITEM, Eindrapport (projectfase 1), "Inventarisatie grensoverschrijdende knelpunten. North Sea Port", Project Rapport 4 maart 2019, 13.

[8] Days of transit or days of sickness are in principle not counted (OECD Commentary 2017, No 15/5-7).

administrative burden.[9] The daily and hourly records present practical difficulties, especially for workers with a highly mobile activity (e.g. consultants, international drivers in road and rail transport). Highly mobile workers can cross several countries per day and thus reach a total of 183 days of presence in more than one State over a twelve-month period. For example, it is common for port employees to cross the border several times a day. The control of this administration is limited, so that the cross-border worker himself can easily respond to the time administration. [10]

Another problem with the so-called 183-day rule is that in practice it is not always easy to identify the employer for the application of the 183-day rule.[11] Since the term 'employer' is not defined in the OECD Model Convention, the treaty States apply their own interpretation (material or formal meaning), which may lead to different interpretations between the countries. [12] This may in particular cause problems in determining the state in which an enterprise/business (in this case a port) is deemed to be established for the purposes of the treaty. Is this where the company has the general management? Is this the State where the company with the actual management occupies the squarest metres? [13] In practice, without further regulation, it is very difficult to clearly identify the territory in which the company is resident for the purposes of the Convention. [14] Due to the difficult interpretation of the term 'employer' and the associated problems of interpretation, the cross-border employee is once again confronted with uncertainty about the tax law position.[15]

Obstacles to social security - For social security purposes, it is important to note that an A1[16] (former E101[17]) form must be submitted in order to demonstrate that there is a posting or the performance of activities in two or more Member States. The A1 form completed by the employer shows that the employee remains subject to the social security legislation of the sending State if he is temporarily employed in another State or in the residence State if he starts working simultaneously in two countries (> 25% of the salary/working time in the residence State). Indeed, the main rule for social security is *lex loci laboris* (i.e. exclusive designation of the State of employment for social security purposes). However, the cross-border worker remains in the service of the employer in the State of

[9] For international drivers in road and rail transport, the problem is well known, and often kilometre or hour records are kept (using the app on the phone).

[10] Previously the 183 days were tested in the relevant calendar year, which led to manipulative corrections. Today, the OECD Model Convention and most of the tax conventions inspired by it use the criterion of "twelve-month period beginning or ending in the calendar year".

[11] "Fiscale gevolgen tijdelijke grensoverschrijdende tewerkstelling van werknemers. Begrip "werkgever" onder belastingverdragen. Korte detachering binnen concernverband, *Stcrt.* 2010, 788.

[12] See: Rapport van de Commissie Grenswerkers, "Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken", Geschriften van de Vereniging voor Belastingwetenschap no. 257, 2017, 99-106; J.P. van 't Hof en M.R.M. Deden, "Het begrip 'werkgever' volgens artikel 15 OESO-Modelverdrag nader toegelicht", *WFR* 2010/974.

[13] Kamerstukken I/II 2004/05, 29 881, A en nr. 1, 9-10.

[14] Kamerstukken II 2012/13, 33 615, nr. 3, 23, onderdeel II.4.

[15] Besluit uitleg begrip werkgever over fiscale gevolgen aan tijdelijke grensoverschrijdende tewerkstelling aan werknemers, *Stcrt.* 2010, 788.

[16] Under the current Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 1.

[17] The E-101 document under the former Regulation (EEC) 1408/71.

posting and carries out the work in the other State. [18] The A1 form proves that social security contributions were/are also paid in the sending state, so that they no longer have to be paid in the other State. In this sense, the A1 form is, in our view, a fully-fledged and effective means of preventing double insurance and contributions.[19]

However, submission to social security legislation other than that of the State of employment may lead to differences in labour costs between residents and non-residents of the State of employment, resulting in inequalities due to unequal pay for equal work in the same State of employment. [20] In the case of Belgium in particular, this can increase considerably because, unlike the Netherlands, Belgium does not have a ceiling on social security contributions. It must be prevented that posting is a free route for unfair competition. The rules should be interpreted restrictively. [21] A1-forms should only be issued when all the conditions are met. In this context, it is useful to refer to the Minister's analysis, which addresses a number of bottlenecks concerning the A1 form (in particular the procedure for issuing and withdrawing the A1 form , posting and work in two or more Member States).[22]

Discoordination between taxation and social security - In addition to the administrative problems in the field of taxation (high administrative burden) as well as social security (delivery of the A1 form), the cross-border employee is also confronted with a problem of (dis)coordination between the two policy areas. For taxation, the 183-day rule is decisive for the allocation of the right to levy taxes, while for social security, a period of 24 months or five years[23] is used. Temporary work in a State other than the State of residence often results in the cross-border employee being subject to the legislation of the State of employment for tax purposes (if he works more than 183 days in that State), while he remains subject to the social security of the sending State (in principle up to 24 months).[24] The concurrence of the different rules results in a high administrative burden for the cross-border worker. In addition, the interplay of tax and social security regulations encourages shopping behaviour. [25] The

[18] ITEM, Eindrapport (projectfase 1), "Inventarisatie grensoverschrijdende knelpunten. North Sea Port", Project Rapport 4 maart 2019, 13-14 accessible at file:///C:/Users/niesten/Downloads/ITEM%20project%20rapport_inventarisatie%20knelpunten%20North%20Sea%20Port_04032019final%20(1).pdf.

[19] ITEM previously indicated that the A1 certificate is accompanied by an employer's administration. See ITEM, Eindrapport (projectfase 1), "Inventarisatie grensoverschrijdende knelpunten. North Sea Port", Project Rapport 4 maart 2019, 13-14 accessible at file:///C:/Users/niesten/Downloads/ITEM%20project%20rapport_inventarisatie%20knelpunten%20North%20Sea%20Port_04032019final%20(1).pdf. In our opinion, however, the A1 certificate provides clarity as to the StateState in which social security contributions are paid, and the burden is outweighed by the advantage of simply demonstrating that social security legislation differs from the legislation of the State of employment.

[20] Minister van Sociale Zaken en Werkgelegenheid, 29 november 2017, "Analyse A1-verklaringen", ref. 2017-0000191966. Besproken door: "Minister verstrekt Tweede Kamer analyse van knelpunten A1-verklaringen", *VN* 2017/61.20.

[21] "Minister verstrekt Tweede Kamer analyse van knelpunten A1-verklaringen", *VN* 2017/61.20.

[22] Minister van Sociale Zaken en Werkgelegenheid, 29 november 2017, "Analyse A1-verklaringen", ref. 2017-0000191966.

[23] Article 16 Regulation 883/2004. See also Practical guide on The applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, 16-17 (accessible at file:///C:/Users/niesten/Downloads/EN%20-%20Practical%20Guide%20December%202013%20(17-02-2014)%20(1).pdf).

[24] Rapport van de Commissie Grenswerkers, "Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken", Geschriften van de Vereniging voor Belastingwetenschap no. 257, 2017, 313.

[25] Rapport van de Commissie Grenswerkers, "Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken", Geschriften van de Vereniging voor Belastingwetenschap no. 257, 2017, 185.

cross-border employee can set up constructions so that he is both subject to low taxation by the State of employment (when working more than 183 days in the State of employment) and remains subject to low social security contributions in the State of residence (the first 24 months).

II. Indication of the Legal/Administrative Dispositions causing the Obstacle

In order to understand the above-mentioned obstacles associated with cross-border working for cross-border industrial sites, in particular as a result of the application of the 183-day rule, an understanding of the laws and regulations in the tax and social security field is required.

Fiscal rules - According to Article 15(1) of the Belgian-Netherlands Tax Treaty of 2001, income from activities carried out by a resident of a treaty State in employment in the other treaty State may be taxed in that other State (the State of employment). The second paragraph of Article 15 provides for an exception if the employee's stay in the State of employment does not exceed a total of 183 days in the relevant period. Based on this so-called 183-day rule, the employee's remuneration is only taxable in the employee's State of residence (withholding tax), if the following three cumulative conditions are met:

1. Employment abroad does not last longer than 183 days per twelve-month period starting or ending in the tax year in question;
2. The foreign remuneration is not paid by an employer established in the work state;
3. And the burden of that remuneration is not borne by a permanent establishment of the employer in the State of employment.

As soon as one of the abovementioned conditions is not met, the power to levy the tax falls to the State of employment. As mentioned above, the concept of 'residence' (in principle, the physical presence at any time of the day) poses a number of major problems.[26]

Social security laws - The main rule for social security is *lex loci laboris*. A person is, in principle, socially insured in the Member State in which he carries out his activities.[27] Due to the principle of exclusivity, the legislation of only one Member State is applied and the other Member States are in principle not allowed to apply their social security legislation. There are a number of exceptions to the main rule of *lex loci laboris*. For posted workers, the social security legislation of the State of residence applies for a maximum of 24 months. [28] When a worker pursues an activity in two or more Member States, the legislation of the Member State of residence generally applies if a substantial part (25% of the salary/working time)[29] of the activity is carried out there. [30] If a substantial part of the activity is not pursued in the Member State of residence, the number of employers for whom activities are pursued and/or the place where the employer is established must be determined. If several activities are carried out for one employer, the legislation of the employer's State of residence/residence shall apply.

[26] OECD-Commentary 2017, nr. 15/5.
[27] Article 11(3) Regulation 883/2004.
[28] Article 12 Regulation 883/2004.
[29] Article 14 Regulation 883/2004.
[30] Article 13 Regulation 883/2004.

If two employers are employed, one of which is in the State of residence of the employee, the legislation of the State of residence/residence of the employer other than the State of residence of the employee shall apply. Article 13 of Regulation 883/2004 also contains a number of exceptions to the aforementioned rules, but these are not discussed here. The concurrence between the aforementioned rules and the fiscal regulations leads to a discoordination with the associated consequences.

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III. Description of a Possible Solution

III. a At the Level of Tax Treaties

In line with the Dutch-German regulation on cross-border industrial sites, it seems to us that, in the Belgian-Dutch context too, there is scope for including a special set of rules for cross-border industrial sites.

Dutch-German context: existing treaty regime 2012 - Pursuant to Article 14(3) of the Dutch-German 2012 tax treaty,[31] a special regime has been included for the taxation of income from employment that is charged to a permanent establishment of the employer, which is located on a cross-border industrial site and through which the Dutch-German national border passes.[32] The term 'cross-border industrial site' is defined as *'a spatially confined area which extends over both Dutch and German territory and through which the common boundary between the two Contracting States passes, provided that the Contracting States have agreed to designate the area as a cross-border industrial site*'[33] (see Article 3(j) of the Dutch-German Tax Treaty, 2016). It is useful to note that already under the old Dutch-German tax treaty 1959 a definition of the term 'cross-border industrial site' was included.[34] In addition to the requirements of a spatially confined area that extends on both Dutch and German territory through which the Dutch-German national border runs, the requirement was that the intended area should have been explicitly designated as a cross-border industrial site by the Netherlands as well as by Germany jointly. Such designation was made by means of an exchange of letters. Such correspondence took place for the cross-border industrial sites 'Avantis'[35] (which entered into force on 1 November 2007) and 'Eurode Business Center'[36] (which entered into force on 1 May 2008).[37] The purpose of the designation was to ensure as much equal treatment as possible in the application of the provisions relating to cross-border industrial sites.

Special tax rule - If three conditions are met (contiguous terrain, extending over the territory of the two States and crossed by the common border), the taxing right is assigned to the employee's State of residence. This is only different if these persons are subject to the social security rules of the other

[31] This paragraph is the successor to Article 10(2)(a) of the Dutch-German tax treaty of 1959, which was added by the Third Additional Protocol in 2004 as part of the regulations for cross-border industrial sites. On this subject: R. Prokisch, “Grensoverschrijdende bedrijventerreinen; het derde aanvullend Protocol bij het Duits-Nederlandse belastingverdrag van 1959”, *FF* 2006/170-03. See: Kamerstukken II 2012/13, 33 615, nr. 3, 23.

[32] In this context, Article 4(4) of the Netherlands-Germany Tax Convention 2012 contains a special provision for cases where the place of effective management of a legal person is situated on a cross-border industrial site and where the common boundary between the two Contracting States runs through the fixed place of business in which the place of effective management is situated. For example, the offices in which the company's management is carried out may be clearly located within the territory of a State. If the State bound by the Convention in which the place of effective management of the legal person is situated is unequivocally identified, it is presumed to be a resident of that State only. If not, it shall become a resident solely of the State in which the major part of the surface area of the building occupied by the enterprise in which the effective management of the enterprise is exercised is situated. See in this respect also Kamerstukken I/II 2004/05, nr. 29.881, A en 1, 9-10. See in this respect also Bijlage bij het belastingverdrag Nederland-Duitsland 2012.

[33] Own translation.

[34] Article 2, first paragraph, section 6 of the Dutch-German tax treaty 1959.

[35] *Trb.* 2006, 203 en *Trb.* 2007, 178.

[36] The cross-border business industrial site 'Eurode Business Center' is located on the joint municipal border of the municipalities of Herzogenrath (Germany) and Kerkrade (the Netherlands).

[37] *Trb.* 2007, 108 en *Trb.* 2008, 39. Zie ook Kamerstukken I/II 2004/05, nr. 29.881, A en nr. 1, 9.

State by virtue of Regulation (EEC) No 1408/71[38] or Regulation (EC) No 883/2004.[39][40] In the specific situation in which an employee works in a cross-border industrial site and, in principle, is able to develop activities continuously on both sides of that border, it is very difficult or impossible from a practical point of view to determine in which territory (Netherlands/Germany) the employee carries out his activities. With regard to taxation, the social security allocation rules, as laid down in Regulation 883/2004[41], were followed. Because of this special treaty provision, taxation and social security contributions for these persons take place in the same state. The special treaty provision leads to a reduction in the administrative burden.[42]

Insertion of a specific regime for cross-border industrial sites in the Belgian-Dutch context - In the context of cross-border industrial sites in the Belgian-Dutch context, it is recommended to include an exception to the regular taxation rules on income from employment, as set out in Article 15(1) and (2) of the Belgian-Dutch 2001 taxation treaty. In line with the Dutch-German legislation, this exception may concern the distribution of taxing powers in respect of income from employment that is borne by a permanent establishment of the employer, which is situated on a cross-border industrial site and which crosses the Belgian-Netherlands border. The special scheme should apply to industrial sites that have been designated by mutual agreement between the contracting States. In this sense, in line with the designation under the Dutch-German tax treaty, North Sea Port could, by means of correspondence, be explicitly recognised as a cross-border industrial site and announced as such in a joint declaration.

If these conditions are met, the taxing rights may be assigned to the Member State of residence of the cross-border worker working on the industrial site. The domicile of the State of residence should be made a general policy in all treaty negotiations.[43]

In addition, an exception to the exception for cross-border industrial sites (and therefore an exception to the taxing right of the State of residence) can be included for the case in which, pursuant to

[38] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJEC 1971, L 149). At the time of the inclusion of the special scheme in the 2012 tax treaty, the predecessor of Regulation (EC) No 883/2004 could apply as a transitional rule.

[39] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJEU 2004, L 166).

[40] Article 14(3) of the Dutch-German tax treaty 2016 reads as follows: "*Niettegenstaande de voorgaande bepalingen van dit artikel, zijn beloningen verkregen ter zake van een dienstbetrekking van een natuurlijke persoon die inwoner is van een van de verdragsluitende staten, die ten laste komen van een op een grensoverschrijdend bedrijventerrein gelegen vaste bedrijfsinrichting, waar de gemeenschappelijke grens tussen de verdragsluitende staten doorheen loopt, uitsluitend belastbaar in de staat waarvan de natuurlijke persoon inwoner is, tenzij deze persoon ingevolge Verordening (EEG) 1408/71 van de Raad van 14 juni 1971, Verordening (EG) 883/2004 van de Raad van 29 april 2004 of ingevolge een verordening van de Europese Unie die na de ondertekening van dit Verdrag daarvoor in de plaats komt, aan de rechtsregels van de andere staat is onderworpen. Indien de persoon ingevolge Verordening (EEG) 1408/71 van de Raad van 14 juni 1971, Verordening (EG) 883/2004 van de Raad van 29 april 2004 of ingevolge een verordening van de Europese Unie die na de ondertekening van dit Verdrag daarvoor in de plaats komt, aan de rechtsregels van de andere staat is onderworpen, mogen deze beloningen in die andere staat worden belast*.".

[41] In particular, the designation rules for activities in two or more Member States (Article 13 Regulation 883/2004).

[42] MvT, Kamerstukken II 2012/13, 33615, nr. 3, p. 23.

[43] Rapport van de Commissie Grenswerkers, "Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken", Geschriften van de Vereniging voor Belastingwetenschap no. 257, 2017, 121.

Regulation 883/2004, the concerned employee working on the industrial site is subject to the social security rules of the other State. This may provide a solution in cases where the employee is very mobile and is constantly working on both sides of the border, making it difficult to determine the exact location of the employee's activities. For the taxation of the remuneration of cross-border workers employed on a cross-border industrial site, the social security designation rules set out in Article 13 of Regulation 883/2004 (the so-called designation rule for the pursuit of activities in two or more Member States) can be used as a basis.

In short, decisive importance must be attached to the 'substantial performance of the work' (to be understood as working time/income). If more than 25% of the activities are carried out in the State of residence, the State of residence is competent. If less than 25% of the activities are carried out in the State of residence, in principle the seat/domicile of the company for which the employee is employed (unless seat/domicile) must be taken into account.

The inclusion of a special allocation rule for the employment income of employees employed on the cross-border industrial sites means that both the taxation and the levying of social security contributions take place in the same state. The aforementioned administrative burdens resulting from the application of the 183-day rule and the A1 form can then be kept to a minimum. In this way, the aim is to achieve better coordination with regard to which taxation must follow the rules of the social security regulation. [44]

Another possibility to solve the practical problems regarding the 183-day rule is a provision comparable to the provision mentioned in the Belgium-Luxembourg agreement.[45] According to this agreement, an employee is allowed to stay outside the State of work for a maximum of 24 days. The limited stay outside the State of work does not affect the fact that the wage of the employee is taxable in the State of work.

III. b At the Level of Tax Treaties and Regulation No 883/2004

Further coordination can be achieved by working with a new period criterion for determining taxation and social security. In this sense, the Committee on Frontier Workers has already proposed to work towards a regulation that would reduce the period of social security to 12 months (instead of 24 months) and increase the period of tax liability to 12 months (instead of 183 days) in the case of posting. [46]

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[44] Also already advocated in the legal doctrine, see : P. Kavelaars, *Harmonisatie van vrij personenverkeer: een drieluik*, Deventer, Kluwer, 1998, 35. Other authors are of the opinion that a far-reaching harmonisation between the rules in the tax treaty (Article 15 of the OECD Model Convention) and Regulation 883/2004 is not desirable because of different objectives and different starting points in both areas. (F. Pötgens, "Het nieuwe belastingverdrag met Duitsland; inkomsten uit dienstbetrekking", *MBB* 2012/07/08-04, par. 2.4, met verwijzing naar E. Kemmeren, *Principle of Origin in Tax Conventions – A Rethinking of Models*, Pijnenburg, 2001, 389-394).

[45] Agreement of 16 March 2015, discussed by C. Buysse, "*DBV België-Luxemburg: activiteit van maximaal 24 dagen buiten werkstaat*", Fiscoloog (I.) 2015, no. 376, 1. H. Niesten, "*Belastingvoordelen van de grensoverschrijdende economisch actieve EU-persoon"* 2017, p. 286 and 287.

[46] Rapport van de Commissie Grenswerkers, "Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken", Geschriften van de Vereniging voor Belastingwetenschap no. 257, 2017, 313-314.

- Practical solution

It goes without saying that good, correct and accessible information is crucial, although problems in this area can still be identified today. Improved cooperation between Member States is essential in order to improve the provision of information so that cross-border workers can be (more) certain of the tax and social security legislation applicable to their specific situation.

One possibility which should certainly be examined in this context is whether two Member States could conclude an agreement on social security. Article 16 of the Regulation 883/2004 determines that an agreement may be concluded derogating from the rules on applicable legislation where this is in the interest of certain persons or groups of persons. Moreover, art. 8, par. 2, of the Regulation 883/2004 reads as follows: "*2. Two or more Member States may, as the need arises, conclude conventions with each other based on the principles of this Regulation and in keeping with the spirit thereof*".

Consequently, Member States may conclude bilateral agreements with each other as long as they are based on the principles of the regulation and the spirit thereof.[47] It should be examined whether this possibility can be used in solving the discoordination problem between taxation and social security.

[47] Inspiration can be drawn from the Fourth Supplementary Agreement between the Netherlands and Germany of 29 March 1951 on the rights of Dutch forced labourers during the second World War. See the Hoorn judgment of 28 April 1994, OJ EC 11 June 1994, C 161. See also Convention between the Netherlands and Sweden concerning the waiving of the reimbursement of benefits to unemployed persons (8 May 2003) and Convention on social security between the Netherlands and Great-Britain and Northern Ireland (21 December 2005), and the Convention between the Netherlands and Belgium for the development of mutual administrative assistance in the field of social security (6 December 2010).

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IV. Pre-assessment of whether the Case could be solved with the European Cross-Border Mechanism (ECBM)

The case of North Sea Port is an interesting example to discuss the range of the instrument ECBM. Two Member States would probably not try to solve cross-border obstacles by using the EU initiative if bi-lateral tax problems are the issue. Cross-border tax questions are laid down in "bi-lateral tax treaties", very often related to international formats, for instance based on the work of the OECD. Moreover, it should be noted that also in the Benelux framework, tax matters are only regulated by intergovernmental agreements (never by a decision of the Committee of Ministers). [48]

This could even be described as an advantage, because neighbouring countries such as the Netherlands and Belgium have developed a certain routine in reviewing these treaties on a regular basis. It is in this case rather evident that the national ministries of finance can be regarded as the addressee who should be approached in case of severe cross-border obstacles.

As shown in this report, there is always the possibility to define new provisions by adding a new protocol to an existing treaty. This could be regarded as a very practical tool without much administrative, political or legal burden. The starting point for such a protocol is a common political objective by the Member States involved.

The case of North Sea Port also highlights the fact that the perceived administrative burden is not only influenced by a certain tax rule. Other rules (not related to taxes) do more or less match with the tax rule in question. In this case, the origin of additional complexity has to do with the match or mismatch of tax rules and social security rules. In fact, the question is how the requirements of the bi-lateral tax agreements are in line with the stipulations of the European Regulation on the coordination of social security. This is another reason why the described problem is not primarily an obstacle that could be tackled by the ECBM. If important elements of the bureaucratic burden is related to certain aspects of the EU social security regulation, this could only be addressed by amending the regulation as part of the normal EU law-making process between Council and European Parliament.

[48] ITEM, "Statuut voor Limburg? Verkenning van de juridische en praktische mogelijkheden tot interregionale grensoverschrijdende samenwerking in de grensregio", eindrapport – project fase 1, 9 november 2018, 116.

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V. Other Relevant Aspects to this Case

North Sea Port is an interesting case beyond the question of single tax rules for cross-border situations. To some extent, it is a rather unique company with its own characteristics. North Sea Port has not the character of a national company whose employees have to work incidentally in other countries on certain projects. The main cross-border work occurs as a daily routine within the same holding and on a clearly defined but rather small territory. As already mentioned, the integration of staff and activities on the Belgian and the Dutch side has been the main purpose of the merger.

On the other hand, North Sea Port is not a multi-national company with two or more locations spread over the territory of the EU. Given the geographical nature of a harbour, North Sea Port could be described as a local company where the clearly defined cohesive territory is an essential part of its DNA.

In this respect, one could speak about a category of companies with particular needs which have – so far – not be taken into consideration when tax rules or other pieces of legislation were made. North Sea Port is in this respect a test case for other integrated cross-border companies. Legislation must correspond to their very particular needs..

Martin Unfried