Analytical report 2014

The relationship between social security coordination and taxation law

Report prepared under Contract No VC/2013/0300 - ***FreSsco***
April 2015

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Social Europe

This report was prepared in the framework of Contract No VC/2013/0300 "Network of Experts on intra-EU mobility – social security coordination and free movement of workers / Lot 1: Legal expertise in the field of social security coordination and free movement of workers". This contract was awarded to FreSsco, a network of independent experts from 32 European countries coordinated by Ghent University.

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Suggested citation:
B. Spiegel (ed), K. Daxkobler, G. Strban & A.P. van der Mei, *Analytical report 2014: The relationship between social security coordination and taxation law*, FreSsco, European Commission, April 2015, 61 p.

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Executive summary

Social security and tax systems have a great impact on citizens and enterprises. They have in common that tax and social security contributions are perceived as deductions which are usually made from income. While taxes seem to be lost in the general budget, social security contributions are allocated to financing the social security system and could open entitlement to benefits.

This report starts with the explanation of some definitions and with some introductory remarks to ease the reading (**Chapter 1**). The report deals with both sides: the levying (social security contributions and taxes) and the granting (benefit) side.

As the situation in the Member States is very different, it is important to provide a short overview of the situation, but also of the systematic decisions in these States (**Chapter 2**). These differences lead to problems for persons whose situation shows cross-border elements.

Under **Chapter 3** the legal system is explained and analysed: while for social security the EU has taken the lead in laying down which Member State is competent to levy contributions (Title II of Regulation (EC) No 883/2004), taxes are still outside such EU instruments and are governed by one of the many Double Taxation Conventions (DTCs). Both types of instruments are not necessarily based on the same principles. There are many differences concerning the notions used (e.g. concerning employer or residence) but also concerning the rules which lay down which Member State is competent. Apart from the fact that under DTCs different States may be declared competent e.g. in situations of posting, frontier workers or simultaneous activities in more than one Member State, there is another still more complicating difference: while for social security always only one Member State is competent, under DTCs more than one Member State may at the same time have the right lo levy taxes.

These different competences immediately lead to problems and challenges, which are highlighted under **Chapter 4**. It has to be noted that the Member States have different systems (e.g. tax-financed social security schemes or Bismarckian schemes where the major part of the budget necessary to finance social security benefits comes from contributions and, thus, taxes are considerably lower). If two Member States, in which such extremely different philosophies exist, are competent for a moving person, this could easily lead to situations which have a negative or positive impact on the persons concerned, as it could result in very high or very low deductions from income compared to purely national situations. To illustrate this, we give an example of a person with a monthly income of € 3,000. In purely national situations, after the application of the national social security contributions and tax rate this would result in a net income of € 1,800. If the competences of the two selected Member States are split (one is competent for social security contributions and the other one for tax) the result of the net income would either be only € 1,300 or € 2,300. We believe that such results are already a problem regarding the fundamental freedoms of the TFEU.

Although the Court of Justice of the European Union (CJEU) up until now did not see problems with such an interaction between the social security coordination Regulation and the DTCs, we think that there might be cases where the CJEU could come to other conclusions.

In addition, we are confronted with many uncertainties stemming from the lack of clear definitions and very complex legal situations in the Member States which try to finance social security not only via clearly defined contributions (e.g. on income) but

also via socially earmarked taxes, which we define as taxes which are clearly earmarked to finance social security benefits. For the moment it is not completely clear (also after our detailed analysis of the relevant CJEU rulings) if they and which of them have to be coordinated under Regulation (EC) No 883/2004.

As already stated, these two fields of policy, i.e. tax and social policy, have not only a levy side but also a benefit side. Social security benefits are well-known to the citizens, but also to EU law experts (taking into account the coordination regime under Regulation (EC) No 883/2004). More hidden are, on the other hand, tax benefits which very often have the same social policy purpose as classical social security benefits (e.g. tax benefits for families). Also the competences to grant such social tax benefits (which we define as tax advantages which have the same social policy aim as classical social security benefits, e.g. tax benefits for persons with children) are very complex (if they are treated under tax principles – we will explain e.g. the famous *Schumacker* principle which has been elaborated by the CJEU) and are often not the same as for social security benefits. It might be unclear which rules should become applicable if a benefit could be classified under both categories.

This report analyses all the different elements and aspects of this interaction between social security and taxes in cross-border situations. As it is the first report on this issue, not all aspects could be elaborated in a very detailed manner. Nevertheless, it briefly gives already some ideas about what further work could be done and into which direction future actions may go (**Chapter 5**). Having done this study we are firmly convinced that something has to be done – be it only additional clarification or be it legislative changes (to the extent possible) to avoid at least some of the problems encountered. Our proposals range from more and better cooperation between the different stakeholders, to additional clarifications (e.g. concerning the borderline between social security contributions governed by Regulation (EC) No 883/2004 and (remaining) taxes, but also between the benefits coordinated by that Regulation and other tax benefits) and finally to more fundamental changes like synchronising competences to levy taxes and contributions e.g. for posted workers.

Chapter 6 contains some short conclusions.

1 Introduction

1.1 Purpose and content of the report

EU law in the field of social security coordination aims at eliminating or reducing hindrances and obstacles to free movement of persons between EU Member States, but this goal has not yet been entirely achieved. This report deals with obstacles to cross-border movement in the fields of social security and taxation, and especially those that result from the simultaneous application of national legislation in these two fields. So far, various reports and studies have been written about cross-border hindrances in the two respective fields, but these do not build a bridge between these fields of politics and law. Based on the mandate given by the European Commission (see Annex), we will try to build this bridge and show the interesting and sometimes disturbing results of this interaction.

This report is structured as follows. First, we try to draw the borderline between the notions of social security and taxation, thereby paying attention to the financing side as well as the benefit side. Then we describe the legal framework which applies to these two different fields of policy in cross-border situations. Thereafter, we elaborate on the challenges which result from the interaction between social security and taxation. Finally, we put forward some ideas on how to overcome some of the most striking problems identified in this report.

This report is basically addressed to two different groups of readers: experts in the field of coordination of social security systems and experts on cross-border taxation. However, on the basis of the mandate given to us, we approach the interaction between the two fields primarily from the perspective of social security coordination. Therefore, we provide more details and background information on the taxation aspects so as to help the social security experts to better understand the complex taxation matters which have to be evaluated in their interaction with social security.[1]

Furthermore, the interaction between social security and taxation is very complex and rich in various details. Thus, we had to limit our work to the main aspects and issues, leaving out other aspects which might also play a role in cross-border situations. Hence, we aim at giving the reader some ideas and a better understanding of where problems may arise. This report is meant as an incentive for further thoughts, analysis and discussions. We hope that it will start a process which ultimately can contribute to the elimination of some of the hindrances and difficulties we have detected of cross-border movement of citizens.

The personal and material scope of this report focuses on employed persons and especially on the levies they have to pay on the income which they receive from gainful activities. In addition, we deal with recipients of social security benefits (especially pensions) to show the impact of social security and taxation for these persons. Extending the analysis in detail also to other income (e.g. stemming from self-employment, or dividends or interest) would necessitate a study on its own. The same goes for other topics, like tax incentives for additional pension coverage or the

[1] More information on the coordination of social security schemes can be found e.g. on the homepage of the European Commission: http://ec.europa.eu/social/main.jsp?langId=en&catId=849.

impact of value added taxes or the taxation of real estate, which, while interesting with regard to social security and taxation, are not the main focus of our study.[2]

1.2 Expressions used in the report

Before discussing the different situations and problems which might occur in cross-border situations, it is necessary to give some definitions and make some clarifications which should help and guide the reader.

Concerning **social security**, **references to the relevant EU legal acts** would necessitate references to Regulations (EEC) No 1408/71[3] and 574/72[4] if the case (e.g. before the Court of Justice of the European Union or CJEU) concerned the period before 1 May 2010 and to Regulations (EC) No 883/2004[5] and 987/2009[6] for the period thereafter. To avoid too complex a text we have decided to refer only to Regulation (EC) No 883/2004 or 'the coordination Regulation' (where possible). Therefore, e.g. in those cases in which the principles of coordination did not change we will only refer to Regulation (EC) No 883/2004 even if the CJEU dealt with a concrete provision of Regulation (EEC) No 1408/71 in its ruling.

When using the term '**social security**' we refer to the financing as well as the benefits side, as both usually are interlinked and addressed together in (public) debates. If we want to focus only on one of these two aspects we will mention this explicitly.

Double Taxation Conventions will be abbreviated to 'DTC'. Usually, these are based on the so-called **OECD Model Convention on the Taxation of Income and Capital** (OECD MC).[7] We do not go into the details of specific DTCs, but refer only to the relevant provisions of the OECD MC.

To avoid too complex terminology we have decided to use the word '**levy**' whenever we speak generally of deductions which are made e.g. from gainful income. Thus, this notion may cover taxes and/or social security contributions.

When we refer to '**EU Member States**', this also includes the EFTA States (EEA States and Switzerland), to which the coordination Regulation applies. Although this is not necessarily a term which is relevant for DTCs (as these conventions are concluded worldwide) we will stick to it also for tax purposes and thus limit our study to DTCs between these EU Member States.

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[2] Interesting lessons could be learnt e.g. from case C-623/13, *de Ruyter*, where we still have to wait for the judgement of the CJEU, but where AG Sharpston already showed the impact of levies on such types of income.

[3] Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149, 5.7.1971, p. 2, as amended.

[4] Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedures for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and their family members moving within the Community, OJ L 74, 27.3.1972, p. 1, as amended.

[5] Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems, OJ L 200, 7.6.2004, p. 1, as amended.

[6] Regulation (EC) No 987/2009 of 16 September 2009 laying down the procedures for implementing Regulation (EC) No 883/2004 on the coordination of social security schemes, OJ L 284, 30.10.2009, p. 1, as amended.

[7] See http://www.oecd.org/tax/treaties/oecdmtcavailableproducts.htm.

Special non-contributory cash benefits (SNCBs) play an important role in this study. Whenever we refer to SNCBs we understand them as the social security benefits covered by the material scope of Regulation (EC) No 883/2004 and as defined by Article 70 of that Regulation.

Member States do not always stick to 'classic' social security contributions and taxes. There is a grey zone where the differentiation between social security contributions and taxes is blurred. Member States have been inventive and have created taxes which follow the logic of taxation but are earmarked, meaning that they go to a special part of the budget (a special fund), usually with exact percentages, meant to finance social security. These levies may be labelled as '**socially earmarked taxes**'.

The term '**social tax benefits'** will be used for all those benefits which are embedded in tax legislation and have the same impact on citizens as social security benefits. That means that they are intended – from an abstract point of view – to cover one of the risks enumerated in Article 3 of Regulation (EC) No 883/2004.

1.3 Methodology applied

This report has been prepared based on analysis and discussion of the topic by the members of the team, especially building on the experiences and knowledge gained on the different aspects of social security and taxation as well as on the literature available. As already said, the most challenging part was building the bridge between the social security and the taxation aspects.

To gain more insight into the situation in the different EU Member States we have also elaborated a questionnaire which was sent out to the FreSsco national experts. This questionnaire concentrated in a schematic manner on the ways in which social security schemes in the EU Member States are financed; on the way in which taxation plays a role in this financing as well as in the provision of tax benefits which have the same purpose as classic social security benefits; and on the impact of social security and taxation on a given income from work. The results from these questionnaires have led to the comparative studies in Chapters 2.1.3, 2.2.2 and 2.3.2. The replies to the questionnaires contained much more information than we could take on board for our study. We abstained from annexing these replies to the study to avoid an overly complex and lengthy report. Of course they can nevertheless be made available to interested readers.

2 Social security and taxes: main features

2.1 Classic contributions and taxes

2.1.1 Elements for the similarities and distinctions between contributions and taxes

'Social security' is one part of a social policy the main aim of which usually is the protection of persons against one of the risks which might occur during the different phases of live. 'Taxation' has the main purpose of collecting the necessary means to finance the various tasks which a state performs, which could also include tasks that belong to the social policy field.

We cannot define social security and taxation as two terms which are clearly separated and mutually exclusive. In the public perception taxation, however, predominantly concerns the financing side ('collection of money'), whereas social security concerns both the financing side (if there are specific contributions to finance the benefits) and the providing side (the benefits granted). Definitions of social security usually concentrate on the benefit side and the risks considered to be covered by the term 'social security'. The list of risks we know today[8] inside the EU is enshrined in Article 3 (1) of Regulation (EC) No 883/2004, which enumerates the following benefits or risks: sickness, maternity and equivalent paternity, invalidity, old age, survivors' benefits, accidents at work and occupational diseases, death grants, unemployment, pre-retirement and family benefits. Of course, this list could be disputed and it could be questioned if it is still up to date.[9] However, as this is the list currently laid down in EU legislation we have decided to stick to this list.

A **social security contribution** can be defined as a levy which is meant to finance a social security benefit which forms part of that list. For present purposes, **taxes** involve any other levies which are not directly and specifically meant to finance one of the listed benefits.[10]

There are many similarities: both taxes and social security contributions are public levies, based on legal statutes or other legal bases, and are mandatory (individuals are not free to pay them or not – *ius dispositivum*).[11] Furthermore, both taxes and social security contributions reduce the salary or other disposable income and there might be a similar tendency (by some) to evade both. Finally, the distinction between taxes and social security contributions may be blurred from an administrations' point

[8] This list of risks has a longstanding tradition. For example, some are mentioned already in Article 25 of the Universal Declaration of Human Rights of 1948 and more specifically in ILO Convention No 102 concerning minimum standards of social security of 28 June 1952, the European Code of Social Security of 1964, and as a standard of the initial and revised European Social Charter.

[9] For example, it could be said that the risk of long-term care is already a risk on its own. Although the Court of Justice of the European Union (CJEU) in the beginning denied that long-term care is a distinct new risk (e.g. case C-160/96, Molenaar*)*, it now seems to be of the view that the special nature of this risk distinguishes it from the traditional sickness risk (case C-388/09, da Silva Martins).

[10] The link between the risks and the levy which makes it a social security contribution irrespective of the national systematics has been elaborated by the CJEU e.g. in C-34/98, Commission v France, paragraph 34 and 35.

[11] G. Strban, 'Contribution collection systems and possible measures to improve their effectiveness'. Council of Europe, Strasbourg 2007, 61 p.

of view in countries where the tax authority collects not only taxes but also social security contributions.[12]

If we assume that social security contributions are dedicated to financing the social security benefits, this assumption can be used to draw the borderline with taxation, which is by definition money levied by the State or any other public authority and which is not explicitly dedicated to financing social security. Of course, States also have several other ways to collect money to finance the tasks they want to fulfil, e.g. stamp duties or fees. These can be regarded as remuneration to the State for rendering services to the citizen (e.g. issuing documents or certificates, or collecting waste) or as penalties which have to be paid by offenders of the law and which also help financing in a general way the State's tasks. As these sources have no direct importance for us[13] (when dealing with social security and taxation), we want to restrict our study to social security contributions and taxes, excluding those other sources.

2.1.2 The borderline between contributions and taxes

Thus, there seems to be a straightforward borderline: social security contributions are levied for the purpose of financing social security whilst taxes are paid into the general budget. It is not possible to establish for which concrete purpose the taxes paid by an individual will be used (e.g. they could ultimately be used to pay civil servants, to build new schools, to pay new equipment for the army or to finance pensions).

Hence, the **purpose** of levying taxes is distinct from the purpose of levying social security contributions. Social security contributions are collected for a specific purpose. First, a social security contribution corresponds to the social insurance relationship between an insured person and a social insurance institution. There is a direct link between the insured person's duty to pay contributions and the insurance institution's duty to provide benefits. Second, social security contributions may involve 'membership elements'. As a member, an insured person has rights (e.g. participation in the self-government of the insurance institution) and duties (paying contributions). Third, the recipient of the contribution is a juridical person governed by public law, which exists for the sole purpose of providing particular social security rights.

Taxes do not have such a specific purpose. They do not represent a payment for a specific benefit by a separate legal person.[14] Their purpose is to gather income. Social protection, fully financed out of general taxation, could hardly be defined as social insurance.

Usually the borderline between social security contributions and taxes is relatively clear under national law or in national practice. 'Classic' social security contributions are often deducted as a percentage from the wages of employed persons or the income of self-employed persons. Often also the amount of the benefits depends on the amount of contributions paid (e.g. pensions), which are collected by the social security institutions. So, there is a clear link between contributions paid and benefits received under national legislation.

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[12] Concerning the different mechanisms and competences to levy see also ibid. Also D. Verbeke, 'Analysis of the main systems of social security contribution collection in the European Union based on the experiences of 12 Member States', 2012.

[13] Keeping it simple is never easy. Of course, also stamp duties and fees have social security elements which could even be traced in Regulation (EC) No 883/2004 (Article 80).

[14] There is no equivalency between the payment of taxes and benefits gained as it is in social insurance (and even more in private insurances).

'Classic' tax is also deducted as a percentage from the gainful income of individual persons (let us call this tax 'income tax'), but, of course, there are many other values which could be directly taxed (e.g. assets, dividends, property, interest etc).[15] Tax usually is collected by tax authorities, which are distinct from social security institutions.[16]

2.1.3 The situation in the EU Member States

2.1.3.1 Explicit definition in national legislation

Although in almost all countries social security and taxes are governed by two parallel sets of legislation (i.e. social security legislation and tax legislation), reportedly[17] there is no clear definition of social security contributions in the legislation (e.g. in **AT**, **BG**, **DK**, **EE**, **ES**, **HR**, **DE**, **IT**, **LU**, **PL**, **CH**). Even where it could be found, it is rather vague (e.g. 'a contribution which is payable under the present law', e.g. in **CY**).

Although there might be some confusion, since sometimes contributions are referred to as social taxes (like in **CZ**; in **EE** there is also a special social tax) or tax-related contributions (**FI**), the distinction between contributions and taxes is nevertheless clear in the majority of countries. Sometimes the distinctive purpose of contributions is emphasised: i.e. they are meant to finance or imply entitlement to a benefit (in **DE**, **FI**, **FR**, **HR**, **PL**, **SI**, **CH**); in some EU Member States they are collected by bodies within the social security sphere rather than tax agencies (like in **AT**, **BE**, **CZ**, **DE**, **ES**); or are collected integrally, but funds are diverted into distinctive accounts (e.g. in **MT**, **SI**; in **UK** contributions must be kept separate from all other revenue raised by national taxes); or are the regulatory responsibility of distinctive branches of state powers (e.g. taxes are regulated by the parliament and contributions by the government in **FR**, or in **CH** the responsibility is divided between the federal legislature and the 26 cantons).

Most often, taxes are not generally defined in the legislation (or the definition is very vague, e.g. as a 'tax chargeable under the present law' in **CY**). Specific taxes might be more precisely defined in special legislative acts governing them. Nevertheless, some general definitions of taxes could be found in the procedural law related to taxes (e.g. the definition of taxes as "every financial income of the state budget, the budget of the EU or the budget of the local community, which is not payment for a service or good, and is paid exclusively on the grounds of taxation legislative acts" – **SI**).

In some countries taxes meet the financial needs of the community without entailing legal positions, e.g. the right to claim a particular benefit. From this point of view, taxes are not earmarked, even though the legislature may attach political objectives to them. The authorities may decide on a political level that a certain tax revenue is used for certain means, e.g. that revenue from taxes levied on tobacco is used for the health insurance (e.g. in **DE**).

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[15] The different functioning of other sorts of taxes, e.g. consumption taxes and excise duties also in cross border situations has also been highlighted by Advocate General Sharpston in C-623/13, de Ruyter, paragraph 49 seq.

[16] For a good overview about the collection and enforcement of social security contributions and tax see D. Verbeke, 'Analysis of the main systems of social security contribution collection in the European Union based on the experiences of 12 Member States', 2012.

[17] The situation in EU Member States is based on the questionnaire replies of FreSsco national experts (some being more exhaustive than others). All the information that could be deducted from such replies is indicated in the text.

2.1.3.2 Definition by the judiciary

In some countries no case law exists on conceptual matters of defining social security contributions and taxes (e.g. in **CY**), whereas in others the role of the judiciary is very much emphasised. In **EL** for example, the courts have, on numerous occasions, declared that the classification used by the legislature is not binding for judicial purposes and they often exercise control as to the nature of a financial burden imposed on a person by the state or state entities. More specifically, the **EL** Supreme Administrative Court has often ruled on the nature of social security contributions, which are distinctive from taxes, also due to their specific purpose (i.e. exchange contributions/benefits). Similarly, the **SI** Constitutional Court has held that pension and invalidity insurance contributions are not taxes according to their legal nature, since tax is without a direct counter benefit, but contributions are taken into account when benefits from pension and invalidity insurance are determined. Also the **AT** Constitutional Court has emphasised the purpose of contributions, which is to constitute social insurance coverage. The link between a levy and social security protection was emphasised also by the **BE** Constitutional Court.

In **FR**, the mere fact that a contribution is used to finance social security schemes does not imply that it is a 'social security contribution' as understood by the French constitution. For instance, the **FR** Administrative Court ruled that contributions paid by pharmaceutical companies are taxes and not social security contributions, even though they are used to finance social security schemes. The Cassation Court retains a dual classification. More specifically, CSG/CRDS (see further Chapter 4.2.1) are 'taxes' according to the national terminology, but 'social security contributions' for the purposes of the coordination Regulation.

In **ES**, the similarities of contributions and taxes are more emphasised than their distinctions: the Supreme Administrative Court has established that social security contributions have a taxation nature but also some features which could be regarded as distinctive. In **IT**, the Cassation Court considers contributions as taxes, or as quasi-fiscal contributions. In **SE**, the Supreme Administrative Court argued that social security contributions are to be regarded as taxes when it comes to the constitutional basis for issuing such rules (taxes are to be decided by the parliament).

Sometimes even in the national legislation is it unclear whether the levy should be classified as a social security contribution or as a tax. For instance in **AT**, the obligation to provide employer's contributions for employees whose income does not exceed a certain amount per day or month (in force since 2002) was not considered by the Constitutional Court as a social security contribution – even if it was levied by social insurance institutions and prescribed by social insurance legislation – if the employee concerned does not become entitled to full social insurance coverage. The purpose of this obligation was to avoid that full-time jobs were replaced by marginal jobs, which are not subject to social insurance and are therefore less expensive for the employer. The aim of the employer's contribution was thus not to provide social insurance coverage but to make marginal jobs less attractive. Hence, this employer's contribution had to be qualified as a tax.

2.1.3.3 *A general overview of financing social security benefits (predominately taxes, predominately social security contributions or a mixture of both)*

For the study it is important to cluster the schemes of the EU Member States. We have decided to group them into 'purely contribution schemes', 'purely tax-financed schemes' and 'mixed financed schemes'. If the participation of the other source is minor (e.g. marginal tax components in the financing of a scheme which is for the rest

financed from contributions) this scheme will nevertheless not be classified as mixed but as purely contributions financed.

The classification was made on the basis of replies to a questionnaire by FreSsco national experts (sometimes with additional comments which are not all represented in the table below, since this might make it too complicated). Moreover, the risks were listed according to Article 3 of Regulation (EC) No 883/2004 (only adding long-term care), and the result might slightly differ if the list were more specialised (e.g. distinguishing sickness benefits in cash from those provided in kind). The aim was to get an overall picture, leaving out every possible detail.

Risk[18]	Contributions[19]	Tax[20]	Mixed[21]
Employed persons			
Sickness	AT, CZ, CY,[22] DE, EL, HR, LT, LV, PL, RO, SI, SK	EE, ES	BG, BE, DK, LI, FI, FR, HU, IE, IT, LU, MT, NL, PT, SE, UK, CH
Long-term care	DE, EL, HR, PT	AT, CY, DK, FI, FR, HU, LT, LV, SE, ES	BG, BE, CZ, IE, LI, LU, MT, NL, PL, SI, CH
Maternity and paternity	CY, DE, EL, HR, LT, LV, NL, PL, PT, RO, SK, ES,CH	EE, LU	AT, BG, BE, CZ, DK, , FI, FR, HU, IE, IT, LI, MT, SE, SI, UK
Invalidity	BG, CZ, CY, DE, FR, EL, HR, IT, LT, LV, NL, PL, PT, RO, SK, ES	EE	AT, BE, DK, , FI, HU, IE, LI, LU, MT, SE, SI, UK, CH
Old age	CZ, CY, DE, HR, IE, IT, LT, LV, PT, RO, SK, ES		AT, BE, BG, DK, EE, , FI, FR, EL, HU, LI, LU, MT, NL, PL, SE, SI, UK, CH
Survivors	BG, CZ, CY, DE, FR, EL, HR, IE, IT, LT, LV, NL, PL, PT, RO, SK, ES	DK, EE	AT, BE, FI, HU, LI, LU, MT, SE, SI, UK, CH
Accidents at work and occupational diseases	AT, BG, CZ, CY, DE, FI, FR, EL, HR, IT, LI, LT, LV, LU, NL, PL, PT, RO, SK, SI, ES, CH	EE, UK	BE, DK, HU, IE, MT, SE
Death grants	AT, BG, CY, DE, FI, FR, EL, IE, IT, LV, NL, PT,	DK, HU, LT, SI	BE, CZ, PL, SE

[18] The same understanding of these risks was used as under Article 3 of Regulation (EC) No 883/2004; as long-term care develops to be a new risk, still covered by sickness, but distinguishable from sickness in the closer sense, we have referred to it explicitly.
[19] Only if financed nearly exclusively by contributions (marginal funding also by tax is ignored).
[20] Only if financed nearly exclusively by taxation (marginal funding also by contributions is ignored).
[21] Any mix of financing by contributions and taxes.
[22] In line with the relevant questionnaire guidelines, whenever the column 'Contributions' is marked for CY, this means financing cumulatively through three sources: primarily through contributions of the insured persons and the employers, and to a lesser extent by the state budget (Πάγιο Ταμείο της Δημοκρατίας).

	RO, SK, ES		
Unemployment	AT, BG, CY, DE, FR, EL, HR, IE, IT, LT, LV, NL, PT, RO, SE, SK, ES	LU	BE, CZ, DK, EE, FI, HU, LI, MT, PL, SI, UK, CH
Pre-retirement	BG, CZ, DE, LV, PT	IE, LU	AT, BE, DK, FI, MT, PL
Family benefits	EL, HR, IT	BG, CY, DK, EE, FI, HU, LT, LV, NL, PL, PT, RO, SE, SI, ES, UK	AT, BE, CZ, DE, FR, IE, LI, LU, MT, SK, CH
Pensioners			
Sickness	AT, CZ, CY, DE, EL, HR, LT, LV, PL, SI	DK, EE, IE, IT, PT, ES, UK	BE, BG, FI, FR, HU, LI, LU, MT, NL, RO, SE, CH
Long-term care	DE, EL, HR	AT, CY, DK, FI, FR, HU, LT, LV, PT, SE, ES	BE, BG, CZ, IE, LI, LU, MT, NL, PL, SI, CH

It might be deduced from the above (very general) overview that some benefits are still predominately contributions financed mainly by employers (e.g. accidents at work and occupational diseases). On the other hand, some benefits are predominately tax financed (e.g. family benefits).

It appears that more and more benefits are financed by a mix of contributions and taxes. This might especially be the case as regards pensions, also in countries where the right to social security is provided mainly by social insurances. The States might have to cover the lack of funds collected by contributions or follow distinctive policy goals by shifting from contributions to more tax financing.

2.2 Socially earmarked taxes

2.2.1 The notion 'socially earmarked tax'

As noted earlier, '**socially earmarked taxes**' are taxes the revenues of which do not go to the State's general budget but rather to a specific part of that budget (a special fund) meant to finance social security. The classification of such socially earmarked taxes as either a social security contribution or as a tax, however, may be crucial and difficult in cross-border situations.

2.2.2 The situation in the EU Member States

According to international (and in many countries, constitutional) norms, it is the obligation of the State to ensure the funds in order to provide security to its inhabitants, and this includes social security. In several EU Member States,[23] there are no special taxes which are explicitly used for social security financing (e.g. in **BG**, **CZ**, **CY**, **FI**, **EL**, **HR**, **LI**, **LT**, **NL**, **PL**, **PT**, **RO**, **SE**, **SI**, **SK**, **UK**, **CH** and **ES** – after

[23] As reported by the FreSsco national experts.

abolishing the 'sanitary cent' in January 2013 due to the ruling of the CJEU in case C-82/12, Besora).

However, there are countries which apply more innovative approaches to secure the missing funds to provide social security. So-called 'socially' or 'social security' earmarked taxes are very diverse. They may be collected from employers (e.g. in **AT** for marginally employed persons, or for dissolving employment contracts or from companies in agriculture and forestry; in **DE** special levies 'U1', 'U2' and 'U3' are paid by all employers for the risks of sickness, maternity and insolvency, a special levy for artists, another one for not employing disabled persons; in **HU** 'social contribution taxes'), from self-employed persons (in **AT** part of the taxes of self-employed persons has to be used for their social security), or even from all employees (such as the special labour market contributions in **DK**).

'Socially earmarked taxes' may as well be collected from purchased goods (e.g. VAT and excise duties on cigarettes, beer, spirits and tobacco in **MT**, where also funds in the Consolidated Fund may be considered as earmarked taxes) and services (e.g. for cabled distribution in **AT**), or from all work-related income (e.g. 'CSG' and 'CRDS' in **FR**[24] and similar to 'CSG' long-term care contributions in **LU**) from all active income (e.g. social tax in **EE**) or from all income in general (e.g. the Universal Social Charge in **IE**). Distinctive solidarity contributions (in **IT**) and various other taxes may also be used to finance social security (e.g. in **FR** taxes on cars and other vehicle insurances, taxes on company pre-retirement packages, taxes on company saving plans, taxes on retirement packages, taxes on free company stocks for employees, taxes on pharmaceutical companies).

There is hardly any information on whether such socially earmarked taxes are coordinated under Regulation (EC) No 883/2004. Where information is available, they appear not to be coordinated in some countries (e.g. in **DE**, **IT**, **MT**) and may be subject to DTCs (e.g. the Universal Social Charge in **IE**), but to be coordinated in others (e.g. the **EE** social tax or **FR** 'CSG' and 'CRDS' after the CJEU decisions; the **HU** 'social contribution tax', which has completely replaced the former contributions of the employers; under the new system, employers do not pay social security contributions into the pension and health insurance funds; instead they pay social contribution tax directly into the state budget, but this tax is intended to cover health, pension and unemployment benefits).

2.3 Social security and social tax benefits

2.3.1 Main features

2.3.1.1 Social security benefits

Regulation (EC) No 883/2004 does not contain definitions of all the different benefits which fall under its material scope, as defined in its Article 3(1). Although some benefits or aspects of benefits are defined in Article 1(a) to (z) the question whether or not a given benefit is covered has to be decided on a case-by-case basis taking into account the constitutive elements of the benefit.[25]

[24] For further details see Chapter 4.2.1.
[25] Member States had to do this job and notify the benefits which from their point of view fall under the material scope (Article 9 of Regulation (EC) No 883/2004), but these lists are not decisive in the end. E.g. C-70/80, Vigier). The CJEU will examine the nature of the benefit and decide whether the classification by

First of all, the benefit must be linked to and cover one of the risks enumerated in Article 3 (1). This list of risks must be read in a 'European sense'. Thus, national definitions are irrelevant. For example, also benefits which fall under national labour law, e.g. wage payments in the event of illness,[26] or benefits which fall under national civil law, e.g. maintenance payments,[27] can be benefits for the purposes of the Regulation. It is also irrelevant which institution or who has to grant the benefit. Thus, the employer who has to continue the wage payments in the event of sickness may have to be regarded as a social security institution, which has to act in accordance with obligations imposed by the Regulation.[28] Finally, the way a benefit is financed does not matter; also benefits which are not financed from social security contributions but from tax revenues can be social security benefits if they are linked to one of the risks mentioned in Article 3.[29]

In addition, social security benefits have to be based on a legal entitlement rather than an individual and discretionary assessment which – at least in the past – distinguished them from social assistance, which still is outside the material scope of Regulation (EC) No 883/2004 (Article 3(5)).[30] SNCBs, which have elements of social security and social assistance benefits, are covered by Regulation (EC) No 883/2004.

2.3.1.2 Social tax benefits

In many States, tax law provides for certain tax advantages for 'social' reasons, e.g. tax reductions for children, advantages for elderly persons, or in the event of extraordinary health care costs or a disability. If the tax debt of a person is so low that it cannot cover the amount of the tax reduction, the tax provision may stipulate that the difference is paid to the taxpayer (so-called 'negative taxes'). Other 'social' advantages provided for in tax law may consist in special tax rates for certain groups of people (e.g. family splitting[31]) or tax-free allowances.

2.3.2 The situation in the EU Member States

Again, it is important which social tax benefits (benefits under tax law that provide protection for traditional social security risks) exist in the EU Member States.

In many countries social protection is provided not only by the so-called 'visible welfare state' (the state providing clear social security benefits). Benefits intended to compensate for lost or reduced income or extra costs when social risks materialise may be found also in tax law (which is sometimes referred to as an 'invisible welfare state'). Social tax benefits (if this notion is used at all) may be less visible,[32] as they do, as a rule, not belong to the domain of social policy, are hence not considered as providing social security, and might be debated less in parliament.

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the Member State has been correct case by case. E.g. in C-215/99, Jauch, it has been decided that the Austrian long-term care benefit cannot be regarded as a SNCB but has to be coordinated as a `standard´ sickness benefit.

[26] C-45/90, Paletta.

[27] C-85/99, Offermanns – of course the European legislature can exclude these benefits again as has been done with the possibility to 'opt out' for maintenance payments under Article 1(z).

[28] Again C-45/90, Paletta.

[29] C-379/85, C-380/85, C-381/85 and C-93/86, Giletti a.o.

[30] C-249/83, Hoeckx.

[31] For further details see Chapter 3.2.2.3.

[32] On the so-called hidden welfare state, see e.g. C. Howard, *The Hidden Welfare State: Tax Expenditure and Social Policy in the United States* (Princeton University Press, Kluwer, 1997), p. 3; B. Greve, 'The hidden welfare state, tax expenditure and social policy', *Scandinavian Journal of Social Welfare*, 1994, p. 206.

There are some advantages of social tax benefits. They may be politically easier to introduce than ordinary social benefits, they are granted more or less automatically, and administrative costs may be lower. Drawbacks of social tax benefits may be that people are not aware that they receive them (if they do, they might not perceive them as a benefit, but as a reduced intrusion of the state in their income) and that they may contribute to the complexity of the tax system. Also, the effect of some social tax benefits can be questioned. For instance, tax benefits in voluntary supplementary pension schemes (e.g. tax reliefs if somebody pays premiums to voluntary supplementary schemes; known e.g. in **BG**, **EE**) usually benefit those with a comparatively high income.[33]

There are various social tax benefits in the EU Member States. Certain deductible amounts to income tax are provided for dependent children. Tax benefits may be offered only for families with a lower income (e.g. in **AT**, **PL**), for families with disabled children (e.g. in **BE**, **IT**), for large families (e.g. in **EL**), for all families (e.g. in **CZ**, but higher if a child is disabled, **DE**, **LT**, **LU**, **MT**, **SK**, **ES**, **UK**), for single parents (e.g. in **NL**) or they may be offered progressively (i.e. the more children, the higher the benefit e.g. in **EE**, **SI**, **FR**, **HU**, **PL**, **RO**).

Social tax benefits may be related to the social risk of sickness (in the event of extraordinary financial burden due to sickness in **AT**, **BE**, **EL** and **IE** for medical expenses, **ES**), old age (for lower-income pensioners in **AT**, in **BE**, **CY**, **EE**, **FR**, **IE**, **NL**, **SI**), disability (e.g. in **BG**, **DE**, **FR**, **IT**, **LT**, **MT**, **RO**, **SI**, **UK** – additional amounts of the Working Tax Credit), accidents at work or occupational diseases (e.g. in **EE**), decease (e.g. in **CY**), unemployment (e.g. in **BE**, **MT**), or reliance on long-term care (e.g. in **DE** and **IT** for a carer; in **MT** for employing a carer; in **FR**, **ES**). In many countries such benefits may also be provided to low-income earners (mentioned for **BG** and **UK** – Working Tax Credit).

In some countries social security benefits (e.g. in **BE**, unemployment benefits in **EL**, pensions in **LT**, **PL**, **ES**) or insurance premiums (e.g. for life, pension and medical insurance in **CY**, private health insurance in **IE**, **PL**, **RO**, **SK**, **ES**) may be exempted from taxation or treated more favourably (e.g. in **IE**).

As a rule, since they are part of the tax system, social tax benefits are not considered to be subject to the EU social security coordination Regulation (e.g. as a rule in **AT**, **BE**, **DE**, **FR**, **IT**, **NL**, **RO**, **ES**); only as an exception are they coordinated under Regulation (EC) No 883/2004, which is the case with family benefits regulated by tax law.

In some countries social tax benefits do not seem to exist (e.g. in **DK**, **FI**, **HR**, **PT**, **SE**, **CH**).

[33] Some describe it as reverse or even perverse targeting. See A. Sinfield, 'Social protection versus tax benefits', in D. Pieters, *Social Protection of the next generation in Europe* (Kluwer, The Hague, 1998), p. 7. Such tax benefits are also known as multiplicators of occupational success. A. Sinfield, 'Why are some more secure than others', Benefits, 1991, p. 3.

3 The legal framework

This chapter outlines the principles which apply in cross-border situations with regard to social security and taxation, respectively. The challenges which result from these principles will be dealt with in the next chapter. It has to be admitted that sometimes the distinction between these two chapters has not been easy. On the one hand, already when describing the legal framework challenges become evident; on the other hand, when working on the challenges a detailed knowledge of the legal framework is necessary and to further explain the challenges also additional information about this framework can be helpful. Therefore, we have decided to summarize under Chapter 3 the general principles of the legal framework; in case additional information (e.g. especially on further going judgements which highlight the problems) is needed to better understand the challenges this will be explained under Chapter 4. So, these two chapters have to be read as interlinked.

3.1 Competences to levy

This part describes the principles determining the competent Member State and thus which State is competent to levy social security contributions or taxes in cross-border cases. The two fields of legislation will be described one after the other, so that the reader can easily identify the common and diverging elements. We will discuss the relevant legal instruments, the principles themselves and, finally, deal with some special situations.

These descriptions are based on the assumption that we already know exactly which levy is a social security contribution and which one is a tax. When this is not so self-evident, e.g. when socially earmarked taxes are at stake, this leads to challenges which we have dealt with especially under Chapter 4.2.1.

3.1.1 General principles

3.1.1.1 Social security coordination

Title II of Regulation (EC) No 883/2004 contains detailed and comprehensive rules determining which Member State is competent to apply its national rules on coverage (who is covered, under which conditions, what are the contributions to be paid for that coverage, the rates as well as the basis to calculate these contributions). Of course, the Member State declared competent has to respect the EU principles, e.g. the equal treatment provision, when applying its legislation.[34]

The starting point is that only one Member State can be competent to apply its social security legislation in a given case (Article 11(1) of Regulation (EC) No 883/2004). If a person were to find him or herself in a cross-border situation and be required to pay contributions in more than one Member State,[35] this would hamper free movement.[36]

[34] C-33/88, Allué and Coonan, where it was decided that language assistants at a university must not be treated differently concerning their social security coverage compared to other assistants, as they are more likely to be foreign nationals.
[35] This is a consequence of the interpretation of the fundamental freedoms by the CJEU: C-143/87, Stanton; C-154/87 and C-155/87, Wolf and NV Microtherm, and C-53/95, Kemmler.
[36] All cases mentioned concern the freedom of establishment of the self-employed.

In relation to the 'old' Regulation (EEC) No 1408/71,[37] the CJEU accepted few and minor deviations of the Regulation from this 'single state rule', e.g. with regard to persons who were simultaneously self-employed in one Member State and employed in another (provided the additional contributions resulted also in additional benefits).[38] Although the CJEU did not hold this parallel competence to be in breach of the TFEU, the European legislature decided to remove these exemptions from the single state rule when it adopted the new Regulation (EC) No 883/2004. Nevertheless, it seems that this principle that only the legislation of one Member State is applicable as provided under Regulation (EC) No 883/2004 cannot be upheld without any exceptions, as the CJEU has now ruled that also a Member State that is not the competent State may (have to) provide benefits which are due under its national legislation.[39]

There is not much room for manoeuvre for the Member States. If the application of the legislation of the competent State does not lead to satisfactory results (e.g. because it would result in short interruptions of insurance careers of the person concerned), the competent authorities of the Member States involved can agree that in the interest of the person concerned the legislation of a Member State other than the competent State applies.[40] Such an agreement to transfer competences, however, cannot be selectively used. For example, such an agreement cannot lead to a situation in which a person is covered e.g. against the risks of health care in Member State A, while for pensions the coverage is in Member State B.

3.1.1.2 Tax coordination

In contrast to social security law, there is very little secondary EU law coordinating direct taxation systems.[41] In principle, it is still the Member States' competence to coordinate national tax systems in order to avoid double taxation, which, like double social security contributions, may hinder the exercise of EU free movement rights. Member States can do so either by means of bilateral tax treaties, usually referred to as DTCs (double taxation conventions), by means of their national tax law or a combination of both. Of course, the most effective way to coordinate tax systems is the conclusion of DTCs, since the States concerned are thus bound to avoid double taxation by an instrument of international law. There are DTCs between nearly all Member States of the EU. The main principles of DTCs are described below. While States are free in how to structure and formulate DTCs, all DTCs follow a very similar pattern. This is because the OECD MC (OECD Model Convention) provides a model pattern, which the States follow with more or less deviations.

[37] Under Article 14(c) of Regulation (EEC) No 1408/71.
[38] C-393/99 and C-394/99, Hervein and Lorthiois.
[39] Cases C-352/06, Bosmann, and C-611710 and C-612/10, Hudzinski and Wawrzyniak.
[40] Article 16 of Regulation (EC) No 883/2004.
[41] Besides the Mutual Assistance Directive (Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ 2011 L 64, p. 1.), which lays down the rules for administrative cooperation in tax matters, secondary law concerning taxation is confined to the Parent Subsidiary Directive (Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2011 L 345, p. 8), the Merger Directive (Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ 1990 L 225, p. 1), the Royalty Directive (Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ 2003 L 157, p. 49), and the Savings Directive (Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ 2003 L 157, p. 38), of which only the last mentioned is concerned with income of individuals, i.e. interest income.

A DTC is only applicable if a person who is resident in one of the contracting States receives income from another contracting State (usually referred to as the 'source State'). For the purposes of a DTC, only one of the two contracting States can be the **residence State**. Article 4 of the OECD MC contains the so-called 'tie-breaker rule', which provides the criteria for establishing which State is to be regarded as the residence State. This starts with the concerned person's unlimited tax liability under national law by reason of domicile, residence and similar criteria, followed by the availability of a habitual home, the centre of the taxpayer's vital interests, the taxpayer's usual abode and the taxpayer's citizenship, and ends with the obligation to have a mutual agreement procedure if the residence State of the person concerned cannot be found out any other way.[42]

The parties of a DTC oblige themselves to waive part of their taxing rights. There are different rules for various kinds of income.[43] Depending on the income in question, the taxing right is given exclusively to the residence State, exclusively to the source State (the State where the income is earned), or is shared by both. In the latter case, the residence State has to avoid double taxation by using either the exemption method[44] (Article 23 A) or the credit method (Article 23 B).

In practice, **double taxation** is avoided as follows. If a person residing in State A is earning € 10,000 in State A and € 10,000 in State B, and the DTC between State A and State B provides for the **exemption method** in order to avoid double taxation, for the € 10,000 earned in State B, the following would happen: State A would exempt the € 10,000 earned in State B from taxation. However, if State A uses a progressive taxation formula according to which the tax rate is 10% for the first € 10,000 of income, but 20% for € 20,000, the € 10,000 earned in State A would not be taxed with 10%, but with 20% (the tax in State A would thus amount to € 2,000). That is because this would also be the tax rate if the € 10,000 earned in State B were gained in State A. As a result, under the exemption method, the income earned in State B is not taxed in State A, but it has influence on the tax rate applicable for the income earned in State A.

Under the **credit method**, State A would principally tax both the income earned in State A and the income earned in State B. At a tax rate of 20%, the tax burden in State A would thus amount to € 4,000 (€ 2,000 for the € 10,000 earned in State A and € 2,000 for the € 10,000 earned in State B). In order to avoid double taxation on the € 10,000 earned in State B, State A will credit the tax due in State B on the € 10,000. If the tax in State B is lower than in State A, State B would still be able to get tax revenue to the extent of the difference between the tax burden in State A and State B. Hence, if the tax on the € 10,000 earned in State B would be € 1,000 in State B, State A would credit it against its own tax of € 2,000 for the € 10,000 concerned and still levy a tax of € 1,000 for that income. In total, State A would levy a tax of € 3,000 on the € 20,000 earned by the person (€ 2,000 on the income earned in State A; and € 1,000 [€ 2,000 minus the tax of State B in the amount of € 1,000] in State

[42] The situation may become rather complicated, when a third State is involved that has also concluded a DTC with the first two States. For the purpose of the DTC with the source State, the third State may also be considered the residence State (which, if the residence State is granted the taxing right, could result in double taxation once again).

[43] Article 6: income from immovable property; Article 7: business profits; Article 8: shipping, inland waterways transport and air transport; Article 10: dividends; Article 11: interest; Article 12: royalties; Article 13: capital gains; Article 15: income from employment; Article 16: director's fees; Article 17: artists and sportsmen; Article 18: pensions; Article 19: Government Service; Article 20: students; Article 21: other income.

[44] However, the foreign income is usually considered for the tax rate in respect of the taxpayer's other taxable income in the residence State. That is why this method of avoiding double taxation is called exemption with progression.

B). However, if the tax levied in State B were to be higher than that in State A, State A would give a credit only up to the tax due in State A. Hence, if in State B the tax on the € 10,000 earned there would be € 2,000 or more, State A would credit it against its own tax of € 2,000 and not levy any tax anymore (it would not give any reimbursement or credit it against the tax due on other income of the person in State A either). As a result, State A would levy a tax of € 2,000 (€ 2,000 on the income earned in State A; the tax on the income earned in State B is 'swallowed up' by crediting the tax due in State B).

When adopting and applying national and bilateral rules in the field of taxation, Member States are obliged to act in accordance with the EU rules on the fundamental freedoms (goods, services, capital and persons) and non-discrimination on grounds of nationality. Most interestingly, while the CJEU has ruled that the fundamental freedoms require that cross-border situations are not treated worse than internal situations, it has accepted the occurrence of double taxation in cross-border situations, where there would be no double taxation in purely internal situations.[45] According to the CJEU, it is up to the Member States to lay down rules on the avoidance of double taxation. If they fail to do so – maybe because they have not concluded a DTC at all, or because of different interpretations of existing DTCs – and, thus, both Member States exercise their taxing rights, the CJEU does not consider itself competent to allocate the taxing rights. As none of the Member States concerned is treating the cross-border situation differently from the purely internal situation (the same tax is levied in both circumstances), the CJEU finds itself unable to detect a breach of the fundamental freedoms.[46]

3.1.2 General rule

3.1.2.1 Social security coordination

The Member State where the work is actually carried out is the competent one (Article 11 (3)(a) of Regulation (EC) No 883/2004). It does not matter where the worker resides or the employer is established. Thus, a teleworker working from home for an employer established in another Member State is subject to the legislation of the Member State where he or she resides. A frontier worker who resides in a Member State other than the Member State where he or she works is subject to the legislation of the Member State where he or she actually works and not to the legislation of the Member State of residence.

For the purposes of Regulation (EC) No 883/2004, 'residence' is the place where a person habitually resides (Article 1(j)). Elements to decide in which Member State the relevant centre of interests is located are contained in Article 11 of Regulation (EC) No 987/2009 and in the Practical Guide on the applicable legislation in the EU, the EEA and in Switzerland.[47] Most importantly, at a given time there can always be residence in only one Member State (no simultaneous residences in more than one Member State are possible).[48]

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[45] See e.g. C-513/04, Kerckhaert und Morres; C-194/06, Orange European Smallcap Fund; C-27/07, Crédit Mutuel; C-67/08, Block, C-128/08, Damseaux; C-96/08, CIBA; C-540/11, Levy und Sebbag.
[46] See e.g. C-513/04, Kerckhaert und Morres; C-67/08, Block, C-128/08, Damseaux; C-96/08, CIBA; C-540/11, Levy und Sebbag.
[47] http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=0&subCategory=0&country=0&year=0&advSearchKey=4944&mode=advancedSubmit&langId=de.
[48] C-589/10, Wencel.

3.1.2.2 Tax coordination

DTCs contain rules for many different kinds of income. Thus, it may happen that a taxpayer's income from employment is taxed in one State, his or her income from dividends in another State and his or her interest income in yet another State. However, as social security contributions are usually levied from income from employment, this section in principle only deals with taxation of income from employment.

The allocation of taxing rights regarding income from employment is regulated in Article 15 of the OECD MC. The main principle is that the taxing right is with the taxpayer's State of residence. Only if the taxpayer is working in the other contracting State, the taxing right is given to the State of employment. The residence State may then avoid double taxation by using either the exemption method or the credit method (see Chapter 3.1.1.2.).

There is only one situation in which the taxing right remains with the residence State, i.e. a situation in which the '**183-days rule**' applies. The following conditions must be met for the taxing right to remain with the residence State:

- The taxpayer must be present in the other State for no longer than 183 days in any 12-months period, commencing or ending within the fiscal year.
- The remuneration must be paid by or on behalf of an employer who is not a resident of the other State.
- The remuneration is not borne by a permanent establishment that the employer has in the other State.

All three of these conditions have to be fulfilled for the taxing right to remain with the residence State. If only one of them does not apply, the taxing right is granted to the working State. The 183-days rule will be dealt with in more detail under Chapter 3.1.3 concerning posting.

In this context especially the impact of a '**permanent establishment**' has to be explained: even if the duration of a worker's presence in the Member State where the work is carried out does not reach the 183-days threshold, this Member State is granted the taxing right if the subsidiary office in this Member State qualifies as a permanent establishment in the sense of Article 5 of the OECD MC and if the remuneration is borne by that permanent establishment. Both conditions are rather complex to assess. In a simplified way, a permanent establishment is usually created in the other State if there is a fixed place of business and the activities performed there are not merely of an auxiliary or preparatory nature.[49] However, even if this is the case, the posted person him or herself might create a permanent establishment in the Member State of work depending on the kind of work he or she is exercising there. If this person has and habitually exercises an authority to conclude contracts in the name of his or her employer in the other Member State, he or she creates an agent permanent establishment in the Member State of work.[50] Now, if one way or another, there is a permanent establishment in the Member State of work, the question is whether the person's remuneration is also borne by that permanent establishment. The question whether the permanent establishment in the Member State of work or the main office in the other Member State has to bear the remuneration costs is to be solved by the so-called transfer pricing rules that are – in simplified terms – following

[49] For details on Article 5 of the OECD MC, see e.g. K. Vogel, DBA (2010), Article 5.
[50] For a thorough analysis of Article 5, paragraph 5 and Article 5, paragraph 6 of the OECD MC concerning the agency permanent establishment, see the contributions in M. Lang, J. Schuch, C. Staringer, P. Pistone & A. Storck (eds), *Dependent Agents as Permanent Establishments* (Linde Verlag, Vienna, 2014).

the arm's length principle. It has to be assessed whether the permanent establishment – if it was another enterprise – would be charged with the remuneration costs by the person's employer.[51]

Some DTCs (e.g. **AT-DE**, **AT-IT**, **AT-LI**, **FR-DE** or **DE-CH**) contain special allocation rules for **employment income of frontier workers** which prescribe that the taxing right remains with the taxpayer's State of residence. In a nutshell, these rules define a certain area in the surroundings of the frontier between the two contracting States. If the taxpayer's place of work in the source State is within the so-described distance, the special frontier worker rule applies instead of the general allocation rule of Article 15 of the OECD MC.

Apart from Article 15 of the OECD MC, there are also other allocation rules on special kinds of employment income, that in relation to Article 15 of the OECD MC constitute a *lex specialis.*[52]

3.1.3 Posting

3.1.3.1 Social security coordination

Posting under Regulation (EC) No 883/2004 is any activity of an employee for his or her employer which is temporarily exercised outside the Member State where the employer is established. It also covers official or business trips to conferences or training. Posting is an exception from the general rule, as not the legislation of the place where the activity is performed is applicable, but the legislation of the Member State from which the person is sent remains applicable (Article 12 of Regulation (EC) No 883/2004).[53] The following conditions have to be met:

- the posting period does not exceed 24 months;
- it is not a replacement of a previously posted person;
- the posted person must have been affiliated to the social security scheme of the sending Member State for at least one month before posting;
- the posting employer must exercise substantial activities in the Member State of establishment;
- a direct relationship between the employer in the posting Member State and the employee must be upheld (no new labour law contract in the Member State of activity).

The residence of the person concerned is not decisive. It is immaterial that the posted employee keeps his or her place of residence in the posting Member State or transfers his or her residence to the Member State where the work is exercised during the posting period.

[51] For a detailed discussion on transfer pricing in respect of permanent establishments, see P. Plansky, *Die Gewinnzurechnung zu Betriebsstätten im Recht der Doppelbesteuerungsabkommen* (Linde Verlag, Vienna, 2010).

[52] Article 15 (3) of the OECD MC applies to income in respect of employment aboard a ship or aircraft operating in international traffic or aboard a boat in inland waterways transport – the taxing right is granted to the State of the enterprise's place of effective management. Article 16 applies to directors' fees – the taxing right is granted to the State in which the company concerned is resident; Article 17 of the OECD MC applies inter alia to income from employed artists and sportsmen – the taxing right is granted to the State in which the personal activities of the taxpayer are exercised; Article 19 of the OECD MC applies to governmental income – with a few exceptions, the taxing right is granted to the State paying the taxpayer's remuneration.

[53] Legal clarification is further provided in Article 14 of Regulation (EC) No 987/2009; Decisions by the Administrative Commission (Decision No A2 of 12 June 2009, OJ 2010 C 106, 5) and the Practical Guide on applicable legislation in the EU, the EEA and in Switzerland.

3.1.3.2 Tax coordination

The term 'posting' is not described or even mentioned in the OECD MC. Thus, the taxing right for the income of posted workers is allocated according to the **183-days rule**, as described above. Consequently, the following principles apply: If the taxpayer is present in the working State for more than 183 days within a period of 12 months that commences or ends in the fiscal year concerned, the taxing right is always granted to the working State. If the taxpayer works less than 183 days within this period in the other State, it has to be checked whether the taxpayer's remunerations are paid by or on behalf of an employer who is not resident in the working State and whether the taxpayer's remunerations are not borne by a permanent establishment of the employer in the working State.

Therefore, leaving aside the last condition, the taxing right is usually dependent on where the taxpayer's employer is resident or established. The differentiation is usually drawn by referring to the kind of work that is fulfilled by the taxpayer. If the taxpayer is doing work on behalf of his or her employer, who is not a resident of the working State, in another State (e.g. the taxpayer is sent to the other State in order to provide a service there) the taxing right remains with the taxpayer's residence State.

If, however, the taxpayer is sent to the working State in order to work within the organisation of another employer there, the question arises whether the sending employer or the receiving employer is to be considered the '**employer'** for the purposes of Article 15 of the OECD MC. In this respect, it is worth mentioning that the term 'employer' has been subject to a lot of scholarly debate, diverging case law and dissenting opinions from finance authorities. The key issue is whether the – undefined – term 'employer' should be interpreted with reference to the national laws concerned, or whether it should be interpreted autonomously for the application of the DTC. While the discussion is not over yet, since 2010 the official OECD commentary on Article 15 of the OECD MC states that the term should be interpreted with reference to the national laws of the States concerned. If the States reach a different conclusion on who is to be considered the 'employer', the residence State will be obliged to accept the qualification of the working State. However, the working State's qualification of the employment is to be subjected to further scrutiny if it disregards the formal contractual relationship and only considers who of both employers in question can be perceived as 'employer' economically. The criteria for this 'economic employer test' have to be in line with the criteria laid down in the official commentary on Article 15 of the OECD MC. They concern:

- who has the authority to instruct the individual regarding the manner in which the work has to be performed;
- who controls and has responsibility for the place at which the work is performed;
- the remuneration of the individual being directly charged by the formal employer to the enterprise to which the services are provided;[54]
- who puts the tools and materials necessary for the work at the individual's disposal;
- who determines the number and qualifications of the individuals performing the work;
- who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;

[54] For an explanation of this criterion, see paragraph 8.15 of the OECD Model: Commentary on Article 15 (2010).

- who has the right to impose disciplinary sanctions related to the work of that individual;
- who determines the holidays and work schedule of that individual.

Thus, the following situations can be distinguished.

First, the employee works in the other State for more than 183 days. The taxing right is for the working State.

Second, the employee works in the other State for less than 183 days. If the services are provided in the working State in the interest of the employer, the residence State holds the taxing right. If the work is performed in the course of 'hiring out of labour' or 'posting to another company', the taxing right is with the working State if the employer is considered resident therein by the working State. However, the taxing right is with the State of residence if the employer is not considered resident in the working State by the working State. If the working State disregards the formal contractual relationship, the test by means of the criteria laid down in the OECD commentary is to be applied.

In this context, it is relevant to point out that – deviating from the opinion stated in the official commentary of the OECD MC – the tax authorities of many States interpret the term '**employer**' in an economic way. This means that if the worker is integrated in a company's staff and organisation, and the company bears the costs for the worker's remuneration, the company is regarded as the person's employer. These conditions are usually fulfilled in the event of intra-group posting. Therefore, if States interpret the term 'employer' in an economic way, the 183-days rule does not have any relevance to intra-group posting. The taxing right is with the working State from the first day of the posting.[55]

Last, but not least, if it is established that the employer is not resident in the working State, the next step is to find out whether he or she has a permanent establishment in the working State, which the taxpayer's remunerations are borne by. If that is the case, the working State is granted the taxing right.

3.1.4 Simultaneous employment

3.1.4.1 Social security coordination

As regards persons who normally exercise activities in more than one Member State, various situations can be distinguished. It may concern persons who consecutively work for one employer in various Member States (e.g. international transport workers like lorry drivers), persons who simultaneously have working relationships with more than one employer in various Member States (e.g. simultaneous part-time contracts with two employers in different Member States in a border region), or persons with short-time contracts who are usually engaged in different Member States (e.g. artists like famous opera singers who have engagements all over Europe during a year).

[55] For the interpretation of the term 'employer' in Article 15(2)(b) of the OECD MC, see in detail K. Dziurdz, *Kurzfristige Arbeitnehmerüberlassung im Internationalen Steuerrecht* (Linde Verlag, Vienna, 2013); see also e.g. K. Dziurdz, 'Article 15 of the OECD Model: The 183-day Rule and the Meaning of "Employer"', British Tax Review 2013, 95 et seq; K. Dziurdz, '183-Tage-Regel: VwGH legt Arbeitgeberbegriff abkommensautonom aus, *IstR,* 2013', 939 et seq; K. Dziurdz, 'Arbeitgebereigenschaft und Betriebsstättenrisiko bei der Arbeitnehmerüberlassung', *Österreichische Steuerzeitung,* 2014, 121 et seq, E. Pinetz & A. Zeiler, 'Der "wirtschaftliche" Arbeitgeberbegriff nach Art. 15 Abs 2 OECD-MA', *SWI*, 2014, 18.

Also for these groups of persons active in more Member States, the single state rule applies. Article 13 of Regulation (EC) No 883/2004 indicates which Member State is the competent one. If a substantial part of all activities (25% of income and/or working time) is exercised in the Member State of residence, this State is competent. If not, the Regulation provides for a rather complex system under which either the Member State where the employer, or one of the employers, is established or, again, the Member State of residence is declared as the competent one.

Thus, a lorry driver who resides in Member State E and usually drives through Member States A, B, C and D for an employer established in Member State A is subject to the legislation of Member State A. A person residing in Member State A, but working for an employer established in Member State B consecutively in both Member States (50% in Member State A and 50% in Member State B) is subject to the legislation of Member State A, as a substantial part of the activities is exercised there.

The situation of highly mobile workers is always delicate and not so easy to decide. To decide if activities are covered by Article 13 of the Regulation a look into the future is necessary: what will be the assumed situation in the next 12 calendar months? If activities in more than one Member State are to be expected, and this would fit into a repetitive pattern, the conditions for activities normally exercised in more than one Member State are met. Thus, an opera singer who usually has contracts all over Europe and who works for at least 25% of the time in his or her Member State of residence is subject to the legislation of that Member State. However, even in cases in which this 25% rule is not fulfilled (e.g. residence in Member State A but engagement always only in the opera houses of Member States B, C and D), Member State A is the competent one (although no activity is exercised there – special rule under Article 13 (1)(b)(iv) of Regulation (EC) No 883/2004).

The Member State which is declared to be the competent one has to cover the whole activity or activities exercised in the EU as if they were exercised in the competent Member State (Article 13 (5) of Regulation (EC) No 883/2004). This has as a consequence that also income gained in another Member State for the same employer or for any different employer becomes subject to the legislation of the competent Member State as if it were gained there.

3.1.4.2 Tax coordination

If a person exercises activities in more than one Member State, all bilateral DTCs between the States concerned have to be considered.

The situation is hardly complicated with sportsmen and artists. Article 17 of the OECD MC lays down a special rule for artists, which always allocates the taxing right to the State where the artist personally exercises his or her acting activity (also called the State of performance), while the residence State is only granted the residual taxing rights according to the method to avoid double taxation laid down in the DTC. Thus, if an artist works in Member State A, then in Member State B and afterwards in Member State C, each of these States will have the taxing right on the part of the income that is to be attributed to the performance in its territory.

A special rule also exists for income in respect of employment aboard a ship or aircraft operating in international traffic or aboard a boat in inland waterways transport (Article 15(3) of the OECD MC). The primary taxing right is granted to the enterprise's place of effective management. Directors, who may have a director's function in several companies, are taxed in the respective companies' residence States. For any other group of highly mobile employees, the general rule of Article 15 of the OECD MC

applies. For example, the above-mentioned lorry driver would have to show for how long he or she was present in any of the States he or she drove through. If he or she was in one State for more than 183 days, this State has the primary taxing right for the income earned by the lorry driver during this period. If the lorry driver was present in all of the States concerned for less than 183 days – which will usually be the case – the taxing right will remain with the residence State (as the lorry driver is only fulfilling services in the interest of his or her employer, who is not a resident of any of the other States).

3.1.5 Pensioners

3.1.5.1 Social security coordination

Under Title II of the Regulation pensioners (i.e. persons receiving invalidity, old-age or survivors' pensions, pensions in respect of accidents at work or occupational diseases) or recipients of sickness benefits in cash covering treatment for an unlimited period have to be regarded as non-active persons (if they do not exercise a gainful employment while receiving a pension). As a general rule non-active persons are subject to the legislation of their Member State of residence (Article 11 (3)(e) of Regulation (EC) No 883/2004) and thus they may (if the national legislation so requires) have to pay contributions in that Member State, unless they decide to make use of the opt-out rule under Article 16(2) of Regulation (EC) No 883/2004.

For pensioners (especially old-age pensioners) usually only sickness and long-term care contributions are relevant. For these contributions the Regulation stipulates a link with the Member State which has to bear the costs of such treatment under the chapters of the Regulation on the provision of benefits.

Regulation (EC) No 883/2004 contains specific provisions regulating which Member State has to bear the costs of treatment of pensioners. If a pension is granted by the Member State of residence (also if the person receives a pension or pensions from other Member States) and the person is entitled to health care benefits in this Member State, this is the competent Member State that will have to bear the health care costs of the pensioner (e.g. also during a temporary stay in another Member State – Article 23). If no pension is granted from the Member State of residence or if in this Member State no entitlement to health care exists (although the person receives a pension from that Member State) this competence is given to another Member State which pays a pension, provided the person would be entitled to care if he or she resided in that State (Article 24(1)). If there is more than one Member State which could be the competent one, the Regulation provides for a hierarchy between these Member States: the cost will be borne by the competent institution of the Member State the pension legislation[56] of which the person has been subject to for the longest period of time, or, in case of a period of equal length, the institution applying the legislation to which the pensioner was last subject (Article 24(2)).

Only the Member State which has to bear the costs of benefits under the above provisions is allowed to collect contributions for the health care coverage (Article 30 of Regulation (EC) No 883/2004). Contributions can also be claimed for pensions paid by other Member States by the competent Member State but only in that amount which would also be due if all pensions were granted only by that Member State (Article 30 of Regulation (EC) No 987/2009).

[56] As specified by the CJEU in case C-321/12, van der Helder.

3.1.5.2 Tax coordination

Article 18 of the OECD MC contains the general allocation rule for pensions. The taxing right is granted to the taxpayer's residence State. A special rule exists for pensions that are paid by or paid out of funds created by one of the contracting States or political subdivision or local authority thereof for services rendered to that State or political subdivision or local authority. According to Article 19 of the OECD MC, the taxing right in respect of those pensions is granted to the 'paying' State. However, if the person is resident in and a national of the other State, the taxing right is with the other State.

3.1.6 The most striking differences concerning the competences to levy social security contributions and taxes

The main differences between the competences to levy social security contributions and taxes can be summarised as follows. The challenges which result from these differences will be dealt with in Chapter 4.

Applicable instruments: Social security is dealt with in European-wide instruments, i.e. directly applicable EU Regulations which apply in the same way to all Member States, while taxation is subject to national legislation and/or bilateral DTCs, which are usually based on the OECD MC, but in detail could differ in the relations between the different Member States.

Residence is an important element for both social security and tax coordination. Nevertheless, different Member States may be regarded as the State of residence for social security purposes and taxation purposes, respectively. There seem to be differences in national practice concerning the moment residence is transferred to another country. In the case of persons who are sent by their employer to work abroad but who keep a permanent housing available to them also in the sending State, the State where the person has his or her centre of vital interests is seen as the residence State.[57] For example, in Austria, if there is still a permanent housing at the person's disposal, the finance administration assumes that up to 24 months usually no transfer of residence takes place, between two and five years an examination of the individual case is necessary and only in the event of an activity of more than five years a transfer of residence is assumed. For social security coordination it is also always a case by case decision, but a transfer of residence could take place for already much shorter periods.

Employer: Although in both fields the economic relationship between the employee and the 'employer' entity rather than the formal contractual relations is decisive, there might be differences. For example, if a permanent establishment exists (see Chapter 3.1.2.2) this might be much more significant for taxation than for social security. Also in cases involving temporary work agencies, the enterprise which makes use of the services performed by the workers sent by the temporary work agency is sometimes regarded as employer for tax purposes, while this is not so for social security. This can also be the case for intra-group posting.

Competences: In a given case, only one Member State is competent to levy social security contributions. This Member State is allowed to apply its national legislation concerning the levy of contributions for income gained in any Member State. In contrast, a person can be taxed by more than one Member State at the same time or

[57] Article 4(2) of the OECD MC contains further rules for cases in which the person's centre of vital interest cannot be made out; for further details see Chapter 3.2.2.3

for the same income. DTCs only prevent that a specific income is taxed twice in full amounts.

General rule: Social security contributions have to be paid in the Member State where the work is actually performed. As regards taxation, the general rule is that the State of residence has the taxing right. However, work exercised in the territory of another State is subject to taxation there. The State of residence has to avoid double taxation with regard to that specific income. This obligation of the residence State to avoid double taxation follows from DTCs, not from EU law, as according to CJEU case law, double taxation is not to be considered a restriction within the scope of the fundamental freedoms (see also Chapter 3.1.1.2.).

Frontier workers: Social security contributions only have to be paid in the Member State where the gainful activity is performed, irrespective of the distance of the workplace from the place of residence. Under most DTCs, the general rule for taxing employment income applies: the State of work has the primary taxing right; the State of residence must avoid double taxation. However, under some DTCs a specific border region is defined and if the work is exercised there, the full taxing right remains with the State of residence, while the State of work is not allowed to tax the frontier worker.

Posting: For social security the legislation of the sending Member State remains applicable if the posting is no longer than 24 months. Residence of the worker and the employer during this period does not play a role. Under DTCs the competence to tax remains with a State only if the residence of the person is in that State, if the work abroad is no longer than 183 days in a 12-months period, and if the employer is not a resident of the State of activity – the latter hardly ever being the case with intra-group posting. Another interesting difference is that the replacement of a previously posted employee does not have any significance under DTCs. Therefore, also employees replacing each other e.g. for years can all benefit from the 183-days rule if the relevant conditions are met.

Activities normally exercised in more than one Member State: Social security contributions have to be paid in one Member State only, which has to be identified on the basis of the residence of the person concerned and the place of the establishment of the employer(s). Taxation can differ depending on the type of activity exercised in more States; in some cases (e.g. artists) the income is taxed wherever the concrete activity is exercised (taxation in different States).

3.2 Benefits

Of course the granting of benefits is very important for social security, but, as we have seen in relation to specific tax advantages this could also concern taxation. In order not to overburden this report with too much detail, the analysis below is limited to benefits or advantages which are meant for persons with dependent family members.

Again, this chapter is based on the assumption that it is clear whether or not a given benefit is a social security benefit covered by Regulation (EC) No 883/2004. With regard to some benefits this cannot be so easily established (see below Chapter 4.2.5).

3.2.1 Social security coordination

3.2.1.1 General principles

According to Article 1(z) of Regulation (EC) No 883/2004 'family benefits' are all benefits in kind or in cash intended to meet family expenses. In family situations usually both parents can claim family benefits. If a father works in Member State A and is also insured there, the mother works in Member State B where she is insured, and the family (both parents and two children) resides in Member State B, the Regulation opens entitlement to family benefits under the legislation of both Member State A and B.

Of course it would not be 'fair' (compared to the national cases) if these double entitlements would be unrestricted. Therefore, Article 68 of Regulation (EC) No 883/2004 provides for priority rules: the Member State declared to be competent by priority has to pay the amount of its full benefit, while the other Member States have to grant only the difference between that amount and its own amount if the latter is higher. In the above example, working in the children's Member State of residence gives priority over the competence of any other Member State. Thus, Member State B (let us assume the amount of the family benefit is € 100) has priority over Member State A (let us assume the family benefit is € 120), which implies that Member State B has to grant the full amount of € 100, whilst Member State A has to grant only the differential amount of € 20.

Although these principles do not seem to be too complex, in practice difficult questions arise as to the calculation of the differential amount. One important question is whether all benefits which could be claimed by the family should be added together for the calculation of the differential amount or if this should be done for each child and category of benefits separately. A part of this question has been answered by the CJEU in relation to Regulation (EEC) No 1408/71 in favour of the second solution:[58] the comparison of the amounts has to be done per benefit category (e.g. for classic family allowances[59] separately from child-raising benefits). Of course, it could be questioned if this is also valid under Regulation (EC) No 883/2004.[60] From the authors' point of view it is most likely that the CJEU would come to the same result under Regulation (EC) No 883/2004. The comparison per benefit category leads to more favourable results for the families concerned and there are no hints in the Regulation that the Community legislature wanted to take away this beneficial situation. If this principle is indeed also applicable for Regulation (EC) No 883/2004, it might be that also tax benefits or advantages (at least some of them) which have to be coordinated as family benefits under Regulation (EC) No 883/2004 cannot be included in a general comparison of all family benefits but can only be compared with corresponding benefits in another Member State.

3.2.1.2 Entitlement to social security benefits which depends on tax elements

Although we have concentrated on the granting of family benefits, also for all other benefits some elements developed by the CJEU concerning the interaction between social security and taxation should be mentioned when it comes to entitlement to social security benefits. Already when determining if entitlement to benefits exists, taxation issues could be relevant. National legislation laying down the conditions for

[58] C-347/12, Wiering.
[59] Regulation (EEC) No 1408/71 contained a definition under Article 1 (u)(ii), which covers all cash benefits which exclusively depend on the number of children and their age as the case may be.
[60] Regulation (EC) No 883/2004 contains only a definition for family benefits (Article 1 (z)).

entitlement especially concerning family benefits sometimes refers to tax law (thus, entitlement depends on the tax treatment of the person concerned – e.g. if the entitlement depends on the fact whether the partner or the children are residents under tax law). The CJEU made it clear that e.g. under Article 67 of Regulation (EC) No 883/2004, which treats family members residing in another Member State as family members residing in the competent Member State for the purposes of entitlements to family benefits, also references to tax law have to be included. Thus, such family members treated for tax purposes as residing in another Member State have to be deemed as residing in the competent Member State for social security purposes.[61] However, this is not a speciality of the relationship between social security and tax law; it is only one aspect of the general principle of **assimilation of facts** as laid down in Article 5 of Regulation (EC) No 883/2004 (which includes also 'tax facts') and is a consequence of the fundamental principles of free movement.

The same applies also e.g. with regard to calculation formulas where the **amount of the benefit is based on the tax base of the person concerned**. If national tax law puts a migrant worker who works in one Member State while his wife resides in another Member State into a less favourable tax class than a worker living together with his wife in that Member State, this has to be regarded as discriminatory and the calculation of the benefit has to be based on the better tax base as if the wife resided with the worker.[62] Again, this is not a peculiarity of the relation between social security and taxation but an outflow of assimilation of facts.

3.2.1.3 Special non-contributory cash benefits

Under Regulation (EC) No 883/2004, SNCBs play a special role. One specific element which makes these benefits especially interesting for the purpose of this study is that they must be financed exclusively from general tax and, thus, contributions must not be involved in the financing of the scheme (Article 70(2)(b)). Therefore, we can learn a lot from the financing of these benefits for the distinction between taxes and contributions on the financing side (see especially Chapter 4.2.2). These SNCBs are coordinated in a special way: only the Member State of residence has to grant them and there is no export obligation under the Regulation (Article 70(4)).

3.2.2 Tax coordination

3.2.2.1 General principles

As mentioned above, States may provide family benefits not only in the form of actual 'social benefits', but also in the form of tax advantages. In many States, tax law provides for certain tax advantages for 'social' reasons. What differentiates social tax advantages from 'normal' tax advantages is that they cannot be linked to any part of income.

For the purpose of clarification: when expenses can be deducted from income, with only the remaining sum being taxed, one may speak of an '**objective' tax advantage**. The advantage can be attributed to a certain part of the income, i.e. that part for which the expenses were incurred.[63]

[61] C-321/93, Imbernon Martinez.
[62] C-332/05, Celozzi.
[63] See e.g. C-234/01, Gerritse.

Social tax advantages are not linked to any special part of the income, but to the entire income and the specific circumstances in which a person lives. They are also referred to as '**subjective' tax advantages**.

EU law has had a major impact on the entitlement to social tax advantages. Before it did, the situation of a person working in two States or residing in one State and working in another used to be as follows: the residence State would only grant the social tax advantage in proportion to the income that it had the taxing right upon, claiming that it was up to the 'source' State to grant tax advantages for the income it had the taxing right on. The latter State, however, would usually consider it as the residence's State duty to provide for a person's social tax advantage.

3.2.2.2 The Schumacker principle

This situation was hard to compare with the fundamental freedoms. One of the first cases on tax law, the (in)famous ***Schumacker* case**,[64] concerned social tax advantages. The CJEU ruled that:

"Income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred."[65]

"Consequently, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation."[66]

Thus, the CJEU concluded that, in general, a Member State that is not the residence State of the taxpayer does not have to grant social tax benefits. According to the CJEU, however, the situation would be different, if

"*the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances."*

To determine the "**major part of the taxable income**" it could be assumed that **90%** is necessary to fulfil this condition.[67] The reason is that there is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment.[68] Thus, in a situation like this, where the person concerned earns the major part of his or her income in the non-residence State it is up to the non-residence State to grant its social tax advantages to the taxpayer.

[64] C-279/93, Schumacker.
[65] C-279/93, Schumacker, paragraph 32.
[66] C-279/93, Schumacker, paragraph 34.
[67] The CJEU has not specified the percentage of income that a person must earn in a Member State in order to have access to social tax benefits. In its Recommendation (97/79/EC) on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJ 1994 L 39, p. 22), the European Commission advised 75%. However, the legislatures of many Member States have decided on a *Schumacker* threshold of 90%; see e.g. Section 1, paragraph 3, sentence 3 of the German Income Tax Act; Section 1, paragraph 4 of the Austrian Income Tax Act.
[68] C-279/93, Schumacker, paragraph 36 et seq.

In the ***De Groot* case**[69] the CJEU clarified that if a person earns income in more than one State other than the residence State, it is the residence State that must take into account the personal and family circumstances. However, the residence State may hand over this responsibility to one of the working States concerned by means of bi- or multilateral agreements. Alternatively, according to the CJEU, the residence State might be released from its obligation to take into account the personal and family circumstances, if one or more of the employment States grant the social tax benefits with respect to the income taxed by them.

The *Schumacker* judgement has been strongly criticised in tax literature, but the CJEU has held on to it and even developed it further. In some cases the CJEU even extended *Schumacker* to 'objective' tax advantages, which as a result triggered even further criticism.[70] A main point of criticism is that a person may be entitled to a **social advantage** in one State and an equivalent social benefit in the other. **Article 7(2) of Regulation (EC) No 492/2011** provides for a right to equal treatment as regards "social and tax advantages" in the working State also for migrant workers. In principle, the working State has to grant these advantages to workers, regardless of the percentage of the income the person concerned earns in its territory (as this Regulation does not know the condition of the "majority of income" as under the *Schumacker* principle). Thus, a taxpayer – who is inter alia working outside of his or her residence State, but not earning the major part of his or her income in the working State – may happily end up with the "social tax advantages" of the non-residence State (under Regulation (EC) No 492/2011) and, according to the *Schumacker* principle, the equivalent "social tax benefit" of the residence State (under a DTC).

Because of the case law on 'social tax advantages' (the working State only has to grant such advantages when the taxpayer is in a *Schumacker* situation) and 'social benefits' falling within the ambit of Regulation (EC) No 492/2011, the question also arises how to approach 'social tax advantages' that are paid to the taxpayer as a **negative tax**.[71] Is this negative tax then to be considered as a social tax advantage that has to be coordinated along the lines of the '*Schumacker* principle' or as a social benefit that, according to the CJEU's case law, has to be granted by the working State?[72]

Social tax advantages may also be granted for risks that are covered by Regulation (EC) No 883/2004. Because of the prevalence of secondary law, these tax advantages should be regulated along the lines of the Regulation. Up to now, however, it does seem that the CJEU does not spend too much thought on whether a social tax advantage is covered by Regulation (EC) No 883/2004, but only handles any kind of social tax advantage along the lines of the *Schumacker* case law. Only, in the recent

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[69] C-147/04, De Groot.

[70] M. Lang, 'Ist die *Schumacker*-Rechtsprechung am Ende?', (2005) *Recht der internationalen Wirtschaft*, 336 (336 et seq); D. Weber, 'In Search of a (New) Equilibrium between Tax Sovereignty and the Freedom of Movement Within the EC', (2006) *INTERTAX*, 582 (604 et seq); G. Meeussen, 'The *Ritter-Coulais* Case – A Wrong Decision in Principle by the ECJ', (2006) *European Taxation*, 335 (335 et seq); E. Kemmeren, 'ECJ should not unbundle integrated tax systems!', (2008) *EC Tax Review*, 4 (4 et seq); G. Meeussen, '*Renneberg*, ECJ Unjustifiably Expands Schumacker Doctrine to Losses from Financing of Personal Dwelling', (2009) *European Taxation*, 185 (185 et seq); M. Lang, 'Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions', (2009) *EC Tax Review*, 98 (102 et seq); C. Bardini, 'The Ablility to Pay in the European Market: An Impossible Sudoku for the ECJ', (2010) *INTERTAX*, 2 (2 et seq). For a detailed elaboration on the *Schumacker* case law with further references, see also K. Daxkobler, 'Die grundfreiheitliche Rechtsprechung des EuGH - Direktes Steuerrecht und Sozial(versicherungs)recht' (2015), 194, et seq.

[71] Direct payment of a tax benefit to the persons concerned, especially in cases in which the taxable income is too low (e.g. below the tax threshold) to benefit from tax reductions.

[72] See critically, K. Daxkobler, op cit (see footnote 70), 575 et seq.

***Lachheb* case**,[73] the CJEU actually did consider a tax advantage as a family benefit in the sense of Regulation (EC) No 883/2004, and accordingly decided the Member State competent for its granting. However, in this case, the CJEU was explicitly faced with the question whether this advantage was to be considered a family benefit or not.[74] Thus, it seems that the outcome of a case before the CJEU concerning the issue which Member State is competent for the granting of tax advantages that by definition fall under Regulation (EC) No 883/2004 depends very much on the concrete situation which is pending before the CJEU and the specific elements elaborated by the national courts.

3.2.2.3 Family splitting

A special social tax benefit that according to the case law of the CJEU is to be handled along the lines of the *Schumacker* judgement is the so-called advantage of **'family splitting'**. Several European tax systems (e.g. **DE**) provide for a special tax rate for (married) couples. The functioning of this kind of tax advantage can be best shown by way of an example. Mr and Mrs X are a married couple, residing in State A. Mr X earns € 4,000, while Mrs X earns nothing. State A's tax law provides for a progressive tax rate. The tax rate for a person earning € 4,000 a month is 40%. The tax rate for a person earning € 2,000 is only 30%. Thus, if Mr X and Mrs X would each be earning € 2,000, the combined family income of € 4,000 would be taxed at a tax rate of 30% (€ 1,200). As a consequence of Mr X earning the entire family income on his own, the income is taxed at 40% (€ 1,600). Thus, due to the fact that the family income is earned by only one but not by two persons, the family income is taxed at a higher tax rate, leaving only € 2,400 (€ 4,000 – € 1,600 tax) instead of € 2,800 (€ 4,000 – € 1,200 tax) at the family's disposal. This problem is fixed by the tax advantage of 'family splitting': basically, if Mr X applies for family splitting, his and his wife's income are added up. The sum is divided by 2 (thus simulating that Mr and Mrs X would contribute to the family income to the same extent). In the end, the tax rate that would be applicable if both persons earned the same part of the income becomes applicable. Mr X only has to pay taxes to the amount of € 1,200.

Thus, the 'family splitting' would not have any effect if the amounts of Mr and Mrs X's incomes were similar. However, whenever there is a considerable difference in income, it is wise for the person who earns more income to apply for family splitting, so that his or her income is taxed at a lower rate. However, it is unwise for the person who earns less income to apply for family splitting, as this would, in effect, result in a higher tax rate for his or her income. By not doing so, the tax rate for the lower income remains the 'normal' tax rate to be applied to that amount of income – that is usually even lower than the tax rate on the shared income.

Now, if the person earning the higher income is in a *Schumacker* situation, he or she has to apply for family splitting in the working State.[75] The working State must take into consideration the income of the taxpayer's spouse and apply the lower tax rate. However, it may be that the working State does not provide for an advantage such as a 'family splitting'. In this case, the 'normal' tax rate of the working State is applied to the taxpayer's income. The 'residence State' cannot remedy this situation either, as, according to the *Schumacker* rule, it is not responsible to take into consideration the personal and family circumstances.[76] The 'loss' of the tax advantage is the consequence of a disparity of the tax systems.

[73] C-177/12, Lachheb.
[74] See also K. Daxkobler, op cit (see footnote 70), 575, footnote 3718.
[75] Case law regarding family splitting: C-279/93, Schumacker; C-391/97, Gschwind; C-87/99, Zurstrassen.
[76] Even without the *Schumacker* rule the residence State could not help, as the taxing right for the taxpayer's income is with the working State. Thus, the residence State does not apply any tax rate on this

3.2.3 The most striking differences concerning the granting of social security and tax benefits

Under Regulation (EC) No 883/2004 a clear distribution of competences to grant benefits is provided. Usually a Member State which is entitled to levy contributions also has to grant benefits. For tax benefits this is usually the task of the residence State unless the major part of the taxable income (90%) is gained in another State. Thus, for taxation the amount of income gained in one State could be decisive. While under social security coordination the individual situation of the person concerned is usually relevant (except for family benefits, where always the situation of the whole family is taken into account), for taxation it could depend on the existence of a family splitting possibility under the laws of a State and on the decision of the persons concerned if the tax is applied only by taking into account the income of the person concerned or also the income of his or her partner.

income. It could, however, apply the 'family splitting rate' on any income that is earned in the residence State in addition to the income earned in the working State. However, following the CJEU's *Schumacker* case law, the residence State would not be forced to do so by the fundamental freedoms, as it is just not responsible for taking into account the personal family circumstances.

4 Challenges

4.1 Introduction

As long as only one State can take the necessary decisions on the interaction between the social security and tax system, there is in principle no problem. The State in question can balance the money received and the expenditures, and ensure that the benefits to be granted can be financed out of the revenues of the contributions or taxes collected. However, in cross-border situations this politically sensitive balance cannot be safeguarded as the power to impose and collect levies and the duty to grant benefits may no longer be in one hand. The precise effects may vary. This chapter addresses various issues concerning 'mismatches' between income and expenditures.

These challenges which we will mention are from a horizontal EU-wide perspective. From a national perspective we assume that the challenges will be very comparable. Nevertheless, the replies to the questionnaires which were sent to the FreSsco national experts did not mention many challenges. If the analytic work on this topic continues, this could be an issue to further investigate (e.g. by again asking FreSsco national experts how they see the challenges identified by us from a national perspective).

One of the main and 'horizontal' challenges we see lies in the vast variety of national schemes, which make it very difficult to come to a common understanding or even application of the different applicable rules of Regulation (EC) No 883/2004 or the DTCs. Reference can be made to the different levels of contributions and taxes[77] (with several exemptions, like general tax exemptions, special ones for special groups, e.g. disabled persons, child carers etc).

4.2 Horizontal issues – a lack of definitions

4.2.1 The grey zone: the borderline between contributions and taxes – socially earmarked taxes

One important question is whether socially earmarked taxes are to be classified either as social security contributions or taxes. From the case law it follows that the answer to this question does not depend on national law. Whether or not a given levy is covered by Regulation (EC) No 883/2004 depends on its purpose and specific features, even if it is regarded and treated as a tax under national law.

The CJEU has already examined the following socially earmarked taxes.

The first is the **French *contribution pour le remboursement de la dette sociale* (CRDS)** (social debt repayment contribution),[78] which is earmarked to finance the *Caisse d'Amortissement de la Dette Sociale* (CADES) (Social Debt Redemption Fund). At the time of the CJEU ruling, this 'contribution' was levied mainly on income from gainful activities of persons who resided for tax purposes in France or where it could

[77] The tables which are available from the OECD, e.g. http://dx.doi.org/10.1787/tax-pers-inc-table-2013-1-en *or http://dx.doi.org/10.1787/tax-ssc-table-2013-1-en*
[78] C-34/98*,* Commission v France.

be assumed that the centre of the gainful activities was in France. Income gained abroad was also taken into account if the income was taxable in France, unless a DTC concluded with the source State of that income provided otherwise.[79] From the French point of view, this CRDS is clearly a tax as it concerns the payment of debts which occurred already in the past through the granting of social security benefits (therefore, there is no link between the payment of these levies and the entitlement to benefits), as the levies are administered by tax authorities and as CADES is no social insurance institution but a public fund which has to finance the debts of social security institutions. In the CJEU's view, however, this special structure does not matter as there is a direct connection to social security, because the levy was meant to finance social security. There is no need that the contributions directly lead to entitlement to benefits for the payer of these contributions. Therefore, also the CRDS is subject to the rules of competences under Title II of the coordination Regulation.

The same applies to the **French *contribution sociale generalise* (CSG)** (general social contribution),[80] which is earmarked to finance the National Family Allowances Fund, the Old-age Solidarity Fund[81] and the compulsory sickness scheme. The CSG is – in the same way as the CRDS – levied especially[82] on the gainful income of persons who have their residence for tax purposes in France and are subject to the DTCs concluded by France concluded by France. The CJEU considered the link to the financing of social security sufficient and thus declared the CSG a social security contribution for the purposes of the coordination Regulations.

Also in **Belgium** a specific levy has been introduced which is based on certain temporary measures relating to the **moderation of the income of self-employed persons**. This levy was introduced with a view to reducing public expenditure and ensuring the financial balance of the social security scheme for self-employed persons. Although from the CJEU's point of view this Belgian moderation contribution is more 'a form of emergency tax' than a social security contribution, it has to be regarded as a social security contribution for the purposes of Regulation (EC) No 883/2004, as it is dedicated to finance social security.[83] It is not decisive that no benefits can be expected in return for these additional contributions. Therefore, Belgium can levy this moderation contribution also on self-employed income gained in another Member State if it is the competent Member State under Regulation (EC) No 883/2004.[84]

Does the above mean that any socially earmarked tax or levy has to be regarded as a social security contribution for the application of Regulation (EC) No 883/2004? No certainty exists. There is also case law that gives rise to doubt.

The **German *Künstlersozialabgabe*** (artists' social charge) is a levy on various forms of remuneration paid to the artists by e.g. publishers, press agencies etc who 'sell' the work of these artists to the public. It is earmarked to finance the social security scheme for artists in Germany. The social insurance for artists is a specific scheme

[79] With regard to the impact of the DTC between France and the UK see Chapter 4.3.2.2., where we analyse the *Derouin* ruling.
[80] C-169/98, Commission v France.
[81] This fund finances some benefits which have been regarded in the past as non-contributory: C-236/88, Commission against France, where it was decided that the benefit in question (topping up the pension to a guaranteed minimum amount) is a social security benefit covered by the coordination Regulations even if it is financed out of tax (at that time before the introduction of the CRDS), and C-307/89, Commission against France.
[82] Again the infraction procedure was limited to CSG levied on gainful income and not on the other sources to which CSG could be applied.
[83] C-249/04, Allard.
[84] See the comment of the Belgian representative in the Administrative Commission for the Coordination of Social Security Systems, in Annex.

which is financed partly from contributions of the artists and partly by the *Künstlersozialabgabe*. The CJEU found that these levies are not directly linked with the persons insured (the artists) and that it can be assumed that these levies do not have any influence on e.g. authors' royalties or the wages of artists. Because it is also forbidden to pass on the *Künstlersozialabgabe* to the amount of the remuneration of the artist, this levy cannot result in a reduction of the artist's income. It does not matter that the *Künstlersozialabgabe* is meant to finance the artists' social security system. Therefore, this levy does not fall under the rules on applicable legislation of Regulation (EC) No 883/2004; it is also levied from remuneration for artists who are themselves subject to the social security legislation of another Member State.[85] The CJEU distinguished the levy under consideration from the CRDS and CSG on the ground that different persons had to pay the 'real' social security contributions (e.g. the artists) and this *Künstlersozialabgabe* (e.g. the publishers).

The *CIBA* case concerned a charge that was levied for a social benefit outside the scope of Regulation (EC) No 883/2004, i.e. the so-called **Hungarian vocational training levy (VTL)**. The base of the VTL were all wage costs of a company. All companies that had their seat in Hungary were obliged to pay this levy – even regarding the wages paid to employees who were working in branches in another Member State. The revenue generated by the VTL was directed into a State Fund that was separated from the general budget, the task of which was to grant funding for vocational training institutions. The VTL neither fell within the scope of the Hungarian DTCs nor within the scope of Regulation (EC) No 883/2004. While the Commission argued that the VTL was comparable to the levies that were at question in the *Arblade* case,[86] thus making a double levy run against the fundamental freedoms, the CJEU ruled:

"Unlike those contributions, which had to be paid for each seconded worker for the purposes of his social security […], VTL does not seem […] to be paid by the undertakings liable to it for the purposes of granting a direct benefit to those undertakings, and even less so to their employees, but is paid into a State fund which offers grants to vocational training institutions in Hungary. VTL cannot therefore, […] be treated in the same way as the contributions which were at issue in Arblade and others."[87]

Thus, as was the case with the German *Künstlersozialabgabe*, the CJEU came to the conclusion that only if the people paying a charge are the same people that have the right to a benefit is there a direct link between charge and tax that would make the payment of contributions in two Member States a problem relevant under the fundamental freedoms.[88]

Thus, the latter rulings seem to suggest that socially earmarked taxes can be regarded as contributions for the purposes of Title II of Regulation (EC) No 883/2004 if there is a link between the payers of the levy and the persons who might be entitled to benefits paid out of the levies' revenues. Phrased differently, one may speak of a social security contribution in the sense of Regulation (EC) No 883/2004, if the people

[85] C-68/99, Commission v Germany.
[86] C-369/96 and C-376/96, Arblade. In this case the payment of contributions to the Belgian system of *timbres-intempéries* (bad-weather stamps) and *timbres-fidélité* (loyalty stamps) was at stake, and the CJEU ruled that it is contrary to the TFEU if two Member States would collect contributions meant for the same purpose.
[87] C-96/08, CIBA, paragraph 32.
[88] See K. Daxkobler, op. cit (see footnote 70), 558.

who are burdened with (or whose employers are burdened with[89]) the charge in question belong to the group of persons who are entitled to the social security benefits financed from this source. The 'direct link' requirement does not mean that any increase in contributions must lead to higher benefits. Yet, what must be discernible is that people paying a certain kind of contribution are (at least in theory) entitled to a certain kind of benefit.[90]

We also have to mention explicitly that these entitlements have to be examined only in theory as it might happen that the concrete individual can never benefit from the levy, e.g. men will as a rule not be entitled to maternity benefits, richer persons never to means-tested benefits (solidarity principle)[91] etc. Also the fact that no additional rights accrue from a levy is not decisive (this does not exclude it from being a social security contribution).

Some questions still remain unanswered. One question concerns the personal scope of the aforementioned direct link requirement. If there is no such link between levy and benefits, does this mean that only the group of persons who are totally outside the scheme (e.g. the publishers in the example of the *Künstlersozialabgabe* in **DE**) fall outside Title II of the Regulation? In other words, do we have to split the classification between the different groups of persons: for those groups of persons who are not entitled to the benefit (e.g. because they are not insured in the scheme) such levies do not constitute contributions, while the same levies might be a contribution for other groups of persons who are covered by the scheme and can draw benefits from it?

From our point of view the CJEU seems to avoid such a complex splitting of the situation, as it has already decided in the ***Piatkowski* case** that e.g. **contributions which are levied on dividends** could follow the competence of a Member State other than the one which is competent to levy 'normal' social security contributions from gainful employment.[92] Of course, this ruling was made under Regulation (EEC) No 1408/71, which in principle was limited to persons exercising a gainful activity and, therefore, contributions on other bases than income from gainful activities were in principle outside the scope of application of this Regulation. In addition, under this Regulation persons who simultaneously exercised an employed activity in one Member State and a self-employed activity in another Member State could be subject to the legislation of both Member States. It could thus also be said that this is a ruling dealing only with a legal situation which no longer exists. Most important could also be the question whether the extended personal scope of Regulation (EC) No 883/2004 changed something in this respect. From our point of view this is not finally decided.

The new case pending before the CJEU (C-623/13, ***de Ruyter**,* concerning the **French CRDS on assets like life annuities**) could shed more light on the question how socially earmarked taxes levied on sources other than gainful employment have to be treated under the coordination Regulations. Advocate General Sharpston concluded in her opinion that contributions on income from assets have to be regarded as social security contributions and thus be coordinated under the Regulation as with regard to such levies there is the danger of having to pay them in more than one Member State.

To conclude, not all socially earmarked taxes constitute contributions for the purposes of Title II of Regulation (EC) No 883/2004. If such contributions are levied on a base

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[89] From our point of view it should be clear without any doubt that also employers' contributions have to be regarded as contributions under Title II of Regulation (EC) No 883/2004, even when employers are never entitled to benefits from the scheme they contribute to for the sake of their employees.
[90] K. Daxkobler, op cit (see footnote 70), 559 et seq.
[91] See e.g. case C-493/04, Piatkowski, paragraph 38.
[92] C-493/04, Piatkowski.

like professional income, which is per se already subject with regard to other social security contributions to the legislation of a Member State (CRDS and CSG on income in **FR**), then they have to follow Title II and nothing else. If they are levied on other sources (especially consumption taxes levied on the purchase of goods and services, e.g. VAT,[93] taxes on alcoholic or over-sweetened drinks or fat food, which are earmarked to finance health insurance) or on totally separated groups of persons (e.g. the *Künstlersozialabgabe* in **DE**), they are not coordinated under Regulation (EC) No 883/2004 and thus free for any other coordination instrument like e.g. a DTC. Levies in between these two categories (on other sources like e.g. property) still create problems as long as the CJEU does not clarify the issue.

Because it may be very difficult to establish whether a concrete socially earmarked tax has to be regarded as a contribution, in practice national classifications may be used more frequently than EU classifications. Therefore, often socially earmarked taxes may in practice be coordinated under tax rules and not under Regulation (EC) No 883/2004, although all criteria for a contribution are met.

4.2.2 Lessons to be learned from the special non-contributory benefits

CJEU case law on SNCBs listed in Annex X of Regulation (EC) No 883/2004 might shed some more light on the delimitation between social security contributions and taxes.[94] In order to be covered by the rule for SNCBs laid down in Article 70 of Regulation (EC) No 883/2004 a benefit has to fulfil the condition that

"*financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary*."

Thus, if a benefit is financed by (earmarked) taxes that are to be qualified as contributions, it could be said that it is not to be considered an SNCB. This suggests that the borderline the court draws between contributory and non-contributory benefits could serve also as a benchmark to define the contributions which are and which are not subject to Title II of Regulation (EC) No 883/004.

The CJEU ruling in the ***Jauch* case**[95] seems to confirm this. This case concerned the **Austrian *Bundespflegegeld*** (federal long-term care allowance) that, subject to certain conditions, was granted to all recipients of a public pension and was financed out of the general budget. However, at the same time that the *Bundespflegegeld* was introduced, the contributions for sickness benefits were increased by 0.8%.[96] The CJEU concluded that because the increase of the contributions for sickness insurance indirectly enabled the funding of the *Bundespflegegeld*, it was to be considered contributory. The decision confirms that the CJEU only sees a social security contribution when there is a direct link between the levies and the funds determined to finance benefits. If such a link exists a benefit cannot be regarded as an SNCB.

[93] In her opinion in C-623/12, de Ruyter, Advocate General Sharpston clearly referred to VAT in France, which also has the task to finance some branches of social security, but which does not make it a social security contribution (footnote 40), but also to other excise duties (paragraphs 49 to 51).
[94] For the following see with further references K. Daxkobler, op cit (see footnote 70), 560 et seq.
[95] C-215/99, Jauch.
[96] Because of the funding mechanism of the Austrian pension and sickness insurance systems, this fact was of decisive relevance: the Austrian pension insurance system was co-financed by subsidies of the general budget. The pension insurance, on its part, granted financial funds to the sickness insurance. Due to the contributions for sickness insurance being increased, less funding was required by the pension insurance towards sickness insurance. This, in turn, resulted in the pension insurance having more money available and, thus, needing less funding from the general budget. The new *Bundespflegegeld* was now financed by the funds, and thus generated in the general budget.

However, a grey zone still exists and not all questions can be answered by the above suggested borderline. For example, concerning the **CRDS and CSG in France** the CJEU has decided that although these levies on gainful income have to be regarded as contributions for the purpose of Title II (see Chapter 4.2.1) benefits financed from these levies are not necessarily 'contributory' and can therefore still meet the conditions of being an SNCB.[97] The reason for this seemingly illogical assumption is, as the CJEU suggested in ***Perez Naranjo****,* that there is no direct link between the levying and the entitlement to benefits. This conclusion is hard to compare, however, with the reasoning of the CJEU in the *Jauch* case.

In sum, the case law on SNCBs does not offer concrete additional guidance on how to distinguish social security contributions from taxes. A levy which has to be regarded as a social security contribution under Title II of Regulation (EC) No 883/2004 does not necessarily exclude the possibility that benefits financed from these contributions can be regarded as special non-contributory benefits.

4.2.3 More problems if the qualification is not clear – A case study on the problems which result from the 'grey zone' concerning the borderline between contributions and taxes

Thus, it is not clear where to draw the borderline between social security contributions and taxes. As a result, it may happen that identically designed levies may be labelled as a social security contribution in one State (which thus treats it in accordance with Regulation (EC) No 883/2004), and as a tax in another State (which will apply the relevant DTC).

For example, both State A and State B charge a **levy of 15% on interest income** that flows directly into their respective social security funds. All residents of State A and State B have to pay the levy. State A considers the levy to be a contribution. State B considers and treats its levy as a tax.

If a person resident in State A who falls under the social security competence of State A earns interest income in State B, State A – qualifying it as a social security contribution – levies its interest charge to the amount of 15% on this interest income. State B, qualifying its identically designed charge as a tax, levies 10% of that charge[98] on the interest income earned in its territory. All in all the person's interest income would be burdened with charges of 25%.

If a person resident in State B who falls under the social security competence of State B earns interest income in State A, State B – qualifying its charge as a tax – will use its residual taxing right on the interest income and levy a tax of 5%. State A – qualifying its charge as a social security contribution, but not being the competent State according to Regulation (EC) No 883/2004 – will not levy any charge at all. Thus, all in all, the person's interest income would be burdened with charges of only 5%.

Consequently, due to the legal uncertainty as regards the borderline between contributions and taxes, there is a difference in burden of 20%, depending on the classification of the charges and the residence State of the person.

[97] C-265/05, Perez Naranjo.
[98] According to Article 11, paragraph 2 of the OECD MC, the source State is only allowed to levy a tax of 10% on interest income, with the residence State using the credit method to avoid double taxation.

If both States qualified their respective charges as either social security payments or taxes – as should be the case under circumstances of legal certainty – the total tax burden would be 15%. Thus, in the first case (residence State A) the interest income of the person is overburdened with charges by 10%. In the second case, the interest income is 'under-burdened' by 10%.

4.2.4 Taxing social security contributions?

So far, we have dealt with taxes and contributions separately. This does not give the whole picture. Especially in the event of the gainful income the two deductions are also interlinked.

Most often, social security contributions can be deducted from the tax base, thus reducing the taxable income. Again, there is no problem as long as the Member State competent for social security is also the Member State having the right to tax the income in question.

However, when this is not the case, the State having the taxing right may not feel obliged to deduct social security payments of the taxpayer from its tax base since the payments to social security are not funding the national social security system. Consider, for example, a person (Mr P), who is resident in Member State A and working in Member State B, with the DTC giving the taxing right to Member State A. As outlined above, in this case, Member State B has the competence to levy social security contributions, while Member State A has the power to tax Mr P's income. According to Member State A's national law, social security contributions are deducted from the tax base. In the cases ***Rüffler***[99] and ***Filipiak***[100], the CJEU ruled that, in a situation like this Member State A has to grant this tax advantage also if the social security contributions are paid in another Member State.

This result is quite logical, as otherwise States would be allowed to frustrate the system of Regulation (EC) No 883/2004 by means of their tax law.[101] That such a 'circumvention' of secondary EU law is not possible had already been the outcome of one of the first tax law cases of the CJEU, the ***Asscher*** **case**.[102] Mr Asscher, who was working in his residence State Belgium and in the Netherlands, complained that the Dutch tax law applied a higher tax rate on his income than would have been the case if he had been a tax resident of the Netherlands. The higher tax rate was justified by the Netherlands on the ground that Mr Asscher was not subject to the Dutch social security system. The CJEU did not accept this reasoning, as this would mean a punishment of Mr Asscher, because of him not being subject to the Dutch social security system.[103] In fact, the CJEU considered the higher tax that Mr Asscher had to pay in comparison to Dutch tax residents as some kind of hidden social security contributions, pointing out that the only justification for the higher tax rates would be if Mr Asscher also received more social security benefits due to them.[104]

The case law does not yet clarify whether the CJEU views tax advantages concerning social security contributions as '*Schumacker* advantages'. If this were the case, the State concerned would only have to grant the advantage if it has the taxing right for the main part of his or her income. In fact, the *Asscher*, *Rüffler*, and *Filipiak* cases

[99] C-544/07, Rüffler.
[100] C-314/08, Filipiak.
[101] See K. Simader, 'Zur Abzugsfähigkeit von Krankenversicherungsbeiträgen innerhalb der Gemeinschaft: Urteil des EuGH in der Rs. Rüffler', SWI, 2009, 499 (449 et seq).
[102] C-107/94, Asscher.
[103] C-107/94, Asscher, paragraph 53.
[104] C- 107/94, Asscher, paragraph 60.

were all about *Schumacker* situations, and from the wording of the CJEU's rulings one could conclude that such advantages are to be qualified as *Schumacker* advantages.[105]

However, the ***Blanckaert* case** casts doubt.[106] This case concerned a German tax resident who was also subject to the German social security system. The person received dividend income from the Netherlands which this Member State also had a taxing right on. The base for Dutch social security contributions was income from employment and home ownership. Persons who were subject to the Dutch social security system and did not receive these kinds of income did not have to pay any contributions, but still had the right to receive social security benefits. According to Dutch social security law, persons were entitled to some kind of credit that was set off against their social security contributions. If a person did not pay any contributions, those contribution reductions were converted into a tax credit and thus reduced the tax debt. Mr Blanckaert – not being covered by the Dutch social security system – was not granted any tax credit for his dividend income, whereas a person covered by the Dutch social security system and only earning dividend income would have been, although not paying any social security contributions either. Thus, the only difference between Mr Blanckaert and these persons was the coverage of the Dutch social security system. The CJEU, in substance, ruled that this difference could justify different tax treatment of persons like Mr Blanckaert. Interestingly, the CJEU clearly did not distinguish between *Schumacker* and non-*Schumacker* situations, although in the case of Mr Blanckaert, who was in a non-*Schumacker* situation, the *Schumacker* principle would have led to the same result.[107] The CJEU regarded the tax credit as a social security rule, and therefore did not apply any principles developed in its tax case law. This is – all in all – a rather unsatisfactory situation, as the fundamental freedoms should be applied to all areas of law in the same manner and be following the same standards. It is not really understandable why a tax advantage in the form of a deduction from the tax base (*Filipiak*, *Rüffler*) should be treated differently than one in the form of a tax credit (*Blanckaert*).[108]

If we assume that deductions of social security contributions from the tax base fall under the *Schumacker* regime, the question also arises which amount has to or can be deducted. Are they to be granted in full, meaning in the amount the taxpayer has to pay to the foreign social security system? Or can they be limited to the amount due in the national social security system?[109]

To sum up, also these different ways of interaction between social security and taxation lead to many problems the moment different Member States are responsible for taxation and social security contributions.

4.2.5 Borderline between social security and tax benefits

Also on the benefit side, there is a grey zone where benefits can be both social security benefits for the purposes of Regulation (EC) No 883/2004 and tax benefits. **Tax benefits for bringing up children** are a good example. The CJEU recently decided that these are to be regarded as social security benefits, although they are

[105] See in detail K. Daxkobler, op cit (see footnote70), 564 et seq.
[106] C-512/03, Blanckaert.
[107] See in detail K. Daxkobler, op cit (see footnote 7070), 568 et seq.
[108] See M. Lang & A. Jettmar, 'Steuerrecht und Sozial(versicherungs)recht – Anmerkungen zum Schlussantrag in der Rechtssache Blanckaert', IWB, 2005, 744; see, also K. Daxkobler, op cit (see footnote 70), 571.
[109] For alternative proposals, e.g. a standardised lump sum amount, see K. Daxkobler, op cit (see footnote 70), 574.

treated as tax benefits under national law.[110] From a theoretical point of view, this is not a problem as often the CJEU decides that also benefits which under national law are not considered to be social security benefits have to be coordinated under Regulation (EC) No 883/2004 taking into account their purpose and constitutive elements. Another example concerns continued wage payments in the event of sickness of an employee which under national legislation clearly is a part of labour law and not social security, but due to the CJEU has to be coordinated under the coordination Regulations.[111] With tax benefits this is not different. If they are considered as falling under Regulation (EC) No 883/2004 they have to be coordinated e.g. as family benefits even if this causes practical or administrative problems for national administrations (tax authorities).

Of course, problems occur if next to the Regulation also other mechanisms of EU or international law are applicable, such as DTCs. This is the case as regards tax benefits for bringing up children, which, according to the CJEU, are also subject to the principles developed in the tax field (see below under Chapter 4.3.2.4).[112] In such cases, national administrations really might become confused: do they have to apply the Regulation, or the tax principles, or both? This is an issue which we will deal with in more detail later on. In addition, we must not forget that 'tax advantages' are also dealt with under the free movement of workers Regulation (EU) No 492/2011,[113] which adds to complexity.

4.3 Problems even if definitions are clear

4.3.1 Case studies

The challenges can be clarified by concrete examples. To avoid too complex situations we have decided to assume that the examination concerning e.g. the concepts of 'residence' or the 'employer' led to the same results under social security and tax principles. Nonetheless, of course these results could also differ (e.g. different States of residence for taxation and social security purposes), which could make real life cases even more complicated than those we have chosen.

4.3.1.1 'Normal' posting

Mr X is an employee of an enterprise established in Member State A, where he has been working for some years. His employer concludes a contract to deliver services in Member State B and posts Mr X to do this job. The competences for taxation and social security will depend on the specific circumstances of the case. The following circumstances can be identified:

- The residence of Mr X is kept in Member State A and the posting is only for less than 183 days. The competences to levy social security contributions and taxes will remain exclusively with Member State A. In principle, there is no problem.
- The residence of Mr X is kept in Member State A and the posting is for a period longer than 183 days but less than 24 months. The competence to levy social security contributions remains with Member State A while taxation competence

[110] For example, the Luxembourg tax child bonus. C-177/12, Lachheb.
[111] C-45/90, Paletta.
[112] C-303/12, Imfeld and Garcet.
[113] Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, OJ 2011 L 141, p. 1.

is already with Member State B. However, Member State A could also tax the income depending on the DTC (progression or crediting principle). Problems could arise.

- The residence of Mr X is kept in Member State A and the posting is for a period of more than 24 months. The competence to levy social security[114] and the taxation competence is with Member State B, but Member State A could also tax the income depending on the DTC (progression or crediting principle). Problems could arise.

- The residence of Mr X is transferred to Member State B and the posting is for a period of more than 183 days but less than 24 months. The competence to levy social security contributions remains with Member State A while the taxation competence is only with Member State B.[115] Problems could arise.

- The residence of Mr X is transferred to Member State B and the posting is for a period longer than 24 months.[116] The competence to levy social security contributions and taxes is only with Member State B. There should be no problems.

So far, we have only looked into the contributing side of the case, but comparable problems will also occur with regard to benefits. It gets much more complex if Mr X is not a bachelor but is married and has two children. We cannot analyse these additional elements in all the variations we have seen above. We will only do so in some very remarkable cases:

- If Mrs X, the wife, is posted by an employer in Member State A to Member State B as well, the same situation arises as described under the points above. Mr and Mrs X are subject to the same legislation for social security purposes and the same legislation for taxation purposes. The same problems may arise as for the situation of Mr X as a bachelor.

- If Mrs X takes up employment in Member State B during the posting period of her husband, the situation will become more complex. If the posting conditions for social security purposes are fulfilled by Mr X, he will be subject to the social security legislation of Member State A, whereas Mrs X will be subject to the social security legislation of Member State B. As a result, the couple has to pay social security contributions in two different Member States. This is the logical consequence of Regulation (EC) No 883/2004, which strictly follows the approach that every person has to be examined in his or her individual situation for the purpose of determining the applicable legislation. As regards taxation, the legal situation will depend on whether the couple has already transferred their residence to Member State B or not. If the posting of Mr X is shorter than 183 days and residence is kept in Member State A, he will be taxable only in this Member State, while his wife will be taxable in Member State B and Member State A could levy additional taxes on her income depending on the DTC (progression or crediting principle). In this case, the negative or positive effects of different taxation and social security rates of Member States A and B could be multiplied as two persons are concerned.

[114] Of course, this is only valid if no agreement under Article 16 of Regulation (EC) No 883/2004 has been concluded.
[115] This implies that during this period also for tax purposes the residence has already been transferred, which is not so certain and depends on the DTC and national practice. In reality these cases could lead to disputes between the countries concerned (see also Chapter 3.1.1.2).
[116] See footnote 114.

- The situation gets even more complex if also the benefits are included in our examination (this is valid also for all other case studies). Let us assume that there are family benefits in both Member State A and Member State B, while only Member State A knows additional tax benefits aimed at helping families with children (e.g. a tax free amount per child under 18 years of age). On the basis of the social security coordination rules both Member States have to grant their family benefits if the couple is subject to the legislation of both Member States (in the situation described under the previous point). If the family still resides in Member State A, this Member State will have to grant its benefits by priority (as Mr X is still subject to the legislation of this Member State due to posting) and Member State B would have to grant a supplement if its benefits are higher. The same would also apply if Member State A's tax benefits are regarded as falling under Regulation (EC) No 883/2004 and are coordinated as family benefits. However, if they are regarded only as tax benefits and the *Schumacker* principle is applied, it would be for the Member State of employment (Member State B) to grant tax benefits (the Member State in which all the income is gained). As this Member State does not offer tax benefits for members of the family the couple would not get any tax benefits. Also a family splitting would not be applicable if such an advantage is only provided under the laws of Member State A and not those of Member State B.

4.3.1.2 Frontier workers

Another example could be made with a frontier worker: Mr Y resides in Member State A and crosses the border to work in Member State B on a daily basis (see Chapter 3.1.2.).

- For social security, the State of employment (Member State B) is competent to levy contributions.

- Member State B is also competent to tax. Nevertheless, the State of residence, Member State A, still has some residual taxing rights depending on whether the DTC provides for the exemption or crediting method. If the frontier worker resides in one of the bilateral partners of a DTC which knows a special rule for specific frontier regions the taxing rights remain with the State of residence (Member State A).

- Thus, problems arise especially if the DTC contains a special rule for the frontier regions, as there are automatically different competences for levying social security contributions and taxes.

4.3.1.3 Persons simultaneously employed in more than one Member State

Finally, it could be also interesting to examine examples where a person has simultaneous activities in more than one Member State (see Chapter 3.1.4). Let us take as an example one case involving highly mobile workers and one involving persons who are working for one employer in more than one Member State continuously:

The case of the highly mobile worker: Ms P is an actress and resides in Member State A, where she is also engaged at the local theatre. Three times a year, she acts at special events in Member State B under temporary work contracts.

- For social security purposes such a person can be deemed a person working in more than one Member State falling under Article 13 of Regulation (EC) No 883/2004. As more than 25% of all the activities are exercised in the Member State of residence A, this Member State is competent to levy the social security contributions on the income gained in Member States A and B. Member State B does not have any right to levy additional contributions.

- As regards taxation, Ms P falls under Article 17 of the OECD MC, which grants the taxing right to the State where the acting activity is exercised. Thus, Member State B has the taxing right on the income earned by Ms P due to her performances at the special events in its territory. Depending on the method to avoid double taxation, Member State A will either exempt this income from taxation or credit the taxes levied in Member State B against its own tax. The income earned from the performances at the theatre in Member State A is only taxed there.

The case of the worker working for one employer in more than one Member State: Mr Q resides in Member State A and is employed by an employer also established in that Member State. He works two days a week in the main office in Member State A and three days a week in the subsidiary office in Member State B on the other side of the border.

- For social security purposes such a person can be deemed a person working in more than one Member State under Article 13 of Regulation (EC) No 883/2004. As more than 25% of all the activities are exercised in the Member State of residence A, this Member State is competent to levy the social security contributions on the income gained for the work in both Member States A and B. Member State B does not have any right to levy additional contributions.

- For taxation purposes, Member State A has the exclusive taxing right on the income earned from Mr Q's work in the main office in its territory. The issue of the distribution of taxing rights for the income earned from the work in the subsidiary office in Member State B has to be solved according to the 183-days rule of Article 15 of the OECD MC:[117] if Mr Q is present in Member State B for more than 183 days within a twelve-month period, commencing or ending within the fiscal year (in this case, this might for example happen if Mr Q also spends some weekends in Member State B), Member State B has the taxing right for the income earned from the work in its territory, and Member State A could take this income in addition into account either under the exemption or crediting method (depending on which of those two is provided for under the DTC in force).[118]

- Even if the duration of Mr Q's presence in Member State B does not reach the 183-days threshold, Member State B is granted the taxing right if the subsidiary office in Member State B qualifies as a permanent establishment in the sense of Article 5 of the OECD MC and Mr Q's remuneration is borne by that permanent establishment (see Chapter 3.1.2.2).

- In sum, in the case study described above, Member State B will have the taxing right on the income earned in its territory if either the subsidiary or Mr Q himself creates a permanent establishment and economically bears the

[117] See above, Chapter 3.1.2.2.
[118] See in detail for the calculation of presence days and working days, S. Bendlinger, *Auslandsentsendungen in der Praxis des internationalen Steuer- und Sozialversicherungsrechts* (LexisNexis, Vienna, 2011).

remuneration costs for Mr Q's work in Member State B, or if Mr Q is present in Member State B for more than 183 days within a twelve-months period. In both cases, Member State A will only have a residual taxing right depending on the method to avoid double taxation. In any other situation (no presence of Mr Q in Member State B for more than 183 days and no permanent establishment there) the exclusive taxing right for the income earned for the work done in Member State B will be with Member State A. In any event, the income earned for the work in Member State A can only be taxed in Member State A.

- To sum up, also persons simultaneously active in more than one Member State are not always subject to the taxing right and the right to levy social security contributions of the same Member State. Under tax law often every State where a gainful activity is exercised is competent to tax the income from that activity while for social security always only one Member State is competent.

4.3.1.4 Pensioners

Also cases concerning non-active persons can show the problems we are confronted with (for the applicable rules see Chapter 3.1.5.). Let us consider a pensioner who receives a pension from Member State A and a civil servants' pension (also covered by Regulation (EC) No 883/2004) from Member State B. This person resides in Member State A, which deducts a certain percentage of the pension for health insurance coverage. In Member State B a special tax is levied on pensions, which is dedicated to the national health care system of that Member State.

- Under Regulation (EC) No 883/2004 Member State A is allowed to levy its sickness insurance contribution also on the pension from Member State B.[119]

- On the basis of the DTC between the two Member States the civil servants' pension from Member State B will be taxed in Member State B, and be exempted from taxation in Member State A, which may only take it into account for reasons of the progression provision. The pension from Member State A will be taxed only in Member State A.

- Thus, if Member State B regards the special tax on pensions as tax, the person concerned could be obliged to pay in both Member States for the risk of sickness, although this would be contrary to the principles of the coordination Regulation. Member State B would not have to incur any costs of sickness treatment, as all these costs have to be borne by Member State A under the Regulation. Of course, the same would also happen if Member State B had no specific socially earmarked tax covering the sickness risk but a general taxation system out of which also the national health system of this Member State was financed. But, if Member State B regards this socially earmarked tax as a social security contribution which falls under Regulation (EC) No 883/2004 it would not be entitled to levy it. Thus, the amount of levies depends on the interpretation of the Member States concerned (see also Chapter 4.2.1).

4.3.2 Problems which result from the case studies

As the case studies reveal, there are many cases and situations in which not only the competence to levy social security contributions and taxes but also the granting of

[119] Article 30 of Regulation (EC) No 883/2004 and Article 30 of Regulation (EC) No 987/2009, as the costs of sickness benefits have to be borne by that Member State A under Article 23 of Regulation (EC) No 883/2004.

benefits are not in the hands of the same Member State. This interaction between social security and tax law principles gives rise to many problems. The same is true for many cases in which the borderline between these two fields is blurred, which adds questions to the already existing challenges. The most important problems are the following.

4.3.2.1 The amount of the levies (remaining net income)

As already said, Member States finance the task of the state in very different ways. In the field of social security, some States rely more on the Bismarckian approach, which results in rather high contributions on income and comparatively low taxes (which are not primarily meant to cover the expenses of social security). Other States have opted for tax-financed schemes covering the whole population. Contribution rates are comparatively low, whereas tax rates are much higher as they intend also to cover the major part of social security.

Consequently, persons who have links with two Member States with different philosophies could win or lose, depending on which system they are subject to for social security contributions and taxation. If the Member State which is competent to collect contributions is one with a Bismarckian system and the Member State to tax the income is one with a tax-financed social security scheme, the person concerned pays much more than in a situation in which either of the two Member States would be competent for both fields.

Consider the following example, for which we have used a recent OECD table showing the percentages of income tax and social security contributions.[120] Let us assume a person has an income of € 3,000. Now, take the example of, on the one hand, a Member State with a Bismarckian system like Germany, which has a contribution rate of 20.7% and – for this amount of income – a tax rate of 19.2% and, on the other hand, a Member State with a predominantly tax-financed social security scheme like e.g. Denmark with a contribution rate of 2.7% and a tax rate of 36.2%. If the person is only subject to German legislation, the total levies (tax and social security contributions) would amount to 39.9%,[121] which would lead to a net income of € 1,803. If the person is only subject to Danish legislation, the levies would amount to nearly the same percentage, namely 38.9% and a net amount of € 1,833.

However, the moment the competences to levy taxes and social security are no longer in the hands of one Member State, the results differ considerably. If Germany is competent to levy social security contributions and Denmark is competent to tax the income, the percentage would go up to 56.9%, and a net amount of € 1,293 would remain as income. In the reverse situation, the percentage would be 21.9% and the net income would be € 2,343. It could be interesting to further develop this analysis and make more concrete calculations. This could be a task for future work; for the moment we think this first attempt sends already clear messages.[122]

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[120] http://www.oecd-ilibrary.org/taxation/income-tax-and-social-security-contributions-2013-1_tax-ssc-table-2013-1-en. Of course, this table is built on averages. Nevertheless, it can show the effects we want to demonstrate very well.

[121] To make the calculation easier, we have decided to apply both percentages to the cross amount and not first deduct social security contributions and afterwards from that result the tax rate. In principle the correct calculation would lead to slightly different results, but, without any major other trends.

[122] National experts have been asked to provide calculations for an example with an income of € 1,000. The results are very interesting, but unfortunately at this stage not explicit enough (in some Member States this income was close to or below the tax thresholds and also additional assumptions e.g. concerning the family situation could help to gather more comparable information. This could be an issue for further work.

Could these different results depending on which Member State is competent to levy contributions and which one is competent to levy taxes be an obstacle to free movement? It may be recalled that the CJEU has decided in relation to social security that the simultaneous exercise of competences by two Member States to collect contributions constitutes a hindrance to free movement.[123] Is this also the case if one Member State is competent to collect social security contributions and another one to levy taxes, which also cover costs of the major parts of social security benefits? Up until now the CJEU has only once been asked to decide on the relationship between the competences for social security under Regulation (EC) No 883/2004 and taxation under a DTC, i.e. in the *Derouin* case, which will be explained more in detail in the following chapter.

4.3.2.2 Socially earmarked taxes covered by DTC and Regulation (EC) No 883/2004 – the Derouin case[124]

Mr Derouin was a resident of France, where he was working as a lawyer. He was also a partner of the British law firm Linklaters. Next to its principal place of business in Great Britain, this law firm also had offices in other Member States, among others in Paris. Mr Derouin was registered both as '*avocat*' at the Paris Court of Appeal and as Registered Foreign Lawyer at the Supreme Court of England and Wales. As remuneration Mr Derouin received a participation of the law firm's profits.

Being resident in France, Mr Derouin was taxable there for his worldwide income, unless France had waived its taxing power in a DTC (so-called 'unlimited tax liability'). Following Article 14(a)(2) of Regulation (EEC) No 1408/71 France also had the competence concerning social security. Persons who both had unlimited tax liability in France and were covered by the French social security system had to pay two kinds of socially earmarked taxes, which are covered by Regulation (EEC) No 1408/71 (CSG and CRDS – see Chapter 4.2.1). Moreover, both CSG and CRDS were covered by the DTC between France and the United Kingdom. According to Article 14 of the DTC, Mr Derouin's income that was to be attributed to his work for the law firm's main place of business in London was exempted from taxation in France. On the basis of Regulation (EEC) No 1408/71, France was the competent Member State for social security purposes and, therefore, France was competent to levy social security contributions, including the CSG and the CRDS.

Because of these contradicting legal bases the French Cassation Court wanted to know from the CJEU if the Member State competent for social security was allowed to waive its taxing right (right to levy contributions) on the part of Mr Derouin's worldwide income that could be attributed to the work done in the UK. Advocate General Mengozzi concluded that France was not allowed to do so as Article 14(d)(1) of Regulation (EEC) No 1408/71 required the Member States to treat any work as if it was performed within the territory of the competent Member State. The CJEU came to another conclusion:

"*Since Regulation No 1408/71 is a means of coordination and not of harmonisation, Member States have the power to determine the tax base for contributions such as the CGS and the CRDS. As a result, as Community law now stands, a Member State is entitled to forgo, unilaterally or in the context of tax treaty such as the Double Taxation Convention, the inclusion in the tax base for contributions such as the CSG and the CRDS of income earned in another Member State by a resident self-employed*

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[123] See Chapter 3.1.1.1.

[124] For the following see for a detailed analysis of the *Derouin* case and further references K. Daxkobler, op cit (see footnote 70), 607 et seq.

person in a situation such as that of the applicant in the main proceedings. Although it is established that no provision of Regulation No 1408/71 prohibits a Member State from calculating the amount of the social contributions of a resident on the basis of his total income (see, to that effect, Nikula, paragraph 31), clearly no provision of that regulation requires it to do so."[125]

From the perspective of the fundamental freedoms, this interpretation of the Regulation would seem to make sense. Mr Derouin is not treated worse than persons only working in France. On the contrary, he is even treated better: he pays fewer contributions to the social security system, while having the right to the same amount of social security benefits. At the same time, however, Mr Derouin is also treated better than those people who are working in Member States with which France has not concluded a DTC, or where the DTC applicable gives the taxing right to France or the scope of which does not cover CSG and CRDS.

As a result it does not seem advisable to include 'contributions' that are covered by Regulation (EC) No 883/2004 in the scope of a DTC. This is at least true as long as there is no comprehensive DTC network with all European Member States with all DTCs covering socially earmarked taxes and constituting the same competence rules for them.

4.3.2.3 Conclusions from the Derouin case and beyond that case

After the outcome of the *Derouin* case, the question arises whether the CJEU would reach the same conclusion if a **person really funded social security with levies in two Member States**, in one via social security contributions, in the other via global taxes? In such cases the person concerned is really penalised for exercising his or her free movement rights. He or she has to pay more than a comparable person who is subject to the social security and tax laws of only one of the two Member States. Worse, he or she is also without any entitlement to benefits from the Member State which is competent to tax the income as the benefit side in principle is only governed by the competences under Regulation (EC) No 883/2004. Health care costs, for example, are borne only by the Member State competent under the Regulation, but e.g. a pensioner may also contribute to health care by paying taxes in the State of residence.[126] The same may hold true for residence-based pensions: although a global tax also finances residence-based pension schemes in some Member States, no periods can accrue there under the Regulation if for social security purposes the Regulation declares another Member State to be the competent one. Again, it may be recalled, in the field of social security EU law objects to a Member State collecting contributions in addition to the contributions paid in another Member State if no additional benefits can be drawn from these contributions.[127]

One understands the dilemma which the CJEU is in and would be if an explicit case with much higher levies in a cross-border situation than in any of the Member States involved would be at stake (see our example in Chapter 4.3.2.1.). What would the implications be of a conclusion that such too high levies are at odds with EU law? If we assume that the competences determined by Regulation (EC) No 883/2004 have already been examined and found to be in accordance with the principles of the TFEU, could we deduct therefrom that also taxation in such cases has to follow the same

[125] C-103/06, Derouin, paragraph 26 et seq.
[126] Compare A.P. van der Mei et al, 'Pensioners and the Financing of Cross-Border Healthcare: Bottlenecks in the Fields of European Social Security Law and International tax Law', 1 *European Journal of Social Law*, 2011, p. 82-102.
[127] Again, e.g. in C-393/99 and C-394/99, Hervein and Lorthiois.

principles to avoid conflicts with the free movement principles (which in principle would mean that DTCs are not applicable in their entirety)?

Immediately, we would run into another problem. Taxes are not only meant to finance social security. Would this mean that the application of the competences as allocated by Title II of Regulation (EC) No 883/2004 only involves that percentage of taxes which is really used to finance social security? This could be regarded as a balanced solution, but also, without any doubt, could lead to administrative nightmares.

Another solution could be that in such cases the Member State, not competent under Title II of Regulation (EC) No 883/2004, which levies taxes which are partially used to finance social security should also have to grant benefits. Let us take again those examples we gave under the case studies for posting (Chapter 4.3.1), where a split competence is given under the coordination Regulation and the DTC. The social security legislation of the posting Member State remains applicable and, thus, the person concerned also acquires periods in pension insurance under the legislation of that Member State, while taxation (including also the financing of the residence-based pension insurance scheme) is already with the new Member State of residence where the activity is carried out during the posting period. Under the Regulation it is clear that the Member State of residence is not competent for the pension coverage. Could the principles of the TFEU require that in such cases periods in the residence-based pension scheme of this Member State not competent under the Regulation also have to accrue because of the payment of taxes? This may be in line with some of the other CJEU rulings according to which the competences under the Regulation cannot preclude another Member State to grant also benefits which are based on that other Member State’s national legislation.[128]

4.3.2.4 Disadvantages on the benefit side

In principle, the coordination of social security is more or less clear and has been tested by many CJEU rulings. Beneficiaries are guaranteed that they receive the benefits they are entitled to. The coordination of tax benefits usually follows the right to tax. As has been shown under Chapter 2.3.1.2. and Chapter 3.2.2, these rules are not as developed as the ones contained in Regulation (EC) No 883/2004 and do not always guarantee that a person gets all the benefits he or she would be entitled to under national law.

How should situations be treated in which a benefit could be regarded at the same time as a social security benefit and/or as a tax benefit? From the case law it follows that the mere fact that a benefit is covered by Regulation (EC) No 883/2004 does not exclude that a Member State which is not competent under the Regulation might, nevertheless, be obliged by other EU principles to grant the benefits.[129] As an example a child bonus under tax law could be mentioned, thus, a tax benefit which has to

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[128] E.g. in C-611/10 and C-612/10, Hudzinski and Wawrzyniak, where explicitly paying tax, even if it is not the Member State of residence, was decisive to open entitlement to family benefits.

[129] This is evident from important cases such as C-352/06, Bosmann, or C-611/10 and C-612/10, Hudzinski and Wawrzyniak, where the CJEU decided that the Regulation does not hinder a Member State to grant its benefits under national legislation even if the Regulation gives the competence to another Member State. However, it can also be shown by other, not so evident, cases like C-75/11, Commission against Austria. In this case, the CJEU ruled that, although the reduced tariffs for transport of students could be a family benefit under Regulation (EC) No 883/2004, Austria has to grant this benefit to all students studying in Austria also when Austria is not competent to grant family benefits under that Regulation (entitlement to these reduced tariffs depends on entitlement to family allowances under national Austrian law, so no entitlement under national Austrian legislation in these cases) based on the principle of equal treatment of EU citizens enshrined in Article 18 TFEU.

follow tax principles.[130] If a person resides in Member State A and works there 20% of the working time for an employer established in Member State B (where the remaining working time is spent), Member State A is also competent (under the *Schumacker* principle) to grant tax benefits. Yet, as this benefit could also be regarded as a social security benefit falling under Regulation (EC) No 883/2004,[131] it would be up to Member State B (which is competent under Title II of Regulation (EC) No 883/2004, as no substantial part of the activity is exercised in the Member State of residence) to grant its family benefits including any child bonus.

Is it up to the person concerned to invoke either the tax rules or the social security coordination or is this for the administrations to decide? What if the application of both the tax rules and the coordination rules is claimed? In such cases it could be doubtful if national and/or EU anti-cumulation rules are applicable. The opposite could also happen. Member State A could refer to the fact that it is (also) a social security benefit and therefore deny its competence to grant the benefit, while Member State B could be of the opinion that it is a tax benefit and could thus also not grant a benefit. This would lead to a situation without any entitlement to benefits.[132]

4.3.2.5 Burden for the persons concerned, their employers and the administration

Under national law, tax and social security rights and obligations are already complex and difficult to understand for the persons concerned and for the national administrations. Employers usually have to employ specialists for these issues or pay for the services of lawyers or tax accountants to avoid mistakes. Cross-border situations are even worse as, in addition to national laws, international instruments such as Regulations (EC) No 883/2004 and 987/2009 for social security and/or DTCs have to be complied with. If these instruments lead to the application of foreign law, this already creates huge problems for the persons concerned or the experts. Most complex are situations in which tax and social security competences are held by more than one State. The correct application of these legislative instruments is something which necessitates a lot of efforts and knowledge which only a few experts have. The lack of transparency, the multitude of different aspects to be considered and the many mistakes which could be made lead to the assumption that in many cases the persons concerned are not treated completely in conformity with the applicable legal acts. Such wrong application of the legal systems could also be caused by the fact that the correct application would have unsatisfactory results. This could add to our fear that the existing lack of synchronisation of tax and social security competences could result in de facto hindrances of free movement which are at odds with EU law.

Cross-border cases usually also take much longer to be administered than purely national cases. Especially if there are interdependencies between taxation and social security (e.g. if social security contributions can be deducted when calculating the tax base) these lengthy procedures add to problems. Imagine a case where the competence for social security in cases of simultaneous employment in more than one Member State is not clear. The Member State of residence first has to decide on a provisional basis under the rules of Article 16 of Regulation (EC) No 987/2009 which Member State is competent. If any other Member State involved objects this decision, for social security purposes provisional competences under Article 6 of that Regulation apply and a dialogue process commences between the Member States. If in the end another Member State is declared as the competent one, the person’s social security

[130] C-303/12, Imfeld und Garcet.
[131] C-177/12, Lachheb.
[132] If the CJEU would not, again, grant entitlements already existing under national legislation in addition to those under Regulation (EC) No 883/2004 – see also footnote **Fout! Bladwijzer niet gedefinieerd.**.

situation (including contributions and benefits) has to be corrected retroactively. This may also necessitate a correction in the tax field. This, however, is not governed by the Regulations. What happens if national tax law does not allow for such a correction? It could be said that such a national procedural law is at odds with the fundamental principles of the TFEU,[133] but it is not sure that the correct results would be achieved in all cases (e.g. taking into account different attitudes towards EU principles, which are nowhere explicitly written down by national authorities and courts).

Therefore, these challenges could be summed up by noting that the application of tax and social security legislation in cross-border situations is very complicated, that there is no guarantee that the correct results are achieved in practice and that the procedures take much longer than in national situations.

4.3.2.6 Cooperation between administrations

Cross-border cooperation between tax and social security authorities is necessary to ensure the correct application of tax and social security laws. Usually, however, such cooperation is limited to the policy field concerned. Thus, Regulation (EC) No 883/2004 only obliges social security institutions to cooperate (Article 76). Cooperation between the authorities in the two fields of taxation and social security, however, is rare and sometimes even obstructed by legal barriers concerning e.g. data protection. This is problematic, as European citizens may not be able to enjoy the taxation and social rights they possess, which hampers the exercise of their EU right to freedom of movement.

4.3.2.7 Conflict settlement

Finally, there is still another aspect where tax law and social security differ: the mechanisms for dispute settlement. Regulation (EC) No 883/2004 provides for a burdensome and lengthy 'Dialogue and Conciliation Procedure' to settle disputes (also developed by the CJEU),[134] which may involve the institutions concerned, the competent authorities, the Administrative Commission and finally, if need be, the CJEU.

Experiences have shown that this procedure may take very long and in many cases does not lead to the necessary results. Leaving aside a possible CJEU ruling, the whole procedure including a decision of the Administrative Commission, is not binding on the Member States concerned.

DTCs often contain a provision on an arbitration mechanism. Arbitral decisions are binding for the parties involved (Article 25 of the OECD MC). Thus, in the tax field there seems to be more efficient ways to solve disputes than in the social security field.[135]

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[133] The principle of effectiveness (national procedural law must not hinder the transposition of EU principles totally) and equivalence (no deviating principles in national procedural law for the transposition of the EU principles). E.g. C-826/79, MIRECO.

[134] Article 5 of Regulation (EC) No 987/2009, Decision No A1 of the Administrative Commission, OJ 2010 C 106, p. 1 (Dialogue and conciliation procedure) and e.g. C-202/97, FTS.

[135] For this topic see further C. De Hosson (ed), Special Issue of INTERTAX 42/3 on Arbitration in tax treaties.

5 Into the future – possible actions to be taken

Although we are only at the beginning of a process, the first analysis we have made demonstrates that there are a lot of questions, challenges and problems. Today's situation is not satisfactory. We think that this work should continue and go more into depth to look for possible solutions.

On the basis of the first analysis we can already draw some conclusions and propose elements for possible future steps.

First of all, the legal situation is not clear. There are many unanswered questions concerning the notions of social security contributions and taxes, on the one hand, and social security and tax benefits, on the other hand. The rulings of the CJEU we have analysed often do not offer the desired legal clarity; on the contrary, they often only add to already existing confusion. Further, the mapping exercise of the schemes in the different EU Member States has shown that there are a lot of different approaches and philosophies. As a result, mobile citizens face serious problems (especially compared to persons who have not moved) in the fields of social security and taxation which may hamper their freedom of movement.

The following solutions to the problems could be envisaged:

5.1 Solutions to achieve more clarity

- The mapping exercise could be continued and broadened to gain more knowledge about the schemes of the different EU Member States and the possible problems which already occurred or could occur due to disparities between national tax and social security legislation. Situation-covering mobility between EU Member States and third countries might be included.[136]
- The borderline between social security contributions under Title II of Regulation (EC) No 883/2004 and taxes could be clarified by clear definitions to be included in the Regulation. Of course, such a definition can only deal with levies which fall under the Regulation because they are linked to social security (a definition of taxation, which does not fall under the material scope of the Regulation cannot be included). Nevertheless, it could be clarified in such a way that also levies which from today's point of view are treated as taxes by the Member States concerned have to be treated as social security contributions due to their link with the risks covered. The main criteria of such a definition could be built on the personal scope of the levy (who has to pay), on the material scope (from which source – only from gainful income or also from other sources) or on other aspects (e.g. on the institutions which collect the levy, the place where the levy is provided under the national legal systematic

[136] See e.g. M. Lang (eds) *Double Taxation Conventions and Social Security Conventions* (Linde Verlag, Vienna, 2006). The fact that, in the famous case concerning a social security convention with third countries, i.e. C-55/00, Gottardo, the CJEU referred to a tax case on DTCs (C-307/97*,* Saint-Gobain) in relation to third countries already shows the importance of a combined analysis of these two instruments (see e.g. S. Dommes & M. Lang, 'Reciprocity and the Balance of a Tax Treaty', in M. Lang, J. Schuch & C. Staringer (ed), *Double Taxation and EC Law* (Kluwer Law International, 2006), 61 et seq). Such an analysis, of course, gets even more relevant considering the difficulties in drawing a borderline between the scope of DTCs and social security conventions.

etc). Such definitions would be especially important to have some guiding principles for socially earmarked taxes.

- The same applies for the lack of a clear borderline between social security benefits which have to be treated under Regulation (EC) No 883/2004 and social tax benefits (still) outside that Regulation.

- These clarifications could be made either in interpretative instruments (e.g. an AC Decision or a Practical Guide) or by ways of an amendment to Regulation (EC) No 883/2004.

5.2 Horizontal solutions on a policy/administrative level

- One could consider improving the exchange of information and best practice models, e.g. by installing a sort of open method of coordination for the taxation/social security field.

- Better cooperation is also desirable between the institutions and authorities which are responsible for taxes and social security, respectively, at national and EU level. A network of experts for these two fields could be installed, the reasons for any hindrances or obstacles for such cooperation should be identified and ways to overcome these problems have to be looked for.

- As there are different players which could be regarded as a centre of knowledge and also which could represent the interests of many States (for social security the AC and for taxation issues the OECD) we could recommend a closer cooperation between these two bodies.

- In concrete cases Solvit could be used more often. This network has the big advantage that it is not limited to either of the two fields of politics. Therefore, Solvit can also tackle issues that concern the interaction between social security and taxation.

5.3 Legislative solutions

Legislative solutions should not be excluded as only by taking such steps the problems could really be overcome. Especially where no solution can be found by interpretation and the CJEU does not think that there is an obstacle in the strict sense, legislative action could be an important remedy for a problem. There are many different ways to change the existing legal instruments.

- Which instruments could be our aim? Of course, changes could be made to Regulation (EC) No 883/2004, but one could also think of a European legal framework for taxes – provided the automatically raised questions are solved. Is there a legal base under the TFEU? Could it be an agreement outside the TFEU which Member States should sign up to as a result of a political decision at European level?[137] Finally, the OECD could be envisaged to change the OECD MC.

[137] As was e.g. the case with Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ 1990 L 225.

- In Regulation (EC) No 883/2004 minor changes could be made to synchronise the different principles, e.g. harmonising the posting provisions towards the 183-days rule in the DTCs (although, as we have shown in Chapter 3.1.3 this would not synchronise posting in all the different situations); the same could be done concerning other definitions, e.g. residence or employer (of course, the same could be done in the OECD MC the other way around). At least for cross-border cases we could strive for a harmonisation of the base to calculate social security contributions and taxes (as today the base often differs considerably) to ease the work of employers and administrations.

- One might consider treating (all) social taxes as social security contributions under Regulation (EC) No 883/2004. A revolutionary idea would be to look for solutions which try to achieve that all Member States coordinate all the different levies which are meant to finance social security under Regulation (EC) No 883/2004. Thus, also the percentage of general taxes which in the end is used to finance social security could only follow the principles under Title II of Regulation (EC) No 883/2004 and would have to be exempt from any other rules, e.g. a DTC.

- Also on the benefit side one could consider treating (all) social tax benefits (a definition – see also Chapter 5.1 – would be needed to clarify what is meant by this notion) as social security benefits under Regulation (EC) No 883/2004.

- Another solution could be to change the coordination and the competences under Regulation (EC) No 883/2004 for social security contributions to the rules under the OECD MC. However, we have doubts that this solution would be in accordance with the principles of the TFEU as it would inevitably lead to the simultaneous competence of more than one Member State to levy contributions.

- Finally, we could think about a 'super' supra-coordination as an umbrella over the Regulation and the DTCs: whenever these lead to different Member States levying contributions and taxes, this instrument could rule out which one has to be considered as competent for both fields.

6 Short conclusions

To sum up, we have seen that the social security and taxation systems of the EU Member States are very diverse. Applying the principles and rules of supranational social security coordination law and bilateral DTCs leads to very complex legal situations in the cross-border setting.

Problems arise due to various elements: first of all, the lack of clear definitions has to be mentioned. Many aspects are not clear at the moment because the borderline between social security and taxation is blurred. Socially earmarked taxes, which form part of a national tax system, but which are dedicated to finance exclusively social security benefits, are levies which are not easily attributable to one of the two fields. Although the CJEU has already ruled on some of these socially earmarked taxes, clear and transparent elements to draw the necessary borderline (especially for answering the questions which kind of levies have to be treated under Regulation (EC) No 883/2004) are missing.

On the benefit side we encounter tax benefits that are clearly linked to one of the risks covered by Regulation (EC) No 883/2004 (especially if these benefits have the task of meeting family expenses). Nevertheless, many Member States still regard them as tax benefits subject to DTCs. Also in this respect clear definitions are missing and the rulings of the CJEU dealing with such benefits up until now do not allow the drawing of a borderline between those benefits which must be subject to the coordination under Regulation (EC) No 883/2004 and those which still stay outside of it.

Complexity is added as a result of different definitions of important notions like 'residence' or 'employer' in DTCs and Regulation (EC) No 883/2004.

Letting aside these problems stemming from missing or divergent definitions, other important issues became evident from the case studies we made: in cross-border situations many problems can be avoided if the same Member State is competent to levy taxes and social security contributions on a person. In this case, it is usually also this Member State that is competent to grant social security and/or tax benefits. The moment different Member States are competent under Regulation (EC) No 883/2004 and under a DTC, problems arise and the person concerned could win or lose in comparison to a person who has not moved. Such different competences could occur e.g. in the case of posting, in the case of frontier workers and persons simultaneously employed in more than one Member State, and also in relation to pensioners. In all of these cases the situation becomes very complex and legal clarity is not guaranteed.

The moment a DTC covers also levies that at the same time have to be regarded as social security contributions under Regulation (EC) No 883/2004, the CJEU seems to be reluctant to rule out that only one of these instruments is applicable; this adds many problems and questions.

The negative results of different Member States being competent for taxation and social security (e.g. much higher levies than in purely internal situations) could be so intense that the fundamental principles of free movement could be at risk.

As this topic is very important, since it affects nearly all cross-border active persons, it cannot be neglected. From our point of view, today's situation should not be tolerated, and we urgently recommend that further steps are taken. These could range from interpretative clarifications to changes of the legal system concerning the

competences to levy and to grant benefits under Regulation (EC) No 883/2004 and/or DTCs.

Many issues have only been dealt with in a not very detailed way by this report, respecting the limits of this study. We, therefore, recommend that further studies are made (which should also contribute to ease the decision on the steps that have to be taken in the future), especially on:

- **socially earmarked taxes**: as for these the double treatment under Regulation (EC) No 883/2004 and a DTC cannot be excluded which automatically leads to problems; the situation in Member States but also the existing legal framework has to be further examined;

- **social tax benefits**: what has been said in relation to the levying side with regard to socially earmarked taxes also applies to the benefit side, where social tax benefits could be dealt with under Regulation (EC) No 883/2004 and at the same time under a DTC;

- **definitions:** if they are common to both fields of politics (especially the notions 'residence' and 'employer', but also other relevant aspects) more clarity could be achieved, especially in order to identify possible conflicting results.

In addition, national experts could be asked for further analysis concerning the challenges identified from a national perspective and these new studies should lead to proposals for (legislative) action to overcome the problems encountered.

Annex: Member States' comments

Comment from the Belgian representative in the Administrative Commission for the Coordination of Social Security Systems (dated 17 April 2015):

On page 38, the paragraph relating to Belgium should be amended or read as follows:

'Also in **Belgium** a specific levy has been introduced which is based on certain temporary measures relating to the **moderation of the income of self-employed persons**. This levy was introduced with a view to reducing public expenditure and ensuring the financial balance of the social security scheme for self-employed persons. The CJEU considered that Regulation (EEC) No 1408/71 applies to a contribution such as the Belgian moderation contribution (direct and sufficiently relevant link to the branches of social security). In this case, the National Social Security Institute for Self-Employed Persons (INASTI) claimed from a Belgian national pursuing activities as a self-employed person both in Belgium and in France the payment of the moderation contribution calculated on the whole of the income received (including the income received in France). On this point, the CJEU agreed with Belgium (paragraph 24 of the judgement) that "*Article 13 et seq. of Regulation No 1408/71 require a contribution such as the moderation contribution to be calculated in such a way as to include under the heading of occupational income the income obtained in the territory of a Member State other than the Member State whose social legislation is applicable even if, after paying that contribution, the self-employed person cannot claim any social security or other benefit at the expense of that State*". Therefore, Belgium can levy this moderation contribution also on self-employed income gained in another Member State if it is the competent Member State under Regulation (EC) No 883/2004.'