

Institute for Transnational and Euregional
cross border cooperation and Mobility / ITEM

A glance at ITEM

Scientific contributions to cross-border cooperation and mobility

Anniversary edition 2015-2019



The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM is the pivot of research, counselling, knowledge exchange and training activities with regard to cross-border mobility and cooperation.

Maastricht University

A glance at ITEM. Scientific contributions to cross-border cooperation and mobility

Anniversary edition 2015-2019

ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise on Demographic Changes (NEIMED), Zuyd University of Applied Sciences, the City of Maastricht, the Euregio Meuse-Rhine (EMR), and the Dutch Province of Limburg.



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Prof. Hildegard Schneider



During the last months, we have reflected on the achievements ITEM has reached in the past years. I think we can look back on a very intensive and fruitful period.

ITEM has been conducting scientific research since 2015 with the clear goal to contribute to the improvement of cross-border cooperation and to decrease barriers for cross border mobility and frontier workers. ITEM also stimulates awareness for the economic potential of border regions, the challenges they are facing due to legislation and administrative practices but also the chances and opportunities they have when border regions are cooperating together. In this period from 2015-2019, ITEM has developed a large network with regional, national and European partners. ITEM has shown that its original mission as formulated in 2015 has been achieved. Based on these results the institute can grow, intensify its research and develop further the specific instruments, such

as the ITEM cross-border impact assessment methodology as well as the ITEM cross-border knowledge portal, which can help policy makers in the decision making process.

We are very proud that an external independent Commission of Experts has evaluated ITEM and its achievements very positively during the past months. The Evaluation Commission specifically underlined the scientific but also the societal relevance of ITEM's research and its activities. The Evaluation Commission also recognized and praised the important network function ITEM has taken up on many levels: regional, national and European. The various forms of activities and co-operations have all been very fruitful.

This positive reaction encourages us to intensify our work also in the upcoming period 2020-2024.

I herewith present you a selection of ITEM blogs written during the last 5 years on cross-border cooperation and mobility. These blogs show a good and understandable representation of the research and work ITEM has conducted during the last 5 years.

This is of course just a small section of the research ITEM has conducted. Please have a look at the ITEM website, www.maastrichtuniversity.nl/item, and the ITEM cross-border portal, itemcrossborderportal.maastrichtuniversity.nl, for the most recent information on ITEM research and contributions to cross-border mobility and cooperation. We are also very proud that the first ITEM-PhD will defend his research results on November 8th, 2019.

Maastricht, August 2019

Introduction

The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM of Maastricht University is an interdisciplinary institute that conducts interdisciplinary research within the scope of cross-border mobility and cooperation issues.

Among the ITEM Expertise Centre's scientific staff are researchers and PhD candidates with expertise in various fields. In addition to scientific output in the form of publications, ITEM researchers and PhD candidates write blog contributions and news articles that are featured on the Maastricht University website. Blogs make academia more available for society and contribute to our goal of bringing science and practice together. This anniversary volume comprises of a collection of short pieces in English (some are translated from Dutch) about some contemporary cross-border issues and output of ITEM during the period 2015-2019.

The themes include:

- Cross-border social security
- Cross-border education & the labour market
- Cross-border mobility
- Cross-border pensions
- Cross-border taxation
- European Union citizen
- Cross-border crime

Cross-border Social security

How Dutch cross border workers also can benefit from the export of Unemployment benefits

Published on 16 April 2019

Saskia Montebovi



At the end of March and the beginning of April, the media again published some disturbing reports about the planned changes to the unemployment schemes in the European regulation on social security and the possible misuse of Dutch benefits by foreign workers.

In this report, we briefly set out the facts regarding the unemployment proposals. What changes are on the European table? What determines Dutch unemployment legislation? Are the headlines right and do the (Dutch) politicians tell the whole story?

Revision of EU Coordination of Social Security

In December 2016, the European Commission submitted a revision proposal for the coordination regulations on social security systems (EC 883/2004 and EC 987/2009). Since then, negotiations have been ongoing on the amendments relating to unemployment, long-term care and family benefits. In this contribution, we focus on two parts of the revision, namely the unemployment export scheme and the minimum waiting period in the event of unemployment.

Unemployment export scheme

Under the current system, an unemployed person can take his benefit to another member state for three months in order to seek work there. The proposed scheme extends this period to six months. It is up to the authorities of the host country to monitor the search for another job and to ensure that the eligibility conditions are met.

The Netherlands is not in favour of extending the export scheme because, in practice, it appears that some EU citizens, more than others, make use of this scheme and the Netherlands seems to lose control of this group of unemployed people as well as of the budget. This is partly due to the fact that in some EU member states, wages are much lower than the unemployment benefits from the Netherlands. The incentive to look for work is therefore minimal. Also, the control in and by the host country is less than what is expected in the Netherlands. In recent weeks, unrest has flared up in Dutch politics and society following reports about the current 3-month export option. For example, it appears that for employees from Poland - who have worked in the Netherlands and (temporarily) return to Poland with a Dutch unemployment benefit - a job in Poland is financially less attractive than the Dutch unemployment benefit that they are allowed to take with them on a temporary basis on the basis of the export scheme. The fact that the export scheme also applies to other EU citizens *is not clearly stated* in the reports. Any EU citizen who is unemployed and believes that he has a better chance of finding a job abroad may temporarily export his unemployment benefit to a foreign country (subject to certain conditions) in order to look for work there

Minimum Work Period

The Regulation makes it possible to add up insurance periods if one only has been insured for a short time in another country and is eligible for benefits. Under the current Regulation rules, this means that one day's work can be sufficient to include work periods in other countries. The proposed new rule introduces a waiting period of one month. Therefore, only employees who have worked in a country for at least one month and who become

unemployed there can invoke the aggregation rule and include their insured periods from former countries of employment. However, this does not mean that the insured years from former countries of employment influence the length of the unemployment benefit. The duration of the unemployment benefit is entirely determined by the last country of employment, that is responsible for the unemployment benefit. However, the unemployment benefit is determined on the basis of the last-earned salary. As a result, as long as the wage gap in Europe persists, the use/abuse of this rule will be attractive. This applies, for example, to Polish employees who come to work temporarily in the Netherlands and then possibly return to Poland with a Dutch benefit for the duration of the benefit. However, this also applies to workers working in other member states where unemployment benefits are higher than the wages in the former country of residence and employment.

Multiple perspectives

The media, the politicians and the authorities involved have made no secret of their indignation at situations of abuse. This is partly justified. Abuse or fraud should indeed be counteracted vigorously. However, simply pointing the finger at those who make use of their right to the free movement of workers is too short-sighted. There are several points of attention that also need to be highlighted in the reports. We will mention some of them here.

Firstly, Polish workers who can take Dutch unemployment benefits with them for a long time is only possible if they have also worked for a long time, in the Netherlands and/or Poland. The simple statement that Dutch unemployment benefit is granted after just one day's work gives a distorted picture. Dutch unemployment benefits are only granted if a sufficient number of weeks and/or years have been worked.

Secondly, the inclusion of foreign periods in the determination of entitlement to benefits is a correct application of the Regulation and is part of the free movement of persons.

Thirdly, Polish workers are not the only ones who are responsible for the temporary export of Dutch unemployment benefits to Poland without control from the Netherlands. This is a combination of the Regulation rules and the Dutch policy with (too) little control and enforcement by the UWV (through austerity operations by the government).

Fourthly, as a result of the Dutch legislation and policy, employers in the Netherlands to a large extent - and more so than in other member states - offer temporary, short-term employment contracts instead of long-term or permanent contracts. In this way, many temporary labour migrants are recruited in certain sectors. In periods of unemployment, these workers temporarily return to their homes and come back later to take up work again, often with a temporary contract...

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Will the European Social Model become a reality at last?

Published on 18 March 2019

Nina Büttgen



More than 17 million workers living or working in another Member State are exposed to possible violations of their rights, either because of poor implementation of EU rules, disinformation or lack of coordination among Member States. Therefore, the EU plans to set up a new authority that will support fair labour mobility within the EU, allowing citizens and businesses to seize the opportunities offered by the Single Market while supporting the cooperation between national authorities, including in preventing and tackling social fraud and abuse. ITEM cooperates with authorities and societal actors on all levels to make fair mobility a reality, in particular for frontier workers. ITEM research

supports common endeavours to remove obstacles that hinder cross-border labour mobility in everyday life. Considering the longstanding critique on the EU's "social deficit", this new European Labour Authority (ELA) may help blow new life into the long untended European Social Model.

The new European Labour Authority (ELA)

Commission President Juncker first announced such an authority in September 2017 as one of the priorities for rolling out the European Pillar of Social Rights. After the legislative proposal in March 2018, an unusually speedy procedure followed. The European Commission, the European Parliament (EP) and the Council reached a provisional agreement on the proposal on 14 February 2019. The EP Committee on Employment and Social Affairs adopted the trilogue outcome shortly after. Momentarily, once the Member States' Permanent Representatives (Coreper) confirm the agreement, it will be awaiting the vote of the EP plenary (expected for end March/beginning April). The intention is to complete the whole process before the upcoming EP elections in May.

Working towards contributing to clear, fair and enforceable rules on labour mobility, the Commission considers the ELA instrumental in improving the enforcement of EU law. The ELA is to organise "joint or concerted" labour inspections of potential abuses with national authorities. It also ought to address social security issues to bolster a well-functioning EU labour market. Furthermore, the unions achieved a crucial addition to the Commission proposal: They will gain the right to file complaints directly to the ELA instead of having to pass through the national authorities to help workers whose rights have been violated. However, a drawback is that some critical sectors like transport are – as yet – to be excluded from the ELA's scope.

Fair Mobility Tool

The application of labour and social security rules in cross-border situations never ceases to cause difficulties. ITEM has therefore researched the added value of developing a "Fair Mobility Tool" for cross-border workers in the framework of the EU Programme for Employment and Social Innovation. At the request of three Interregional Trade Union Councils (ITUCs), ITEM conducted an exploratory study on "fair mobility" for the cross-border worker and the feasibility of such a tool. The study concluded that the tool could be an important means to address obstacles and reduce abuses in cross-border employment with flexible contracts. It might thus also be of use to the ELA in terms of assembling relevant information in the long term.

With these research results, the unions will work together during all of 2019 to realise the fair mobility tool. ITEM and the three ITUCs will present and discuss the results in a common event in mid-June.

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Combat social dumping more successfully with a renewal of the posting of workers directive?

Published on 15 December 2016

Marjon Weerepas

Social dumping is a difficult issue at present in political institutions, both national and European. In short, social dumping, workforce in most cases are working under appalling conditions by being seconded in other countries.



To combat social dumping, EU Commissioner Thyssen launched a proposal in the spring of 2016 to change the current Posting of Workers Directive 96/71/EC. After invocation of the so-called yellow card procedure, particularly by Eastern European Member States, Thyssen decided to retain the original text. It is important that, among other things, the free movement of services and the free

movement of workers are promoted, but just naming these two freedoms immediately exposes the contradiction between them. After all, the optimal implementation of the free movement of services will not always benefit the free movement of workers or vice versa.

One of the spearheads of the proposal is that the same labour-law regulations should apply regarding payment for the same work in the same place, regardless of whether a local or a posted worker does the work. A positive point is that the proposal considerably expands the minimum conditions outlined in the current Posting of Workers Directive, even though that raises new questions of its own. The proposal advocates equal remuneration, for instance, but what exactly can be considered 'remuneration'? Would this include continued wage payments in case of illness, for example? An important point in the proposal is that the applicable labour law becomes that of the work state after 24 months of work in this work state. Even though this does not become clear from the draft Directive, it seems that this period of 24 months is based on the maximum posting period as outlined in Regulation No 883/2004 on the Coordination of Social Security Systems. Since the introduction of the proposal, there have been calls, however, for reducing the 24-month period to six months (see e.g. a recent note by Dutch labour union CNV). This term seems to refer to the period of 183 days laid down in the fiscal posting of workers regulation. It is to be welcomed that not only labour law, but also social security and tax law are taken into consideration. And, admittedly, the aim for coordination between premium and tax liability is a noble one, but the question is whether a reduction of the term to six months is of help to posted workers. According to Art. 57 of Regulation 883/2004, for example, a Member State is not required to provide old-age benefits if the insured periods do not exceed one year. The Regulation does require, however, that Member States add up short periods that together comprise more than a year for the granting of these benefits and, for example, unemployment benefits. See further CVA Explanatory Note. In addition to these issues, it is also cumbersome for the workers concerned to switch to a different system of social security after six months and then to have to leave that system again in the foreseeable future.

The question, however, is whether this is the right time to adapt the Posting of Workers Directive. I refer here to the Enforcement Directive that should have been implemented in June 2016. The Netherlands did, even though reporting duties have been suspended until the digital notification system is operational, probably in 2018. A number of Member States have not yet completed the implementation, however. The Enforcement Directive provides more opportunities for checks than the current Posting of Workers Directive. Given that combating social dumping is largely about performing checks, it raises the question whether we should not first await the effects of the implementation of this Directive and its inherent checking tools. It does not make much sense, after all, to embellish new rules that are not being properly enforced in the first place. In addition, the average posting lasted for 103 days in 2014. This would mean that the inclusion of the 24-month term will not have the desired effect in many cases, which is not to say that the 183-day proposal is the ultimate solution. One possible checking mechanism might be the introduction of a licensing system for employment agencies, like in Belgium.

It is clear that the issue of social dumping should be addressed. The relevant authorities in the field of labour, social security and tax law must jointly combat the phenomenon of social dumping. One of the questions that has to be answered in this context is whether the terms should be the same in all areas of law, all while considering the interests of the workers concerned!

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Cross-border education & the labour market

Foreign Surprises just across the border

Published on 10 April 2019

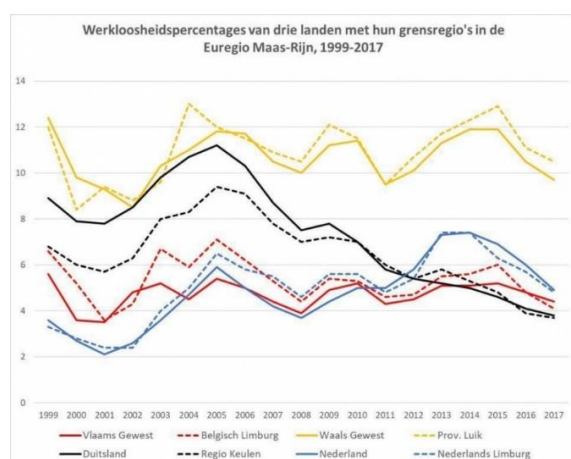
Frank Cörvers



If you live or work in a border region, there are both advantages and disadvantages. Let me start with the most important drawback: for national events, you are a long way away from where the most happens. These are the major Randstad conurbations: if you're unlucky in The Hague, if you're lucky you just have to travel to Utrecht. Something similar applies to the supply of jobs, which is simply larger and more diverse in the Randstad. The provision of information about events and jobs is mainly nationally oriented. Many, including those from the border regions of the Randland, are better informed about the vacancies, exhibitions and offers of supermarkets in their own country than in the regions a few kilometres across the border. Where there is a different world, different rules and laws, different shop chains and opening hours, different news, different customs and a different language. Have you ever met a Fleming in the morning or in the afternoon? I have often experienced miscommunication about this, because in Flanders it means before and after 12 noon respectively.

Main advantage in the border regions of the Randland: If you are willing to make an effort, the potential of people and events is much more diverse on the other side of the border than within the Netherlands. There are often big differences. For example, a full tank of petrol across the border in Belgium can easily be 10 euros cheaper than in our country. So tank tourism pays off, although apparently not everyone finds it worthwhile since there are still Dutch petrol stations at the border with Belgium. Furthermore, the cultural offer is much more diverse just across the border, as well as the offer of products and services. Be surprised by the differences!

For the economy and the labour market in the border regions, national developments are leading and there is no such thing as a Euroregional labour market, with shared trends in economic growth or unemployment. In other words, the developments in the border regions are much more synchronous with their own country than with the neighbouring border regions. This is illustrated by the accompanying figure on unemployment developments in the Meuse-Rhine Euroregion. The continuous lines show the unemployment rate of the Flemish Region, the Walloon Region, Germany and the Netherlands. The dotted lines of the same colour in the region or country show the unemployment rate in the respective border regions of the Meuse-Rhine Euroregion. In terms of unemployment development, the border regions are not in sync with each other, but with their own country. The conclusion is that there is no Euroregional labour market.



Source: Eurostat

Here, too, there is an advantage: surpluses and shortages on the regional labour markets on both sides of the border can offset each other. Sometimes the oversupply of professionals or care personnel is somewhat greater in Germany or Belgium with a shortage of personnel in the Netherlands, and sometimes the opposite is true. Jobseekers and employers can benefit from this, although they continue to focus primarily on the domestic supply of jobs and the labour potential in their own country. Good information about the oversupply of jobseekers and the bottleneck professions in the labour markets of the border regions is necessary to be able to benefit from the differences.

Unfortunately, there is little to be gained when it comes to personnel for care and education in the border regions of the Netherlands and Flanders. There are major shortages on both sides. For example, I recently learned from a reliable Flemish source that the number of students in nursing courses in Flanders has fallen dramatically in recent years, due to a lack of interest among young people and the attractiveness of other sectors where the economy is booming. This is very bad news for Maastricht University Hospital because it employs a lot of Flemish staff. Would the Board of Directors of the university hospital already know that the labour potential of new Flemish recruits is drying up – I couldn't find it so easily on the internet – or is one surprised?

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The Professional Qualifications Directive: Still No Compliance?

Published on 28 March 2019

Lavinia Kortese



In the EU, the mobility of many professionals is governed by the Professional Qualifications Directive. The instrument was introduced in 2005 and adapted in 2013. Due to be implemented on 18 January 2016, the directive's transposition apparently leaves much to be desired. On 7 March 2019 the Commission issued a large number of infringement proceedings against the Member States for having incorrectly transposed the directive.

Making use of qualifications across Member States is an important aspect related to transnational and cross-border mobility. Of course, labour market access is, in principle, free due to the free movement articles enshrined in the EU Treaties. Nevertheless, one group of professionals may be restricted in their mobility. Some professions are regulated, meaning that requirements related to diplomas and work experience (i.e. qualifications) are laid down by law. In order to prevent national laws containing qualification requirements from forming too much of an obstacle to mobility Directive 2005/36/EC was adopted.

Directive 2005/36/EC, also known as the Professional Qualifications Directive, underwent extensive modernisation through Directive 2013/55/EU. Although the deadline for its implementation already passed over three years ago, the Member States are apparently still not in compliance. On 7 March the European Commission initiated infringement proceedings against almost all EU Member States. Whereas 24 Member States received reasoned opinions, two Member States received letters of formal notice. This means that Member States will have two months to reply. Should the reply prove unsatisfactory, 24 Member States may be referred to the Court of Justice while the remaining two Member States may receive reasoned opinions.

It is not the first time that such proceedings were initiated against a large number of Member States in the context of the Professional Qualifications Directive. In 2016, 14 Member States, among which the Benelux countries and Germany, received reasoned opinions. Back then, the procedures mainly concerned the lack of communication about the transposition of the directive into national law. Ultimately, the infringement cases initiated for the Benelux countries and Germany were closed between February 2017 and March 2018.

The present infringement proceedings concern a wide array of topics under the Professional Qualifications Directive. According to the Commission, the Member States have failed to implement correctly some core

aspects of the modernisation of Directive 2013/55/EU. In particular, the proceedings concern the European Professional Card, the alert mechanism, principle of partial access, proportionality of language requirements, setting up of assistance centres, and the transparency and proportionality of regulatory obstacles.

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The Benefits of the Internationalisation of Higher Education

Published on 4 June 2018

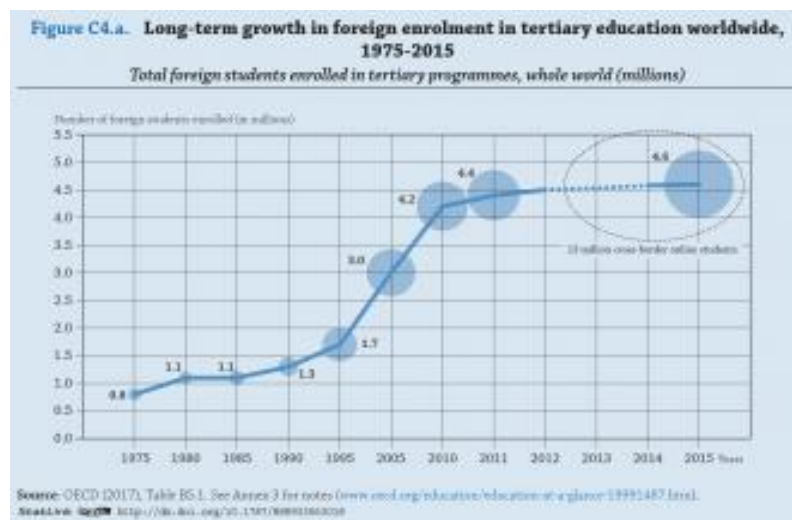
Julia Reinold



The internationalisation of higher education (IoHE) relates to sensitive topics of public concern. Considering the ongoing debate in the Netherlands regarding the challenges related to the internationalisation of higher education, it is time to take a step back and remember the many benefits as identified by the existing academic literature.

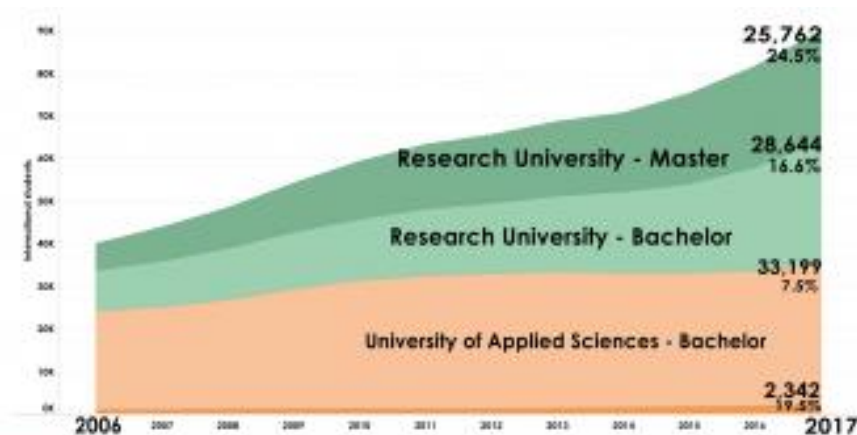
International students around the world and in the Netherlands

Migration for education is not a new phenomenon. As the number of individuals enrolled in higher education increased, so did the number of international students. To be precise, the absolute number of international students enrolled in higher education world-wide increased from 0.8 million to 4.6 million between 1975 and 2015. The share of international students, however, remained relatively stable over time.



(OECD - Figure C4.a. Long-term growth in foreign enrolment in tertiary education worldwide, 1975-2015)

According to EP Nuffic, around 90,000 international students were enrolled in Dutch higher education degree programmes in the academic year 2017/18, excluding students, who came to the Netherlands for parts of their degrees only (e.g. semester abroad). While programmes at universities of applied sciences (HBO) are rarely taught in English, research universities (WO) teach 23% of bachelor and 74% at master level exclusively in English. In addition, 12% of bachelor and 11% of master programmes are taught in multiple languages. One should note, that this does not apply to all fields of study. In particular, programmes that are directly linked to the domestic labour market like health care, law and education are mostly taught in Dutch.



Visual 1: Total number of international degree students in the Netherlands over time. Total number and relative shares divided by UAS/RU, and bachelor's/master's. Latest = 2017-2018; sum of total = 89,947.
© EP NUFFIC

(EP Nuffic - Incoming student mobility in Dutch higher education 2017-2018 - Visual 1: Total number of international degree students in the Netherlands over time)

What is in it for whom?

Various stakeholders can benefit from the internationalisation of higher education, including international and domestic students, higher education institutions (HEIs), companies, home and host countries.

Students

Studying abroad is a way for students to gain international experience and to develop both personally as well as professionally, for instance, by getting to know different cultures, improving language skills and developing a more cosmopolitan identity. In addition, it can be a strategy to improve one's career prospects, especially if the required knowledge and skills cannot be obtained in the student's home country. International classrooms lead to improved learning outcomes, foster intercultural skills and create international networks preparing both international and domestic students for living and working in a globalised world.

Higher Education Institutions

HEIs can benefit from the IoHE both financially and academically. In the context of declining financial contributions of governments, international students (from outside the EU) are an additional funding opportunity. Moreover, internationalisation can improve HEI's reputation and the quality of education programmes because of increased international competition for the best students and academics. In addition, attracting international students is vital for many HEIs to survive, especially in countries where the population of young adults is expected to decline drastically in the coming decades.

Host Countries

Host countries can benefit from the IoHE economically. In the short term, international students bring additional revenue through general living expenses. In the long term, international students can add to the domestic pool of highly-skilled workers and thereby help strengthening the domestic knowledge economy. This is especially important for countries that experience demographic change, negative population developments and growing skills shortages. EP Nuffic estimates that international students who stay in the Netherlands contribute €1.57 billion to the Dutch economy each year. International students who do not remain living in the host countries can become ambassadors for HEIs and the industry of the country in which they studied which can contribute to international cooperation and trade.

Challenges

Despite the benefits of the IoHE, many challenges remain. For instance, international students are confronted

with many challenges upon arrival in the host country, including issues of adjustment, integration, discrimination, financial costs, restricted access to the labour market and other administrative and legal hurdles. If these can be dealt with, the benefits for all stakeholders will increase even more.

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Crossing borders in search of education? Not for schoolchildren!

Published on 30 October 2017

Alexander Hoogenboom



Can Member States of the EU prohibit pupils from attending education abroad, simply on the belief that it might hamper the integration of these children into society? This contribution shows that educational mobility for schoolchildren is still fraught with obstacles in an area supposedly without internal frontiers, but that the restrictive measures of such mobility likely do not comply with EU law.

Primary and secondary education have an important role to play to ensure that new members of society are taught certain basic knowledge and skills, but also to induct them into the values, norms and principles that society holds dear. Such education is thus simultaneously the foundation of personal development and emancipation, as well as a process of socialisation and integration.

In recent times, however, some states are seeking to exert more control over the ideological development of the young. In the US, Trump stresses that his policy of 'America First' requires having schools teach 'patriotism'. Similarly, the Dutch coalition agreement, specifies that schoolchildren must now learn the national anthem and its context – an idea of the Dutch Christian Democrat leader Buma meant to counter the perceived threat of multiculturalism. And in Germany, a multicitizenship (German, Dutch and New Zealand) family was recently forced to sell their house and business, and to leave the country so that the children would be allowed to attend an international school in the Netherlands.

If that sounds extreme, read on.

A sad story

After the closure of the St. George's international school in Aachen, several of the parents sought to have their children attend education at the United World College in Maastricht. This was, however, prohibited by the NRW Schulamt, which is tasked with the supervision of the *schulpflicht* in Nordrhein-Westfalen (Article 88 jo. 37 Schulgesetz NRW). The reasoning was that this would hamper the integration of the child(ren) into German society. The consequence of this policy is that this particular family, with deep roots in Germany, had no choice but to move countries in order for their children to be enrolled in the desired school.

The point of this contribution is to assess whether this NRW policy is legal in the EU context. The Preamble to the Treaty on the European Union after all reminds us 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe'. The behaviour of the NRW Schulamt in this case goes against this very basic principle and, as will be argued, violates EU law.

Can Member States prohibit their citizens from attending education abroad?

Two points must be made clear at the outset.

First, the United World College is a Dutch state-subsidised ('*bekostigd*') school, subject to the *Wet op het primair onderwijs*, and supervised by the *Onderwijsinspectie*. The most recent report indicates that the United World College is an 'example for other schools' due to the fact that it scored very well on a relatively large amount of the quality indicators.

Secondly, where it concerns a Union citizen residing in Germany but attending education in the Netherlands, EU law is *a prima facie* applicable. Since the United World College is state-sponsored, it can be debated – based on the Wirth case - whether it provides 'services' within the meaning of Article 49 TFEU and thus whether the measure could be challenged under that heading. However, in any case the child may rely on Article 21 TFEU with a view to exercise her free movement rights for the purpose of attending education elsewhere. This was

confirmed in the case of *Schwarz*. The situation examined here goes one step further: The *Schulamt* is prohibiting the child in question from attending education in another Member State *tout court*. This constitutes a breach of what is now Article 21 TFEU (former Article 18 EC) following the case *Jipa*.

But what of possible justification grounds?

Such restrictions may only be justified if it is 'based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to a legitimate objective pursued by the provisions of national law. It follows from the case-law of the Court that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective.'

As seen above, the United World College has near-exemplary scores as to the quality of the education provided. It follows that any argument with respect to the lack of quality of education abroad must fail out at the outset.

The *Schulamt* has primarily invoked that the pursuit of education in Germany is crucial to ensure the integration of resident children in German society. Case law of the Court of Justice also indicates that Member States can in certain circumstances invoke the need to protect the national identity in this respect, as education is an integral part thereof.

It may however be wondered whether this is a legitimate argument in this context. After all, the Court has indicated that access to education abroad is a core element to the free movement of students within the European Union, which the EU actively seeks to promote. In that light it may be wondered whether it is legitimate for a Member State to prohibit its nationals from pursuing education abroad at all.

Alternatively, even if the aim would be accepted as legitimate, there are several reasons to consider that it still fails the test of proportionality.

First, it may be wondered whether the policy employed seeks to attain this aim in a systematic and consistent manner. The relevant *Schulgesetz NRW* provides in Article 34(5) that the *Schulpflicht* may also be fulfilled in recognised/approved international schools situated within Germany. Children may attend this school without special leave to do so by the *Schulamt*. This is somewhat strange. Seeing as the curricula of international schools are, indeed, international, it seems the *Schulamt* is simply concerned with the place of establishment. Somehow following an international curriculum in Germany safeguards integration into German society whereas this is not the case if that same or similar curriculum is pursued in the Netherlands. As such the integration criterion not pursued systematically and consistently: this constitutes a breach of the principle of proportionality.

Secondly, the Court of Justice has made clear that when a Member State is to assess the degree of integration of a person, it cannot base this assessment simply on a single criterion such as, in casu, school attendance in Germany. From the case of *Martens*, it follows that the personal circumstances of the child must be taken into account, such as her nationality, her language abilities, the situation of her parents and other social and economic factors. The *Schulamt* may not simply reject an application on the stated grounds without a thorough examination of these factors. When looking at the facts of this 'case': both the mother and the father worked in Germany, the children spoke German, and the family lived in Germany. It can hardly be doubted that the children are sufficiently integrated into German society.

Conclusion

There are several reasons to consider that the *Schulamt*'s decision and overall policy to prohibit education attendance in another Member State of the EU breaches EU law. Neither the lack of quality of education abroad nor the supposed 'danger to the integration of the child' can justifiably invoked to justify a restriction of free movement for education purposes. Considering the *Schulamt*'s strictness in this, it is likely that a procedure before a national court is necessary to change the policy in this regard. Until such time, the *Schulamt* should take note of the lengths parents will go, and justifiably so, for their children to receive the education they think is in their best interest. In that light, one could seriously wonder whether in the case of the family who left house, job and country, integration into German society was achieved...

Cross-border mobility

Cross-border cooperation: North Sea Port

Published on 13 August 2019

Pim Mertens



On 12 July 2019, State Secretary Knops of the Interior and Kingdom Relations (BZK) sent a letter to Parliament containing information on the progress of cross-border cooperation. In this letter the progress of cross-border cooperation is explained in four themes: cross-border initiatives, preconditions and border barriers, governance and EU & Benelux. ITEM has made several scientific contributions that make a solid basis for some of the different themes. For example, after an initial inventory done by ITEM, the Dutch

and Flemish government decided to further look into possible solutions for border barriers for the cross-border North Sea Port.

Building cross-border cooperation and information

The Dutch government is committed to cross-border cooperation in which obstacles are removed by means of tailor-made solutions, European resources are deployed in a targeted manner and good preconditions are created.

Several cross-border initiatives, such as youth events, (academic) collaborations and Regio Deals, will be actively supported. At the governance level, structural cooperation is also being worked on by means of, among other things, an annual Border Country Conference between North Rhine-Westphalia and the Netherlands, with the associated Border Country Agenda. This will explore the possibilities for physical cooperation within a *one-stop shop* or network cooperation between border regions and expand the provision of information and advice on the valuation of diplomas and professional qualifications. The latter is done within the B-solutions project, financed by the European Union and the Ministry of Education, Culture and Science, 'Roadmap and fact sheet for the recognition of qualifications for promising professions'. ITEM is the project leader for this project, which will be completed this autumn.

North Sea Port

Despite a 'borderless Europe', border barriers can still be experienced many times over. This also applies to North Sea Port, the combined port of Ghent and Terneuzen as of 1 January 2018. Commissioned by the Province of Zeeland and the Ministry of the Interior and Kingdom Relations, ITEM has made an inventory of bottlenecks for the cross-border port area between the Netherlands and Belgium. The border bottlenecks arise from differences in legislation and regulations in various policy areas.

For example, a border worker has to administer his hours in order to avoid double charges, there are difficult differences for the employer in pension schemes, dismissal protection and health insurance, and the harbour masters in the two countries have different powers, despite the fact that it is one port area. These are hampering economic growth and hampering day-to-day practice. Attempts to make it more sustainable are also hampered by the fact that, for example, cross-border railway lines and pipelines are subject to different procedures, permits and provisions relating to the environment and town and country planning.

ITEM's inventory forms a solid basis for solving these border bottlenecks, which will happen after the report has been delivered. In the letter, Knops states that both the Dutch and the Flemish sides are willing to legislate on

the obstacles. In the next phase, an upcoming analysis of the bottlenecks will be provided under supervision of The Governor of the Province of Antwerp, Mrs. Berx, and the former Vice President of the Council of State, Mr. Donner, after which a system will be developed that will offer a solution.

Conclusion: Preconditions and border barriers

The letter from the House of Representatives has shown that many projects and studies are already underway to remove border barriers and create the right conditions for cross-border cooperation. These include the Knops statements that Border Infopoints (BIPs) will continue to be supported by structural funding, that German fast-tracked teachers will be able to work as teachers in the Netherlands more quickly and, finally, that future legislation and regulations will be better geared to border regions. After the summer of 2019, the Border Effects Guide will be added to the Integrated Assessment Framework (IAK) as a tool for policymakers and legislative lawyers, so that the effects of policy for border regions and border barriers can be detected and prevented at an early stage.

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Border Obstacle when Renewing Driving Licences

Published on 7 February 2019

Lavinia Kortese



ICD carrier and resident in the border region? In that case, it is possible that the treating cardiologist is located in a neighbouring country. It follows from European law that EU citizens have the opportunity to receive cross-border care. However, the provision of such care does not appear to be widely accepted. For example, the Central Office of Driving Certification (CBR) does not accept statements from foreign cardiologists. Such action can be considered in conflict with current European law.

Persons with an Implantable Cardioverter Defibrillator (ICD) must report to the CBR to demonstrate that they are fit to take part in traffic. This requires a note from a cardiologist. If the cardiologist is based abroad, this note will not be accepted. Arguments put forward? It is not possible to check whether the foreign doctor meets Dutch requirements.

Such a justification cannot be accepted in the light of the applicable European law. It follows from the groundbreaking Kohll judgment that health care in the EU also falls under the free movement of services. As a result, restrictions on that free movement are in principle not permitted, but can be justified. It is clear that in this case there is an obstacle to the free movement of services. An EU citizen cannot go to his or her regular cardiologist in the neighbouring country for the medical examination, but must instead use the services of a cardiologist established and BIG-registered in the Netherlands.

Is this obstacle justified? In the light of the Kohll case, this question must be answered in the negative. The case revolved around the question of whether it was permitted for social security institutions to demand permission before persons could receive care abroad. Luxembourg, the home country of the case, argued that the reimbursement of services provided abroad should be subject to the authorisation of the social security institution in the home country. The underlying reason was related to the protection of public health: the authorisation served to guarantee the quality of medical services in the neighbouring country.

The Court of Justice of the EU has put an end to this argument. The conditions for access to and exercise of the profession of doctor are harmonised at European level. Such conditions are indeed laid down in the Professional Qualifications Directive. Therefore, the Court argued that doctors in all EU Member States offer guarantees equivalent to those offered by nationally established doctors. Thus, assessments as to the quality of medical

services from other Member States must be regarded as an unjustified restriction on the free movement of services.

The CBR's actions should also be considered as assessment of quality. In the light of the Kohll case, it must be concluded that this is contrary to the European legislation in force. However, the solution is simple: accept the statement of the foreign cardiologist. If the CBR wishes to confirm that the foreign cardiologist has been trained according to European standards, it can consult to the available medical registers of the neighbouring countries.

Read the full analysis in the Case Database of the ITEM Cross-border Portal , Case 1007.

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‘Ontgrenzer’ Martin Unfried: ‘Moderate public transport links hinder labour mobility’

Published on 16 March 2018

Martin Unfried



Stimulating cross-border labour mobility? Provide an adequate supply of information, uniformity in laws and regulations, language education and infrastructure, suggests 'ontgrenzer' Martin Unfried in an interview with EurekaRail. This blog was originally posted on EurekaRail on 15 March 2018.

With the increasing scarcity of the labour market, employers are increasingly orienting themselves across borders. They meet willing employees there, but it rarely happens. The barriers often turn out to be insurmountably high. Differences in legislation and social security, lack of clarity about the mutual recognition of diplomas; they hinder the development of a Euroregional, cross-border labour market. "Not to mention the poor connections in public transport," says Martin Unfried, international cooperation expert in an interview with EurekaRail.

Detacher. That's how Martin Unfried was once called by the Province of Limburg. A nickname that he will never lose again, but that is appropriate. He wrote the report *Van stilstand naar Verandering*; an analysis of the labour market in the Meuse-Rhine Euroregion, including a large number of recommendations for opening up the market. "Written on behalf of the province in 2013", says the native German at the headquarters of the European Institute of Public Administration (EIPA) in the heart of Maastricht, where he guides new civil servants through the complex organisation called the European Union. "I was then asked to put the solutions into practice. Since then, I have spent a large part of my time breaking down borders."

Information

Good information is the first step towards a more international labour market. Certainly important in the border regions of Limburg where many bottlenecks in supply and demand could be solved with more labour mobility.

And not without success. "Together with a large number of parties, we have set up the Border Information Points in Kerkrade and Maastricht. Employers and employees can go here with all their questions. Unbeknownst to them and uncertainty prevent both employers and jobseekers from taking the step across the border. Good information is the first step towards a more international labour market. Certainly important in the border regions of Limburg where many bottlenecks in supply and demand could be solved with more labour mobility.

Transport

The train and bus connections between South Limburg and cities such as Aachen, Liège and Hasselt are not optimal. It's serious when you know that we're talking about a city metropolis with two million inhabitants within a radius of 50 kilometres. As a result, employees without a car have little or no chance of working across the border.

And then there's public transport in the border regions. "It is also a barrier and not the slightest one. The train and bus connections between South Limburg and cities like Aachen, Liège and Hasselt are not optimal. It's serious when you know that we're talking about a city metropolis with two million inhabitants within a radius of

50 kilometres. As a result, employees without a car have little or no chance of working across the border. It also stops those who are interested in a job in childcare, just like the nurses, the employees of VDL NedCar or other jobs. Poor public transport also hinders people on benefits or people returning to work. And what about interns? Most students, especially Mbo'ers, depend on public transport. If you live in Heerlen, go and do an internship in Jülich. Or at the Chemelot Campus in Geleen if you live in Aachen. Not to be done. It is clear that we wholeheartedly support a project such as Eurekarail. It is high time for a regular train connection between these cities. Not an easy task, by the way. Paradoxically, digitisation is also a barrier. The various ticketing systems and chip cards cannot communicate with each other. This appears to be difficult to solve. There are also complications with the various privacy provisions. There is still a way to go."

English

But how is it possible that almost half of the students at Maastricht University are German? "University education is a story of its own. Maastricht has opted for English as the official language. This makes UM an international university. Typical for the Euregion, however, is that so few Dutch students find their way to the RWTH in Aachen, although this is one of the best universities of technology in Germany. This has to do with the Euroregional language 'German', which is too big a barrier for many Dutch youngsters. And a real obstacle to labour mobility on a regional scale. It is a combination of more information, standardisation of rules and laws, language teaching and infrastructure. This is what we are working towards with ITEM. In this context, I hope that the management of the Meuse-Rhine Euroregion will have a stronger position, as will the Benelux Parliament. These are issues that need to be addressed regionally."

Linkage

Martin Unfried has another important argument for better public transport. "The link with high-speed trains and airports. This will make the Meuse-Rhine Euroregion more easily accessible from other European countries and the rest of the world. At EIPA I even notice that course participants and visitors complain about the connections from Brussels, Düsseldorf or Schiphol. Do they still have to travel for hours by train with the necessary changes and waiting times? Not convenient."

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The German Autobahn toll scheme: its effects on the border regions

Published on 23 June 2017

Barbara Hamacher, Martin Unfried

Amidst the public debate on the potentially discriminating impact of the German toll scheme for passenger cars and the expected revenues, border regions are raising their voice about the potentially negative impacts on cross-border interaction. A closer look reveals that the impacts could be economical, ecological and social in nature. As part of its annual cross-border impact assessment, the ITEM Expertise Centre does research on the expected effects in the Meuse-Rhine Euregion.



With the implementation of the toll scheme now adopted by the German Government and Parliament, what are the potential effects for the German-Dutch border regions? And what does the toll instrument mean for European integration and the harmonization of future toll systems in the EU?

Many EU Member States have toll systems for passenger cars in place. One prominent system is the Vignette system, e.g. in Austria or Slovenia, where car drivers buy a vignette for a certain period of time, which has no relation whatsoever to the number of kilometres driven. The other prominent system is distance-related toll on sections of motorway, like in France or Italy. The German federal Government decided to implement an infrastructure charging system, i.e. toll, for passenger cars in line with the first model. As a consequence, foreign car drivers will have to buy a *Vignette* in order to drive on the German *Autobahn*. Although both foreign and domestic car owners will have to pay the toll charge, the latter will obtain tax relief through a deduction from the national vehicle tax of at least the same amount as the toll charge.

Current debate

The introduction of toll has been causing major controversy in Germany for years. Initially, only one smaller regional party of the present coalition, the CSU from Bavaria, advocated the instrument. Meanwhile, two issues are still being pushed by the many sceptics: whether the toll scheme will actually generate substantial revenues at all, given the intended tax compensations to German citizens; and whether the German toll scheme will not be seen as a breach of EU law due to its discriminatory effect on foreign car owners.

Surprisingly, however, the European Commission suspended the infringement procedure after recently agreeing with the German government on two main changes in the governing piece of legislation, the *Infrastrukturabgabengesetz*: firstly, a further differentiation of the vignette system from three to five vignettes, emphasizing the environmental impact of the toll; and secondly, lower prices for short-term vignettes, which are typically bought by foreign car owners.

Meanwhile, the accusation that the toll scheme would have a discriminatory effect on foreign car drivers persists in other forums: the European Parliament as well as several law professors in Germany and other European countries maintain their criticism and refuse to recognize in these changes a termination of the scheme's discriminating effect.

In addition, there is still the broad expert discussion inside Germany about the estimated revenues and whether there will be any net revenues for German infrastructure at all.

Potential impacts on border regions

A closer look at Germany's planned road toll scheme for private cars reveals that many negative impacts threaten the border regions:

Economically, German entrepreneurs close to the borders fear financial losses due to a declining number of customers from the neighbouring countries.

Ecologically, the toll system is likely to affect the environment negatively by deflecting traffic from the motorways to secondary roads.

Socially, there is a real risk of relaunching the barrier effect on the internal European borders, of restricting cross-border interaction and of creating a sense of discrimination on the other side of the border. It could also spark the introduction of similar toll systems in the Netherlands or Belgium. The introduction of the German system certainly makes a European harmonization of toll systems, as recently advocated by the European Commission, more difficult. For citizens and companies in the Meuse-Rhine Euregio, this could mean having to deal with many different toll systems in the future.

Addendum to article;

In 2019 the Court of Justice of the European Union stopped the planned tax. In the judgment (C-591/17 Austria/Germany), the Court found that the combination of the infrastructure charge and the exemption from car tax enjoyed by holders of vehicles registered in Germany constitutes indirect discrimination on grounds of nationality and is contrary to the principles of the free movement of goods and services.

This confirms the conclusions of ITEM. ITEM researchers Martin Unfried and Barbara Hamacher had not only identified the legal problems at the time, but also, and above all, the adverse effects on the border regions. It was noted that the proposed toll would penalise the inhabitants of border regions in particular, not only in neighbouring countries (e.g. commuters and companies), but also in Germany itself. For example, people living on roads with a sudden increase in traffic and entrepreneurs would have to bear the negative consequences of tolls. In addition, the study described a fundamental drawback of the German plan: the German toll would slow down the introduction of an EU-wide, kilometre-dependent solution, as proposed by the European Commission years ago, rather than help it forward. The current ruling of the European Court of Justice now offers the opportunity to find integrated solutions. This is particularly good news for border regions.

Cross-border pensions

Belgian Royal Decree brings unemployment benefit for frontier workers into line with Dutch pension

Published on 28 January 2019

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With the Royal Decree of 12 December 2018, Belgium has solved the problem for the cross-border worker where the unemployment benefit does not match the Dutch pension. The new decision states that Belgian unemployment benefit for frontier workers does not stop at the age of 65 but continues until Dutch (foreign) pensions take effect. Because the Royal Decree has created some uncertainty in pension circles and among (near) pensioners, the most important facts are summarised here.

Problem sketch: creation of an income gap

According to the European Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems, with regard to workers residing in Belgium and working in a country bordering on Belgium, such as the Netherlands, the country of employment is responsible for pensions, but the country of residence is responsible for unemployment. If this worker becomes unemployed, he is entitled to an unemployment benefit in Belgium ending at the age of 65. Only at a later age will he be eligible for AOW under Dutch law. In the intervening period, this frontier worker is confronted with an income gap. This is caused by the different pension ages for statutory pensions between the Netherlands and Belgium, and the lack of flexibility.

Example

Someone was born in 1955 and has been working for a Dutch employer since 1974, but lives in Belgium and is a frontier worker. He will be dismissed at the age of 64 in 2019. The frontier worker is eligible for Belgian unemployment benefit, which ends when he reaches the age of 65. The AOW only takes effect at 67 and 3 months, which in any case creates an income gap of 2 years and 3 months.

Solution = Royal Decree of 12 December 2018

The published Royal Decree - which entered into force retroactively on 1 January 2018 - attempts to provide a solution for this group of frontier workers. On the basis of this decree, the employee can receive unemployment benefit after 65 years in Belgium until he can claim a pension awarded by or pursuant to a foreign law, such as the Dutch AOW.

However, the scope of the new decision is no longer limited to workers employed in the Netherlands, but is extended to persons employed in a country bordering on Belgium. Furthermore, persons who live and work in Belgium but have in the past lived and worked for a long time in another country are not covered by this measure. According to the Council of State, this restriction of the circle of beneficiaries leads to a twofold difference in treatment between categories of persons, and the Royal Decree - and the explanation given herein - does not contain any elements that can reasonably justify the distinction.

Conditions for application

The revised provision does not take into account the age condition (i.e. 65 years) in order to remain entitled to Belgian unemployment benefit. Depending on the nature of the unemployment, different conditions apply. The following cumulative conditions apply to a temporary unemployed person:

1. The employee does not receive a pension within the meaning of Article 65 of the Royal Decree of 25 November 1991 on the regulation of unemployment; Article 65 stipulates that the unemployed person who can claim a full pension cannot receive benefits;
2. the employee applies for benefits as a temporary unemployed person after the month in which he reaches the age of 65;

3. temporary unemployment is not the result of a suspension of the execution of the employment contract due to force majeure caused by the employee's incapacity for work.

The following cumulative conditions apply to the wholly unemployed:

1. It concerns an employee who claims benefits as a wholly unemployed person (as a full-time or as a voluntary part-time employee);
2. the employee cannot claim a pension awarded by or pursuant to a foreign law;
3. the employee was usually employed as a blue-collar worker, employee or miner in a country adjacent to Belgium, and has kept his main residence in Belgium, and in principle returns there every day;
4. the employee provides proof that during a continuous period of at least fifteen years, and while he had his main residence in Belgium, he was linked to an employment contract with an employer established in the Netherlands.

If these conditions are met, the unemployed worker can continue to receive unemployment benefits after the age of 65, while for all other beneficiaries, entitlement to such benefits ends when that age is reached. However, under the scheme, there is no choice, after reaching the age of 65, between a pension or unemployment benefit.

Conclusion and remaining concrete problems

With the publication of the Royal Decree of 12 December 2018, the Belgian legislator seems to have complied with European case law. As of 1 January 2018, it will be possible for former frontier workers to continue to receive unemployment benefits after the Belgian maximum age of 65, provided that certain conditions are met.

Although the Royal Decree provides for the solution of a concrete problem for a targeted circle of people, a number of elements remain uncertain; the tenability of the restriction of the circle of eligible persons, the cumulation of old-age pension and unemployment benefits after the age of 65 and the interpretation of the concept of "pension" in terms of cumulation of Belgian unemployment benefits and foreign pensions. These problems require further Belgian guidelines to clarify the concrete implementation of unemployment benefits after the age of 65 when the above conditions are met.

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Mixed pensions: civil servants pension up for revision

Published on 20 April 2018

Pim Mertens



The statutory pension of civil servants in Belgium is on the verge of a reform. The legislative proposal 'mixed pension' will soon be introduced by law, after being the centre of intense debate for nearly a year. What exactly does 'mixed pension' mean?

Many pension systems make a distinction between civil servants and the private sector, including in Belgium. What if you have worked both as a civil servant and as a private employee? How does the pension system deal with the granting of public and private pensions?

Under Belgian law, there is a special pension applicable for permanently appointed civil servants: the statutory pension of civil servants. This statutory pension is financed on a pay-as-you-go basis, whereby the working civil servants finance the pension benefits of the retired civil servants. The right to a statutory pension is accrued over the course of working years. In addition to permanently appointed civil servants, contract staff also work in the public sector (non-permanent employees). Contract staff are not covered by the statutory pension, but by the supplementary pension in the second pillar. When a contractually appointed person is appointed at a later date, the question posed above arises: how to deal with the years as a contractually appointed person? To date, in the case of permanent appointments, previous contractual years have been converted into statutory pensions. Any pension entitlements in the second pillar will lapse. In this way, the contractual years do not make any difference to the final pension, as the past contractual years have been converted into entitlements to statutory pension.

As a result of the coalition agreement, the mixed pension bill of 19 October 2017 puts an end to this automatic conversion. The law ensures that years of service as contractual are no longer taken into account for the statutory pension after permanent appointment. This results in a mixed pension: the (possibly) accrued occupational pension during the contractual years and the accrued statutory pension. There is a transitional arrangement for civil servants who were permanently appointed before 1 December 2017; they will only receive a statutory pension.

The introduction of the mixed pension is based on a number of arguments. In addition to the increase in life expectancy, and hence in the level of pension benefits, pay-as-you-go financing is also coming under pressure due to the declining wage bill. The number of permanent appointees is falling in comparison with the number of contract staff (non-permanent appointees). The result: a declining group bears an increasing burden. This pressure is exacerbated by Belgium's closed system, which means that the civil servants of the local communes/administrations pay the pensions of their retired civil servants. The last argument put forward is that the distinction between the treatment of permanent and contractual employees in the area of pensions is undesirable, as many of the same jobs are carried out.

Mixed pensions increase the importance of the second pillar in the public sector. However, Belgium has one of the lowest employee pensions in Europe. Within the public sector, too, not every local government has a supplementary pension scheme. A major effort is still to be made to facilitate an adequate pension payment for civil servants with a mixed pension. The law seeks to make a start by providing a financial incentive in the form of a reduction in pension contributions.

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Life certificates: a barrier to the free movement of pensioners

Published on 6 February 2017

Sander Kramer



Have you ever considered enjoying your retirement elsewhere, perhaps in a sunnier European destination? Based on the European Citizenship and the freedom of movement you are free to reside elsewhere in Europe. But are you truly free or are you obstructed in your freedoms?

One of these obstacles of the European freedoms of movement is the life certificate.

Pensioners continue to receive their Dutch pensions after emigration. This includes their AOW pensions and any supplementary pensions. One of the conditions is the annual submission of a Life Certificate. This obligation exists because no data exchange takes place between the Sociale Verzekeringsbank SVB (Social Insurance Bank) or Dutch pension funds on the one hand and the foreign municipalities, administrations, social insurance banks or pension funds on the other. This implies that the SVB or pension funds are not automatically informed by the foreign authorities of the life and death of the beneficiary living outside the Netherlands. This type of information exchange does take place for pensioners living in The Netherlands. Note that this obligation also applies to German or Belgian pensioners enjoying their pensions outside Germany or Belgium, respectively.

Life certificates are sent to foreign pensioners by the SVB or the relevant pension fund, usually digitally. The foreign pensioners are then obliged to fill out the document and have it signed by the foreign competent authority, e.g. the Dutch embassy or the foreign municipality, which typically incurs a legal fee or cost reimbursement. If the certificate is not completed and returned, the pension benefit will be suspended, thus ending the guaranteed Europe-wide export of pension benefits. Despite certain harmonisation measures, such as the 'Agreement on the issuing of Life Certificates', which was joined by the Netherlands on 3 August 2011, there are still differences in submission methods and times.

The established case-law of the European Court of Justice, including, for example, the Kohll, Martens, Turpeinen or Pusa cases, shows that national systems that harm certain individuals with the nationality of that country for the sole reason that they have exercised their right to move and reside freely in another Member State constitute a restriction of the freedoms that every citizen of the Union enjoys. The life certificates prevent

the free movement rights from taking full effect, as the pensioners are hindered in the exercise of these rights by legislation in their state of origin, i.e. The Netherlands, that harms them for having exercised their rights to free movement. In the light of European citizenship and the European freedom of people, and bearing in mind all the elements involved, this obligation to submit a life certificate can be considered an obstacle to the European rights of free movement.

Although the European integration and unification process can be seen as one of the major achievements of the Treaty of Maastricht, it is hindered by national administrative obligations. The initiative to resolve these bureaucratic and administrative obstacles to cross-border mobility and the exercise of the European freedoms lies with the Member States. Cross-border checks of 'being alive' can be performed in collaboration with external partners, such as social insurance banks, pension funds and (local) authorities, thus setting a good example for others to follow.

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The importance of a flexible AOW commencement date

Flexible retirement age as a solution for unemployed cross-border workers

Published on 5 October 2017

Bastiaan Didden



Last week, the Dutch and Belgian ombudsmen called on their governments to take action in the context of pensions problems for unemployed cross-border workers, aged 65, and living in Belgium. In response to this call, a possible solution by Expertise Centre ITEM is elaborated in this blog.

Making the statutory retirement age more flexible is a subject that has attracted a great deal of attention in recent times. The discussion focused in particular on people with heavy professions. However, a group of people who also benefit, as advocated several times by ITEM (see, among other things, this opinion paper on the Pension Pro website), from a flexible AOW retirement age, are the frontier workers.

Last week, this emerged once again from an appeal by the Belgian and Dutch ombudsmen to the Belgian and Dutch governments to come up with a solution for frontier workers aged 65 and living in Belgium who have worked in the Netherlands and have become unemployed. Unemployed Belgian workers who have not worked as frontier workers in the Netherlands will receive their Belgian statutory pension from that age. However, an unemployed frontier worker resident in Belgium who has worked in the Netherlands will receive his accrued (Dutch) statutory pension with effect from the applicable Dutch statutory retirement age, which is currently 65 years and nine months, 66 years from 2018 and from 2022, 67 years and three months.

As a result of the different statutory retirement ages in Belgium and the Netherlands, the aforementioned unemployed frontier worker ends up in a state of disarray. This is an undesirable situation, as it is estimated that 2,000 former frontier workers will be affected this year, which is why both ombudsmen are calling on the governments to take action.

As far as ITEM is concerned, this action could consist in further exploring the possibility of making the state pension age more flexible so that the Belgian and Dutch statutory retirement ages can be aligned. Certainly with a view to the future, as a result of the way in which the increase in the statutory retirement ages is regulated in both countries, a flexible AOW age could be an adequate solution for the unemployed 65-year-old Belgian frontier worker.

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Cross-border taxation

European Court of Justice allows Dutch tax credit reduction

Published on 13 March 2019

Pim Mertens



As of 1 January 2019, the tax part of the tax credit will no longer be automatically granted to frontier workers who work in the Netherlands but do not reside in the Netherlands. This constitutes an obstacle for frontier workers. ITEM has already questioned this before. Recently, the European Court of Justice (ECJ) issued an interesting ruling regarding the other part of the tax credit, the premium part: in this case, the Netherlands may proportionally reduce this part over time.

Case

The case concerns Zyla, a Polish national who worked and lived in the Netherlands from 1 January to 21 June 2013. After ending her job, she moved back to Poland. There she remained unemployed for the rest of 2013.

The European basic regulation for social security stipulates that Zyla, through her activities in the Netherlands, had been socially insured in the Netherlands in the period 1 January - 21 June 2013. Because of her activities, she was also liable to pay taxes in the Netherlands. Furthermore, she is entitled to the general tax credit, which consists of a tax part (for taxes) and a premium part (for social contributions). At the time, Zyla chose to be treated as a domestic taxpayer for the entire calendar year, with which the full tax credit can be obtained. However, in assessing income tax and social contributions, the Dutch Tax Authority reduced the premium part of the tax credit proportionally in time with the period that she did not live and work in the Netherlands.

In Europe, the free movement of workers applies, which means that foreign workers are entitled to the same social and fiscal advantages as domestic workers. Also, according to European case law, Member States must take into account the personal and family situation of foreign persons, who have earned the largest part of their income in the Member State concerned and who cannot make use of tax or social advantages in the Member State of residence. According to Zyla, the reduction made by the Tax Authority violates this European case law, resulting in discrimination based on the place of residence. Because Zyla's entire annual income is earned in the Netherlands and she has no income in Poland, she cannot get a similar benefit in Poland.

Judgment

Ultimately, the ECJ did not agree with Zyla. The Netherlands has opted for a social security system in which contributions must be paid. A number of other Member States finance social security from general tax revenues. The contribution part of the tax credit is designed to motivate people to continue working. To this end, the rebate is linked to the size of the premiums paid. Because Zyla no longer paid contributions, the ECJ initially ruled that there was no disadvantage. Even if there was a disadvantage, Zyla's situation, in which she was only socially insured in the Netherlands until 21 June 2013, is not the same as and comparable to the situation of someone who is socially insured in the Netherlands throughout the year. In conclusion, there is no question of unequal treatment.

The reduction of the premium part of the tax credit was applied on a time-proportional basis. In this way, the reduction was in line with the insured period. According to the ECJ, due to the different financing methods of social security systems within the EU, EU law cannot prevent movements between Member States in the social

field from being neutral and benefits from being lost. EU law only ensures equal treatment of foreign workers who pursue an activity in a Member State other than their State of residence compared to resident workers.

Consequence

It is, therefore, not only the tax part of the general tax credit that is the subject of discussion. In the case of the premium part of the general tax credit, this judgment shows that the Dutch Tax Authority may reduce it proportionately in time to the period insured. The different national systems and the national powers with regard to social security mean that cross-border activities do not have to be neutral. These do not constitute unjustified border obstacles.

Want to know more?

This ruling, just like other leading ECJ rulings, is further elaborated on the ITEM Cross-border Portal.

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Reducing administrative burdens through joint action!

Published on 14 June 2018

Kilian Heller



Current developments in the area of cross-country joint audits could reduce administrative burdens and enhance legal certainty. But, what are joint audits? This contribution shortly elaborates on the concept and the current developments of joint audits that could facilitate a cross-country concept of joint audits.

Have you ever wondered why different auditors are conducting inspections on work conditions, tax returns and proper payments of social security contributions?

Supply of labour to other companies nationally or across borders involves careful observation of several areas of law. Companies must comply with rules of each area and depending on the state involved, enforcement is often carried out by distinct authorities. Each of them following their own procedures and conducting their own form of controls.

Satisfying the demands of all administrations individually can be time-consuming, costly and cumbersome. In cross-border situations the matter becomes even more complex: More people are involved, and each country follows its own approach, when enquiring frequently overlapping information. Known ways to reduce administrative burdens and costs already exist and are currently explored. New developments at European Union (EU) level could be on the brink to provide further tools to improve the current situation. One way of improvement may be joint audits. But, what are joint audits? This contribution shortly elaborates on the concept and the current developments of joint audits that could facilitate a cross-country concept of joint audits.

What are joint audits, and why should we use them?

Joint audits offer a possible remedy for time and quality inefficiencies of traditional audits as they operate at a deeper level of cooperation among administrations. Instead of two or more teams of auditors, in a joint audit only one team composed of auditors of both administrations works on a case and produces one final report. Thus, the one-sided information gathering of traditional cooperation is replaced by a joint-information gathering and evaluation team.

Breaking unintentional 'Chinese walls' between social security, tax and labour law enforcement in domestic as well as cross-border situations to reduce administrative costs, save time and increase quality!

In cross-border tax conflicts and EU Social Security Coordination situations, there are various tools administrations can use to obtain information for the assessment. The most prominent tool is Exchange of Information (Eoi), which is laid down in international conventions, EU directives, regulations and decisions. Eoi represents a one-sided approach of administrative cooperation where one administration asks the other for information pertaining to the same area. The audits however, are conducted separately in each state, even though both countries are eager to determine whether tax or social security has properly been paid to the right administration. As a consequence, the company will have to report to each administration and can become the intermediary between administrations. A lack of direct communication between the administrations can lead to conflicts of interpretation which in turn leads to slow progress and uncertain outcomes.

In practice

Especially in the field of international tax law, joint audits have gained more and more attention ever since the OECD Joint Audit Report was published in 2010. Various countries launched pilot projects to conduct joint audits, one of which was carried out between Germany and the Netherlands. The project started in 2013 and ended in 2014. During that time five joint audits were conducted following the OECD principles for joint audits. Another pilot project was conducted between Germany and Italy, with similar results. Even though not all went according to the book, auditors concluded that cooperation was definitely enhanced, but that these projects represent only the first steps. Thus, cross-border joint audits have a great potential for all tax areas as well as non-tax areas. For international tax law purposes joint audits are also a way to avoid lengthy Mutual Agreement Procedures, which are the last resort to solve an unclear tax situation.

Advantages and challenges

Joint audits are pro-active, can increase the quality of the assessment, reduce the contact necessary between party under scrutiny and authorities, and prevent conflicts arising between administrations. Additionally, the existing 'Chinese walls' between social security, tax law and labour law crack open when auditors start looking over the fence and directly communicate with each other. The current legal framework in many countries however does not foresee such an interaction at this point.

Despite the many advantages cross-border joint audits might have, they do not come without difficulty. Different information or interaction standards of the countries involved might conflict. Language can become a challenge for a proper assessment and other potential obstacles include timing mismatches in procedures or logistics and resource constraints.

However, I am convinced once established, joint audits may have many more advantages apart from the ones mentioned above. Joint audits could lead to common practices, jurisdictions having the possibility to learn from each other and identify best practices. Direct interaction between inspectors can greatly enhance communication among the authorities, also in light of future joint assessments. Pilot projects as mentioned above are proof of that.

Current EU Developments with great potential

For social security and labour law great potential lies in the recent proposal for a European Labour Authority (ELA), which shall come into being in 2019. The ELA may become a promising tool to encourage administrative cooperation through cross-border joint audits in social security and labour law. Whether or not tax falls within the competences of the ELA remains to be seen but is unlikely. Currently, the objectives of the ELA encompass the support of cooperation between national authorities to protect compliance with EU law and prevent fraud.

Therefore, one way ahead could be the introduction of joint audits between Member States. As the concrete tasks of the Agency are still unclear, the future will show how influential the new entity is going to be.

Ultimately, what would be desirable is not only having cross-border joint audits in one area of law but having one joint audit for all the three areas to solve a situation of conflict as efficient, timely and accurately as possible. The concept of a joint audit may however not only be interesting for cross-border situations, also cross-administrative joint audits may yield great results. This however is still a utopian idea and the momentum for such a move forward is yet to come. Nonetheless, joint audits are a promising new approach, which should be explored not only between authorities in cross-border tax audits, but also amongst authorities responsible for the other areas of law.

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Limitation of tax credit for frontier workers working in the Netherlands: tested for border effects?

Published on 23 October 2018

Marjon Weerepas



In the Bill on Other Fiscal Measures 2018, it is proposed that from 2019 onwards, only the tax part of the tax credits to which non-qualifying foreign taxpayers from the country concerned are entitled in the income tax will be applied in the payroll tax for all foreign frontier workers. On the basis of the proposed measure, only the tax part of the labour tax credit will be applied to foreign taxpayers from the circle of countries (to which Belgium and Germany belong) as from 2019 in the payroll tax. In the case of foreign taxpayers from third countries, the tax portion of any tax

credit will not be applied. For taxpayers who belong to the so-called 'country circle', they are only entitled to the tax part of the labour rebate in the payroll tax.

In short, the measure means that the foreign taxpayer - i.e. the frontier worker working in the Netherlands from Belgium and Germany - can no longer use the payroll tax to make tax credits available. This should, if possible, be done afterwards by means of the personal income tax assessment.

This measure raises a number of questions. Belgian and German border workers in particular are likely to be adversely affected by this measure. It is feared that by introducing this measure, these border workers will no longer be willing to work across the border. As a result, it becomes more difficult for Dutch employers in the border region to find personnel. In addition, the question arises as to whether Dutch employers will now have to solve all problems relating to pay slips for foreign workers. If that is the case, the administrative burden on these employers and their frontier workers will increase.

Another question is what incomes will be affected by the measures in particular. Are these particularly low incomes? After all, a large number of tax credits depend on taxable income or labour income. For example, the general tax credit depends on the amount mentioned in the first column (€ 19,982 (figures for 2017)). For taxable income from work and housing above this amount, the general tax credit will be reduced. For taxable incomes above € 67,068, there is no longer a general tax credit. Finally, how long will it take for a frontier worker to cash in on his tax credit? After all, he has to do it afterwards via the IB assessment.

In short, it seems that no border effect test has been carried out with respect to this proposal.

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Abolishing the 30%-facility? Look before you leap!

Published on 12 April 2017

Marjon Weerepas



The 30%-facility is regularly discussed in both case-law and politics. The facility is currently under pressure and facing turbulent times. With a potential abolition, which may become reality, particular attention must be paid to the effects and possible alternatives.

The 30% scheme currently faces turbulent times and is under pressure. The 30% tax ruling is a facility within payroll tax that allows for 30% of the salary to be enjoyed free from tax. Both incoming and outgoing employees can use the scheme for up to eight years, under certain conditions. The conditions for incoming employees include, among other things, having specific expertise and having resided in The Netherlands at more than 150 km from the Dutch border for more than two-thirds of the period of 24 months prior to previous employment. In addition to businesses, Dutch universities make regular use of the 30% scheme to attract sufficient numbers of specialised staff.

The scheme is regularly invoked in case law. There was an important ruling, for instance, on the 150 km limit: the Sopora ruling. (*ECJ 24 February 2015, Case C-512/13, ECLI:EU:C:2015:108, BNB 2015/133, m.nt. G.T.K. Meussen, NJ 2015/316, with notes by J.W. Zwemmer*) Knowledge workers who live and work in the Netherlands within the 150 km zone from the border are not allowed to use the 30% scheme. A further distinction is made between foreign taxpayers who live within the 150 km zone and those who live outside. The Court of Justice considers that the requirement is not contrary to Article 45 TFEU, unless the limit is set in such a way that the exemption systematically leads to clear overcompensation of the extraterritorial costs actually incurred. The Supreme Court caused turbulence with its judgement after the Sopora ruling, holding that the scheme does not cause systematic overcompensation. This does not apply to individual overcompensation but systematic overcompensation. (*ECJ 24 February 2015, Case C-512/13, ECLI:EU:C:2015:108, BNB 2015/133, with notes by G.T.K. Meussen, NJ 2015/316, with notes by J.W. Zwemmer*)

Not only for magistrates, but also in the political arena, the 30% scheme is the object of discussion. At this moment there are calls for abolishing the 30% scheme, including, for example, in the election programmes of political parties SP, PvdA, Groenlinks, DENK, SGP and VNL. D66 proposes a task-setting limit by € 0.5 billion to the 30% scheme of limit the tasks, while CU and SGP advocate limiting the use of the 30% scheme to salaries lower than or equal to the Prime Minister's salary, the so-called *Balkenendenorm* (after former Dutch Prime Minister Jan-Peter Balkenende who introduced the concept). In addition, the CU wants to limit the use of the scheme to five years. (*Sjaak Janssen, De fiscale ideeën in de verkiezingsprogramma's, WFR 2017/49*) Of course, this depends on the outcomes of the formation process and the subjects outlined in the coalition agreement. We can only hope that all the pros and cons and all the consequences have been weighed and taken into account before the decision to abolish is made. Another option is to explore possible alternatives, such as altering the percentage, having employers reimburse the actual extra-territorial expenses, and adjusting the period of eight years.

One might also look abroad in the search for alternatives. It is remarkable that many European countries have facilities for specialized staff that are similar to the 30% scheme. Some are directly comparable to the Dutch facility, such as those in Italy and Sweden, while others may consist of a tax exemption for certain sources of income, like in Belgium, or offer a reduction in the applicable tax rate, e.g. in Denmark, among others. Many such schemes include the specific expertise requirement (Belgium, Denmark, Finland, Sweden and Portugal), and they are generally limited in time. Sweden, for example, has set a period of three years. (*Kamerstukken II, vergaderjaar 2011/12, 33 003, no. 10, p. 69-70*) Germany is the great exception; it does not have such a scheme.

The consequences for the staffing policy of universities are unknown should the Netherlands indeed abolish the 30% scheme. It is to be hoped that the legislator explicitly pays attention to the consequences of abolition for universities and other educational institutions in the discussion of the amendment of the 30% scheme.

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European Union citizens

Brexit and citizenship I: retention of EU citizenship

Published on 22 October 2018

Anne Pieter van der Mei



The entire structure of Article 50 TEU implies that it is up to a Member State to withdraw from the Union without there being any limitation imposed by EU law as to the reasons for the withdrawal, how this decision is taken or the extent to which that Member State takes into consideration the interests of its own nationals. If a Member State decides to exit the EU, and thus to strip their nationals of EU citizenship, it is perfectly entitled to do this. The EU, including its highest court cannot and should not alter this.

The UK's decision to withdraw from the European Union has triggered much debate on the legal status of UK nationals living in an EU-27 Member State and EU citizens living in the UK. Fearing a Hard Brexit, politicians, NGOs as well as academics have suggested diverging options for ensuring that all EU citizens who, prior to Brexit-day have exercised their free movement rights, will be able to retain their residence and equal treatment rights.

The various ideas and proposals all seem to be based on the presumption that Brexit will imply loss of EU citizenship for UK nationals. This is logical. The wording of Article 20 TFEU – “[E]very person holding the nationality of a Member State shall be a citizen of the Union” - makes clear that to be an EU citizen one must a Member State national. Loss of a Member State nationality implies automatic loss of this privileged status. When a Member State withdraws from the EU its nationals become third country nationals.

Earlier this year, however, an Amsterdam court expressed doubts about this reading of Article 20. This court was faced with a case that was initiated by UK nationals living in the Netherlands who claimed that the Dutch State and/or the city of Amsterdam had to take measures to ensure that they could continue to enjoy EU citizenship rights after Brexit.

Referring to case law of the Court of Justice, and *Rottmann* in particular, the Amsterdam court observed that EU citizenship now constitutes an own autonomous source of rights and that decisions implying loss of Member State nationality must be proportional. In the court's view, it is far from sure that loss of national citizenship implies loss of EU citizenship. The Amsterdam stated its intention to ask the Court of Justice whether a hard Brexit indeed implies that UK nationals will become 'ordinary' third country nationals.

In the end, however, no preliminary question was send to Luxembourg. It is not clear to me why the Amsterdam court thought that UK nationals might keep EU citizenship after Brexit. It may very well be that EU citizenship has evolved to become a fundamental status that may constitute an autonomous source of EU rights, and that the Treaty demands that EU citizens can genuinely enjoy EU citizenship rights. From that, however, no conclusion can be drawn about a possible retention of EU citizenship itself. The Dutch court suggests that EU citizenship can possibly be retained because of *Rottmann*.

In this ruling the Court of Justice held that Member States must, before taking a decision withdrawing “their” nationality, consider the consequences of such a decision for the person concerned as regards the loss of the rights he/she enjoys as an EU citizen. It is hard to understand, however, why or how the Court's line of reasoning in *Rottmann* can be extended to situations in which a Member State national loses his/her nationality as a result of the decision of his/her Member State to step out of the Union. A decision to withdraw nationality in individual cases and a decision to withdraw as an entire State from Union are not in any serious manner comparable. The entire reasoning of the Court was clearly geared towards the specific individual situation in which Mr Rottmann found him. It simply does not make much sense to draw from this reasoning conclusions for the entirely different

situation of Brexit in which millions could lose EU citizenship as a result of collective decision adopted in accordance with their own democratic rules to exit the EU. Article 20 TFEU makes it patently clear that EU citizenship is derivative in nature. In *Rottmann* nor in any other ruling did the Court cut through EU citizenship's exclusive and absolute link with Member State nationality. From existing case law one, arguably, can only draw one logical conclusion: for UK nationals, Brexit implies loss of EU citizenship.

Of course, (some) UK nationals might hope for an activist Court that in a next case will be willing to change its position. The Court is well advised, however not to do so if it does not wish to be accused of acting contrary to the Treaty drafters' goals. In Maastricht the drafters made it patently clear that it is the Member States that decide on nationality and thus on who possesses EU citizenship. In Lisbon, by including Article 50 in the TEU, and thus by ordering the EU to negotiate and conclude an agreement with the exiting Member State governing the arrangements for withdrawal, the Treaty drafters made it clear that a possible retention of EU citizenship and the rights linked to it is a task for the political EU institutions, not for the Court. The entire structure of Article 50 TEU implies that it is up to a Member State to withdraw from the Union without there being any limitation imposed by EU law as to the reasons for the withdrawal, how this decision is taken or the extent to which that Member State takes into consideration the interests of its own nationals. If a Member State decides to exit the EU, and thus to strip their nationals of EU citizenship, it is perfectly entitled to do this. The EU, including its highest court cannot and should not alter this.

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Brexit and citizenship II: Associate EU citizenship

Published on 23 October 2018

Anne Pieter van der Mei



Why would the EU at all consider unilaterally offering a new status to British (or other former EU) citizens without there being any reciprocal status or legal protection for EU citizens living in the UK (or any other exiting Member State)?

As stated in a previous blog (“Brexit and Citizenship I: Retention of EU Citizenship”) politicians, non-governmental organisations as well as academics have made proposals on how to protect the rights of in particular UK nationals living in an EU-27 Member State post-Brexit. The most interesting one among the suggested proposals are those calling for the introduction of an associate EU citizenship. The original idea, if I am correct, stems from the mind of the European Parliament’s Brexit coordinator, Guy Verhofstadt. In December 2016, Verhofstadt suggested a form of EU ‘associate citizenship’ status that would allow individuals to “keep free movement to live and work across the EU, as well as a vote in European Parliament elections”. MEP colleague Goerens supported the idea and added that “[f]ollowing the reciprocal principle of ‘no taxation without representation’, these associate citizens should pay an annual membership fee directly into the EU budget.”

The idea of an associate EU citizenship has proven to be controversial, with some indeed advocating it and others (strongly) opposing it. Discussions on this status are not always easy to understand, partly because it is not truly clear what associate European citizenship would actually entail. To be sure, associate European citizenship would differ from EU citizenship itself. Those who favour it do not seem to call for a retention of the status established by Article 20 TFEU but rather for the creation of a new status. Further, it would be a status to be granted or offered to nationals of former Member States and not, for example, to third country nationals who have acquired long-term residence status. Third, in terms of substance, the new status would encompass the most important EU citizenship rights: free movement rights (presumably including equal treatment) and active voting rights in European Parliament elections.

Numerous aspects, however, still remain unclear. For example, will paying a fee into the EU budget be a requirement, as MEP Goerens suggested? The issue certainly is relevant for the legitimacy of Associate citizenship and reminds us of the 'citizenship-by-investment' of Malta, and a few other Member States. The Maltese programme has proven quite controversial *inter alia* because of a free rider problem. By buying Maltese citizenship, a country with which they may have no genuine link, third country nationals could acquire EU citizenship and, subsequently, move to other Member States, which otherwise would never have admitted them. This free rider problem would not exist if one were to introduce associate citizenship at EU level. Yet, is it desirable to ask a price for a citizenship-like status, to commercialise it? Will it be a new status based on a genuine link that its holders have with the EU or one of its Member States, or will associate EU citizenship be a tradable good?

A next question that then arises is who would be the beneficiaries of this new associated citizenship? Concretely in the case of Brexit: will only the Brits who have moved to another Member State and have lived there for a given period of time be given the right or option to become associate EU citizens, or also those who have never done so and find themselves in 'purely internal British situation'? The answer to this question is relevant because it triggers the subsequent question of what the actual aim of associate citizenship would be: is it just a means to ensure the continuation of rights for nationals of exiting Member States living in other EU Member States, or does it have an own intrinsic or more deeply motivated aim? If the former is the case, why would UK nationals who have never settled across the Channel still need to have a right to vote for the EP? Those who wish to include EP election rights for this category of UK nationals must have something else or more in mind. Yet, what exactly? Even though the term 'associate citizenship' is used, is it not that this is meant as a covert way to make sure that Brits, and potential other future ex-Member State nationals, can nonetheless retain EU citizenship?

It is of course perfectly possible that advocates of associate European citizenship themselves do not exactly know what they are proposing or what the implications of their proposal might be. As noble as their motives may be, if these advocates have more in mind than merely freezing the legal status of UK nationals living in 'Europe', one must be cautious. Critical questions must be addressed. If this envisaged status is meant as a status separate from EU citizenship, yet encompassing the same or very similar rights as the latter, does it not undermine EU citizenship? Even if it were established that the EU can formally confer all rights that it offers to its own citizens to third country nationals, does the very existence of EU citizenship not command restrictions? Further, and recalling what has previously been said about Article 50 TEU, why is there at all a need for the EU to consider introducing a new status to the benefit of people who have collectively, and fully in accordance with their own internal constitutional norms and procedures, decided to step out of the Union and decided to give up their EU citizenship? Apparently, the majority who voted in favour of Brexit did not consider EU citizenship important enough. And whatever others may think of this choice, the choice to leave the EU made was entirely legally. Those who voted to remain simply have to accept that they, as a result of UK constitutional rules, lost the battle and, with that, EU citizenship and all rights flowing from this status. In fact, by offering one-sidedly associate citizenship to those UK nationals who wish to remain part of the European integration project, the EU is meddling in the internal affairs of a former Member State in which it arguably should not meddle.

Finally, and perhaps most importantly, why would the EU at all consider unilaterally offering a new status to British (or other former EU) citizens without there being any reciprocal status or legal protection for EU citizens living in the UK (or any other exiting Member State)? The number of EU citizens in the UK far exceeds the number of UK nationals living in 'Europe'. As noble as it may be to show legal and political compassion with UK nationals in EU-27 Member States, the EU's main commitment does not, or at least should not, lie with them but rather with EU citizens living in the UK. The EU should not give in to the pressure of all those who – often quite annoyingly – place so much emphasis on the negative implications of Brexit for UK nationals living in the EU without giving equal (if any at all) attention to the rights and interests of EU citizens residing in the UK. Reciprocity is a must. Without it, introducing associate European citizenship is an idea that is doomed to be rejected by EU citizens.

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Who is a spouse for the purpose of EU free movement law?

Published on 22 January 2018

Alexander Hoogenboom



Union citizens have the right to be accompanied by their ‘spouse’ when exercising their mobility rights. But what if your spouse is denied right of residence because the destination Member State does not recognise your marriage? A battle in which the stakes ride high

Suppose you, a Union citizen, legally married your non-EU partner in an EU Member State. Subsequently you decide to move to another EU Member State to take up an exciting employment opportunity. When registering with the immigration authorities, however, you are told that your marriage will not be recognised. As a consequence, your spouse is denied a right of residence. As you see your dream collapse around you, you ask yourself the following question: what is the point having the right to move freely in the EU if you cannot bring your family?

In the case of *Coman*, the Court of Justice is faced with the question whether Mr. Hamilton, the same-sex US national partner of Mr. Coman, a Romanian national, can be denied the status of ‘spouse’ by Romania despite a legal marriage concluded in Belgium, with the result that the former cannot benefit from a right to work and reside in Romania.

Advocate-General Wathelet in his Opinion in the case is clear. Under the relevant legislation, Directive 2004/38 (applied here by analogy due to a peculiarity of EU law), Union citizens have the right to be accompanied by their ‘spouse’ when exercising their mobility rights. This term was deliberately chosen to be neutral and does not intrinsically refer to heterosexual couples only.

Taking due regard to the evolving context in which EU law operates, Wathelet eventually finds that the combination of the need to protect and respect family life and the principle of non-discrimination on grounds of sexual orientation requires the interpretation that ‘spouse’, for the purpose of EU free movement law, includes same-sex partners whose marriage has been concluded in accordance with the laws of a Member State of the EU. It follows that Mr. Hamilton must thus be recognised as a ‘spouse’ of Mr. Coman by Romania.

One can only agree with this conclusion. There are indeed a plethora of human rights-related arguments that could be made: from the right to family life, to non-discrimination on grounds of sexual orientation to simply invoking the right to human dignity to argue that a society must recognise and respect deep relationships formed by consenting adults. However, the outcome of the Court of Justice is perhaps of significance beyond even this.

We have seen that the Commission has finally been willing to intervene and defend the *Rechtsstaat* against the machinations of the Polish government. We have seen that the EU negotiation team has given no ground on the matter of protecting Union citizens’ rights in the Brexit negotiations. The Court of Justice of the EU now has the duty to show that the EU is able to take a stand on controversial issues without there being a clear consensus among the Member States. To show that the EU treats, within its legal framework, with equal concern and with equal respect the legal bonds formed between two human beings, irrespective of their gender.

Cross-border crime

Tackling drug-related problems in Maastricht should be continued and deepened

Published on 4 October 2018

Hans Nelen



The approach of drugs related problems in Maastricht, with the help of a specially equipped project Frontière, based on the decrease of visible nuisance in the city over the recent years, has so far been successful.

Many reports from citizens and shopkeepers have resulted in enforcement actions. The tried and tested communication strategy in the project, consisting of extensive feedback to reporting agents and intensive and well-considered communication about drug related events in the districts of Maastricht, has paid off without a doubt. Nevertheless, Maastricht should not rest on its laurels. A deepening of the approach to gain a better understanding of the underlying structures and networks of drug traffickers would be an advantage. Integrity can also be strengthened by allowing other partners such as the municipality and the police to put their stamp on the approach.

These are the main conclusions and recommendations from the evaluation study of the Frontière project carried out by Prof. Hans Nelen - Professor of Criminology at Maastricht University's Faculty of Law - and researcher Kim Geurtjens. Frontière refers to the integrated approach to drug nuisance in Maastricht, as it has been designed since 2012.

From the outset, Frontière relied on three pillars: information and monitoring, an enforcement strategy and a communication strategy. The research makes it clear that Frontière's main objective, to reduce the visible drug-related nuisance in the city of Maastricht, has been achieved. Although this result cannot be attributed exclusively to Frontière, the project did make a substantial contribution to it. The administrative measures taken in the context of the project - such as area denunciations, gathering bans, property closures, etc. - were particularly important in this respect. The criminal and financial approach was not as effective as intended.

A second important conclusion is that the communication strategy has resulted in more appreciation from citizens and entrepreneurs, a broader public support base and an improved information position. The systematic feedback of information from the project to citizens and entrepreneurs who had contacted the drugs hotline is regarded as one of the most highly developed parts of the project.

Based on the available quantitative data, it appears that the drug problem in the city of Maastricht will have diminished in size and severity from 2015/2016 onwards. The report does, however, make an important reservation in this regard, as it is likely that - partly as a result of the digitisation of society - the drug trade is less visible today than it was a number of years ago. The possibilities offered by the Internet have had a significant impact on the dynamics of drug trafficking. Apart from these social developments, Frontière's activities were primarily aimed at reducing the visible nuisance and, in most cases, there were no opportunities for further research into the underlying structures and networks of drug traffickers. As a result of the reorganisation between 2015 and 2017, the police's commitment and involvement in the project declined, so that in recent years there has been a greater rather than a greater understanding of the nature and seriousness of the underlying problem.

At the end, the final Frontière evaluation report explores the possibilities of obtaining a better picture of drug-related nuisances and crime in Maastricht and the surrounding area. It also considers the preconditions that need to be met in order to be able to speak of a truly integrated approach to the drugs problem.

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Is a ban on outlaw motorcycle clubs effective?

Published on 3 March 2017

Kim Geurtjens



In Germany, various chapters of outlaw motorcycle gangs have been prohibited over the last decades. The Netherlands are currently working on a case to effectuate a ban. However, the effectiveness of a ban to tackle (organised) outlaw biker crime remains to be seen.

These days, motorcycle clubs such as the Hells Angels are associated with disturbances of public order, e.g. public drunkenness, intimidating presence and assault on the one hand, and with cross-border organised crime such as the trafficking of drugs, arms, and people on the other. For these reasons, governments often refer to them as criminal motorcycle clubs or outlaw motorcycle gangs.

In Germany the Minister of Internal Affairs of a Federal State (Bundesland) can prohibit organisations whose objectives and activities violate criminal law, the constitutional order or go against the peaceful coexistence of nations. Such a prohibition may, among other things, lead to the seizure of the organisation's assets; non-compliance with the prohibition can be sanctioned through criminal law.

In the Netherlands, the Public Prosecutor can request the court to prohibit organisations whose actions violate public order. Previous attempts to prohibit local Hells Angels chapters in this way have failed. According to the judiciary, the facts, which included intimidation, drugs and arms trafficking and inexplicable cash flows, were not evidence of the commission of organised, large-scale criminal offences of such a serious nature to justify a ban. In addition, the courts emphasized that the right of association is a great good within a democratic society, only to be curtailed in exceptional cases. In November 2016, the Public Prosecutor requested the Utrecht court to ban the Bandidos motorcycle club.

While the Dutch courts emphasised the right of association in previous cases, the German Bundestag instead tightened the Association Act in January 2017 to prevent abuse of the right of association. The amendment provides for a ban on the use of club symbols related to already prohibited clubs.

As recent as 2012 and 2015 Germany saw a ban on the Aachen chapter of the Bandidos and the Cologne chapter of the Hells Angels, respectively, as well as on their various supporting clubs, i.e. clubs that are subordinate to a prominent club. In addition, 2015 marked the first nationwide ban of an entire motorcycle club: Satudarah from the Netherlands. But does a ban aid the fight against criminal motorcycle clubs?

In Germany, members of prohibited motorcycle clubs have been known to simply switch clubs in some cases, or a support club takes over when the prominent club has been dissolved. In addition, members of prohibited motorcycle clubs who have not switched clubs will no longer be identifiable to police and justice by their group symbols. This is particularly problematic with respect to members engaged in organised crime, of whom it is suspected that they go underground to continue their activities. In addition, there is fear of a relocation of criminal activities.

Proponents, however, point to the potential of a ban for closing down clubhouses, clamping down on individual members and banning group symbols. This would especially benefit the enforcement of public order and safety, since the presence of the prohibited club through its group symbols could no longer be used as a means of intimidation. It also sends a clear signal: criminal motorcycle clubs will not be tolerated.

In short, while a ban on criminal motorcycle gangs may provide leads for resolving public-order issues, it will probably change little to the involvement of criminal club members in organised crime.

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ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise and Innovation on Demographic Changes (NEIMED), Zuyd Hogeschool, the city of Maastricht, the Meuse-Rhine Euregion (EMR) and the (Dutch) Province of Limburg.

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