National Report Netherlands

Frans Pennings/Bert Alink

I. General Part

II. Special Issues

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1. Comparison of the National Social Security Systems and Tax Systems

1.1. Overview

1.1.1. The Characteristics of the Dutch Social Security System

The first Dutch statutory social security laws were very much influenced by Bismarckian systems, in particular the German and Austrian industrial accident laws. The first law, the *Ongevallenwet*, was a Bismarck-type social security scheme. This law was succeeded by a Sickness Benefits Act, Invalidity Benefits Act and Unemployment Benefits Act in the course of time, which are all of a Bismarckian type. Although these laws were changed and renewed through time, there are still Bismarckian type schemes for sickness, invalidity and unemployment.[1]

During the Second World War, the Dutch Government, at the time in exile in London, was very much influenced by the *Beveridge Report*, which was written and published in this period.[2] It established a Commission to write a White Paper on the future of Dutch social security.[3] The report by the Dutch Commission was the basis of a series of national insurance schemes, *i.e.* schemes which cover all residents and offer flat-rate benefits. Such schemes cover the areas of old-age pensions (*Algemene Ouderdomswet* (AOW)), survivors' benefits *(Algemene nabestaandenwet* (Anw)), and exceptional medical costs. National insurance schemes were added to the employees' insurance schemes. Both types of social security insurance are still part of the present system.

As a result, the Dutch system is a combination of Bismarckian and Beveridgean social security schemes.

In addition to these insurance schemes, social provision schemes, such as the system of social assistance, were implemented. These schemes fill the gaps in protection which are not covered by the social insurance schemes.

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1 *See*, for an elaborate description of the Dutch System, Frans Pennings, *Dutch Social Security Law in an International Context*, The Hague, 2002,

2 W. Beveridge, *Social Insurance and Allied Social Services*, London 1942.

3 Commission Van Rhijn, *Sociale Zekerheid*, The Hague 1945, Part II.

In the last decade, the responsibility of the employer to provide social protection has been increased, in particular in the area of sickness benefits. These obligations are found in the Labour Code.

The combination of the employees' insurance and national insurance schemes means in itself a deviation from a pure Bismarckian system or a pure Beveridgean system. Still, the disability, unemployment and sickness benefits schemes follow the Bismarckian principles to a large extent, as these are still employees' insurance schemes: the personal scope of the schemes is limited to employed persons and assimilated categories; the level of benefit is wage related and the benefits are paid from contributions. Separate laws provide for a minimum income, if necessary, in those cases where these employees' schemes do not. The liability of employers for the income provision of their ill employees is a remarkable deviation from the Bismarckian system.

The national insurance schemes provide for flat-rate benefits to, in principle, residents. This does not mean that all residents receive a full benefit if the risk materialises; the level of the old-age pension, payable under the national insurance scheme, depends on the number of years the person was insured in the Netherlands (as a result of residence or the fact that s/he was subject to wages in this country). Also survivors do not automatically receive a full survivor's pension: a test on income applies.

Figure 1 Overview of the System

insured risk	**employees scheme**	**self-employed scheme**	**national insurance**	**other**
sickness	ZW			wage
disability	WAO			Wajong
old age			AOW	
decease			Anw	
unemployment	WW			
children				AKW
medical expenses	Zfw	Zfw	AWBZ	
poverty				Abw
				Tw
				IOAW
				IOAZ

Dutch social security is not strictly based on a personal or territoriality principle. Persons residing abroad and working in the Netherlands who are subject to wage tax are covered by the employees' and national insurances.

1.1.2. The General Characteristics of the Dutch National Tax System

The income of both individuals and corporations is subject to direct taxation.

Individuals (natural persons) who have an income will pay income tax (*Inkomstenbelasting*). They may receive income from different sources. Income tax takes into account the origin of the income and distinguishes three categories. These categories are known as 'boxes'. The income in each of the three boxes is taxed at a different rate. Box 1 is the taxable income from work and dwellings. Box 2 is the taxable income from a substantial interest and Box 3 is taxable income from savings and investments. It is possible that a certain type of income fits the description of more than one box, *e.g.* income from substantial shareholding fits the description of Box 2, but also the description of Box 3. The Income Tax Act (Wet op de Inkomstenbelasting) governs the order of the three boxes. As a general rule, a certain type of income is taxed in the first box mentioned. This means that the income from a substantial shareholding will be taxed in Box 2 and not in Box 3.

Income in Box 1 is taxed at a progressive rate:

- The first bracket: 1.80 per cent on the first € 16,893;
- The second bracket: 9.35 per cent on the next € 13,464;
- The third bracket: 42 per cent on the next € 21,405;
- The fourth bracket: 52 per cent on the excess.

Income in Box 2 is taxed at a rate of 25 per cent; income in Box 3 is taxed at a rate of 30 per cent and the total of the tax owed in the three boxes is the income tax payable.

The above mentioned rates are those applicable in 2005. Each year the rates are corrected for inflation.

As a rule, tax liability is connected to permanent residence in the Netherlands. Natural persons residing in the Netherlands are taxed on their world-wide income. Persons residing outside the Netherlands may also be subject to taxation: if they have certain types of income within the Dutch

territory, *e.g.* from business, capital or rent and lease, they will be taxed on this income (domestic income).

Natural persons (resident or non-resident) who are in paid employment in the Netherlands are also subject to wage tax (*Loonbelasting*). The employer or entity that pays the wages withholds the wage tax and pays it periodically to the tax administration. Wage tax is levied at a progressive rate, similar to that of Box 1 of the income tax.

The fact that income from paid employment is subject to wage tax and to income tax (income from work and dwellings) does not have the effect of double taxation. The wage tax is an advance tax payment on income tax. This means that the withheld wage tax can be offset against the income tax payable.

Until 2001, The Netherlands, in addition to income tax, levied a tax on wealth (*Vermogensbelasting*). This tax was abolished with the introduction of Box 3 in the 2001 Income Tax Act

As with natural persons, companies are taxed with corporate income tax (*Vennootschapsbelasting*) on their worldwide income if they are residents of the Netherlands (resident taxpayers). Companies who are established according to Dutch civil law are supposed to be resident in the Netherlands. Companies which are not established in the Netherlands, the so-called non-resident taxpayers, are taxed on their domestic income only. Corporate income tax is levied at a rate of 27 per cent (26 per cent as from 2006, 25 per cent as from 2007) on the first € 22,689 of the taxable profits and at 31.5 per cent on the excess. As from 2006 and 2007, the rate of 31.5 per cent will be reduced to 30.5 per cent and 30 per cent respectively.

A company distributing dividends is required to withhold tax at a rate of 25 per cent on these dividends and to remit this dividend tax to the tax administration. The shareholders thus only receive 75 per cent of the dividend. A dividend being paid to a natural person is also part of the taxable income for income tax (Box 2 if it is a substantial shareholding, Box 3 if it is not a substantial shareholding). The dividend withholding tax is an advance levy on income tax. This means that the dividend tax withheld by the company, like the wage tax, may be set off against the income tax payable.

Aside from the direct taxes, The Netherlands levy some indirect taxes. The most important one is Value Added Tax (*Omzetbelasting*). This tax is being levied on the transfer of goods and services in exchange for money.

1.1.3. The Relation between the Dutch Social Security System and the Tax System

Between the Dutch tax and social security system there are various coordination rules. One example is income on which tax and social security contributions are calculated. The wage tax and the income tax on income from work and dwellings (Box 1) are levied at the same time as the social security contributions for the national insurance scheme. The basis for social security contributions payable is based on the taxable income in the first two brackets of income from work and dwellings. The rate is 32.60 per cent for persons younger than 65. For persons aged 65 and older the rate of the social security contributions is 14.70 per cent because they are no longer required to pay old-age pension (AOW) contributions. The social security contributions for the employees' insurance schemes are also being withheld from the wage. The basis for the calculation of the employees' contribution to the employees' insurance scheme is the taxable income for the wage tax.

As far as income tax and wage tax is concerned, there are several kinds of supplementary rebates that take account of the amount of income earned and the taxpayer's personal circumstances. For example, rebates for those who are employed; for parents in respect to their children; for single parents and for elderly people with a small income. These rebates generally contribute towards an equitable distribution of the tax burden. Only resident taxpayers can benefit from these supplementary rebates. However, a non-resident taxpayer can opt to be treated as if he is a resident taxpayer. If he does so, he can also benefit from these rebates. By way of exception a person resident in Belgium may benefit from these rebates even if he does not opt for treatment as a resident taxpayer. This is due to a special clause[4] in the Tax Treaty that Belgium and the Netherlands have concluded. The effects of this convention will be discussed in more detail in Section C, where we will pay attention to the *D*.-case.

1.1.4. Conflicts between the Tax System and Social Security System in the case of Cross Border Migration

In the case of cross border migration, problems arise, since the rules for determining the applicable legislation for social security are often different from those applicable to tax law. Whereas migration most often

[4] Art. 26, par. 1 Double Tax Convention The Netherlands - Belgium

occurs in the case of migration to bordering countries, the social security conflict rules are often found in the EU coordination Regulation, Regulation 1408/71,[5] whereas tax rules are found in bilateral agreements, Since these conflict rules have different definitions and principles, there is sometimes a divergence in the applicable legislation: for instance, the period for posting is different. In tax agreements, a person can be subject to more tax systems simultaneously, whereas for social security the principle applies that a person can simultaneously be subject to one system only.

Consequently, the main problems in the relation between tax and social security rules in cross border situations lie in the conflict rules. Within the national tax and social security system there are only few problems, since the systems have been adjusted closely to each other. An example was already given above, that a person subject to wage tax in the Netherlands, is subject to employees' and national insurance schemes. As a result, the tax law defines the personal scope of the national insurance schemes for the non-residents. Since the tax offices collect the contributions for the national insurance schemes, they are also responsible for the interpretation of this condition.

A problem which existed for a very long time was that the benefit administration and tax office had a different view on who was an employee and who was a self-employed person in border line cases, such as a freelancer, a main shareholder and an interim manager. By a recent Law the decision of the tax office is made binding. Although this uncertainty was mainly a problem in national cases, it could of course also affect cross border situations.[6]

1.1.5. The Aim and Role of Social Security Conventions

The Netherlands have concluded quite many social security conventions. Initially, they were made in order to prevent overlapping of insurance and

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5 *OJ* 149 p. 2 (last codified by Council Regulation 1318/93, OJ L 28 of 30 January 1997). See, for a thorough analysis of these legal instruments, F. Pennings, *Introduction to European Social Security Law*, 4th ed., Antwerp 2003. A consolidated version of Regulation 1408/71 and Regutation 574/72 was published in *OJ L* 28 of 30 January 1997. For the web site of the (non official, but most recent) consolidated version, see http://europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf.

6 For an example where this problem appeared before the Court of Justice EC, see Court of Justice 30 January 1997, Case 340/94, *De Jaeck,* [1997] ECR I-461.

to ensure payments of benefits to Dutch nationals and nationals of other countries. These conventions were made, in particular, with countries to which many Dutch people migrated (US and Canada) and later also with countries from which large groups of immigrants came to the Netherlands (Morocco, Turkey). In addition, there were agreements with the countries in the neighbourhood.

Now Regulation 1408/71 has taken over this role in respect of the EU Member States, the objective of the conventions with EU countries is mainly to supplement the rules of the Regulation and to provide for implementation rules (such as the rules of reimbursement on medical costs).

In respect of non-EU countries, the Netherlands have renewed a lot of its conventions recently due to the Benefit Restrictions (Foreign Residence) Act) (*Wet beperking export uitkeringen)*,[7] which went into effect on 1 January 2000, and limits the right to export benefits to countries with which agreements have been made which enable the export of benefits. During Parliamentary debates on the Law, the Government announced that they intended to make agreements with all countries to which an export of benefits is relevant. Treaties have indeed already been made with most of the countries in which large numbers of claimants reside.[8] These treaties have to ensure that reliable information will be given on issues such as the identity, death, civil status, family situation, work, income, address, training, detention and health position of the claimant and his partner and family. The provisions of the treaty require the foreign benefit administration to verify such data and allow the Dutch benefit administration to check these data abroad. The objective of the treaties is to treat beneficiaries abroad in the same way as in the Netherlands (where the required information is already available).

Therefore, it can be said that the main objective of many social security conventions is to ensure the enforcement of the national benefit rules and to guarantee that the required information will be given.

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7 *Stb.* 1999, 250.

8 See *Evaluatieverslag Wet beperking export uitkeringen* (Assessment Report on the Benefit Restrictions (Foreign Residence) Act, which reports (p. 11) that by 1 January 2003, the end of the transitional period, with 44 countries outside the EU/EEA a Treaty will be concluded which will allow the export of benefits; this will mean that 97 per cent (87,000) of all beneficiaries abroad (outside EU/EEA) will not face the restriction on the export of benefits. The number of persons covered by the Law will be 2,675 (three per cent of all beneficiaries abroad) plus 625 AOW beneficiaries.

These conventions are not based on a model social security convention, but it can be safely assumed that already existing ones serve as examples for drafting new conventions.[9]

Social security conventions are not really a very popular academic topic. Several articles have been written on the relation between the conventions and export of benefits.[10]

In addition, fiscal studies pay more attention to the social security conventions, in particular when they interact with tax treaties.

1.1.6. Case Law of the EC Court of Justice on Bilateral Social Security Conventions

There are only very few cases on the relation between social security conventions and EU law, because the disability and survivors schemes are Type A schemes (*i.e.* the level of benefit does not depend on the length of insurance); periods fulfilled under systems of other Member States need therefore not be taken into account, and therefore no bilateral convention has to be invoked for this purpose. Consequently, there is no situation comparable to the *Rönfeldt* case in which the Court ruled that rights acquired on the basis of the convention were infringed upon by EU law.[11] For the old-age scheme, the AOW, it is relevant that it is a residence scheme with hardly any threshold for being granted a (prorate) pension. Also for this reason it is not necessary to invoke conventions.

A case before the EC Court of Justice in which a bilateral convention with the Netherlands was relevant was the *Hoorn* judgment.[12] This was a special case, as it concerned forced labour by a Dutch person in Germany during the Second World War. The case concerned Art. 2 of Complementary Agreement No 4 between the Federal Republic of Germany and the Kingdom of the Netherlands on the settlement of rights

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9 ILO Convention 157, the Maintenance of Migrant Workers' Rights Convention, 1982, seems to be frequently used, in any case in the past, as a reference work for drafting a convention, but this is not a binding model.

10 F.J.L. Pennings, > Het einde van de exporteerbaarheid van Wajong-uitkeringen?=, *Migrantenrecht* 2000/3, p. 71, e.v.; Y. Jorensen B. Schulte, *Coordination of Social Security Schemes in Connection with the Accession of Central and Eastern European States*, Brussel, 1999, p. 236.

11 Court of Justice 7 February 1991, Case 227/89, [1991] ECR I-323.

12 Court of Justice 28 April 1994, Case C-305/92. *Albert Hoorn v Landesversicherungsanstalt Westfalen*, [1994], ECR 1994 p. I-1525, p. I-01525.

acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945.

The Court considered that, under Art. 2 of the Complementary Agreement, it is compatible with Community law for forced labour performed by Netherlands nationals in Germany during the Second World War to confer no entitlement under the German pension insurance scheme, but to be accounted for under the Netherlands scheme as if it had been performed in the Netherlands. The alleged difference of treatment does not stem from the Complementary Agreement itself, which merely determines the law applicable to the workers concerned, without stating the scope of the benefits. It is the fact that the Netherlands legislature laid down for the pensions for which it is responsible under the Complementary Agreement an amount different from that laid down by the German old-age insurance scheme for pensions payable by it that causes the difference. Community law, as it currently stands, does not preclude the Member States from providing by legislation or conventions concluded with other States different pension arrangements for different categories of population. Such difference of treatment does not come within the terms of the prohibition provided for in Art. 7 of the Treaty which is specifically intended to prohibit discrimination based on nationality.

1.2. Bilateral Social Security Conventions and Tax Treaties

Among the social security conventions concluded by the Netherlands, a distinction must be made between a) conventions which grant Dutch nationals and insured persons, and foreign nationals and insured persons of the countries with which conventions were made, benefits on ground of insurance and b) conventions which merely ensure payments of Dutch benefits abroad.

The Netherlands has concluded bilateral social security conventions of the first category with, Australia, Bosnia, Canada, Chile, Cyprus, Israel, Cape Verde, Croatia, Macedonia, Malta, Morocco, New Zealand, Panama, Poland, Quebec, Tunisia, Turkey, United States, and South Korea. With Austria and Germany conventions were made for the benefit of persons not covered by Regulation 1408/71.

Conventions of the second category were made with Argentina, Brazil, Costa Rica, Egypt, Ecuador, Hong Kong, Jordan, Thailand, Indonesia, Filipinas, Hungary, Estonia, Lithuania, Monaco, Romania, Slovakia,

Surinam, Czech Republic, and South Africa. National law governs export to Netherlands Antilles and Aruba.[13]

National courts do not often have to refer to the conventions, but sometimes they are indeed relevant, for instance in disputes whether periods completed in other countries are relevant for a benefit claimed.

The Netherlands have signed many treaties for the avoidance of double taxation with regard to taxes on income and capital (personal and corporate income tax, wage tax, dividend withholding tax). In older treaties, too, double taxation on wealth was often avoided. Tax treaties with the following countries are in force and effective on 1 January 2005:

Argentina, Armenia, Australia, Austria, Bangladesh, Belarus (White Russia), Belgium, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Great Britain and Northern Ireland, Hungary, Iceland, Ireland, India, Indonesia, Israel, Italy, Japan, Kazakhstan, Kuwait, Korea, Latvia, Lithuania, Luxembourg, Macedonia, Malawi, Malaysia, Malta, Mexico, Moldavia, Mongolia, Morocco, New Zealand, Nigeria, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovak Republic, South Africa, the Soviet Union (the treaty applies to the former member states of the Soviet Union with the exception of Azerbaijan and with the exception of those former member states of the Soviet Union to whom a new treaty applies), Spain, Sri Lanka, Surinam, Sweden, Switzerland, Thailand, Tunisia, Turkey, the United States of America, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia (this treaty applies to Bosnia-Herzegovina, the Federal Republic of Yugoslavia (Serbia and Montenegro) and Slovenia), Zambia, Zimbabwe.

In addition, the arrangement between the Netherlands Trade and Investment Office in Taipei and the Taipei Representative Office in the Netherlands also applies for the avoidance of double taxation.

Tax relations between the Netherlands, the Netherlands Antilles and Aruba are regulated in the Taxation Agreement of the Kingdom of the Netherlands.[14]

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[13] This list is derived from C.J. van den Berg, *Schematisch Overzicht van de Sociale Verzekeringswetten*, Deventer, January 2005.

[14] This list is derived from a brochure issued by the Dutch Ministry of Finance, Taxation in The Netherlands 2005.

The before mentioned Double Tax Conventions are based on the OECD-Model Convention on Income and Capital (OECD MC)

Bilateral social security conventions are regularly invoked before a national court. Also the Tax Treaties are often subject to decisions of the national courts. The reason is the fact that a certain type of income, according to national tax legislation, may be taxed in more than one country and the text of the specific tax treaty is not evident.[15]

1.3. Multilateral Social Security Conventions and Regulation 1408/71

1.3.1. Multilateral Social Security Conventions Ratified by the Netherlands

There are several multilateral social security conventions signed by the Netherlands.

A first category is that of ILO conventions containing standards. Of the Conventions which are still up to date, these are the following. Convention 102, the Social Security (Minimum Standards) Convention was ratified in 1962.; in 1966 it ratified Convention 121, Employment Injury Benefits Convention, 1964; Convention 128, the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 was ratified in 1969, while Convention 103, Maternity Protection Convention, adopted by the International Labour Conference in1952, was ratified in 1981.[16]

A convention including coordination rules is Convention 118, Equality of Treatment (Social Security) Convention, 1962; the Netherlands ratified this convention in 1964.

For an overview of the countries which ratified these conventions, *see* the website of the ILO.[17]

The Netherlands ratified also instruments established by the Council of Europe. Instruments setting standards are the European Code of Social Security (1964) and the European Social Charter.

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15 For example, Hoge Raad 5 September 2003 (Nr. 37 651) **(**BNB 2003/379 c*) concerning the question whether the Netherlands is allowed to levy tax on a fictional income in cross border situations.

16 See, on the impact of ILO Conventions in the Netherlands, Frans Pennings (ed), *Between Hard and Soft Law*, Antwerp 2005 (forthcoming).

17 http://www.ilo.org/ilolex/english/convdisp2.htm.

For coordination purposes, two Interim Agreements on social security, signed in 1953, are relevant: the European Interim Agreement on social security schemes relating to old age, invalidity and survivors; and the European Interim Agreement on social security other than schemes for old age, invalidity and survivors. These agreements were meant to be a temporary provision for the period until the European Convention on Social Security of the Council of Europe had been signed and ratified by the Member States. The latter Convention was signed in 1972. This Convention was aimed at the multilateral coordination of the social security systems of the Member States. Due to the small number of ratifications of this Convention, however, this objective was not achieved.

In addition to the Interim Agreements, the European Convention on Social and Medical Assistance was signed in Paris on 11 December 1953. This is the only multilateral Convention on *public assistance* and this Convention received many ratifications.

For an overview of the countries which ratified these conventions, *see* the website of the Council of Europe.[18]

The Netherlands also ratified Social Security Conventions for specific categories of workers: The Rhine Boatmen Agreement (27 July 1950); and the Convention on Social Security for International Transport Workers (9 July 1956).

1.3.2. Regulation 1408/71 and Bilateral Conventions

Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons, and to members of their families moving within the Community, has had considerable effects on Dutch social security. From the case law of the Court of Justice it is apparent that Dutch courts frequently asked for preliminary rulings. A rough estimate is that so far approximately 20 per cent of the judgments in the area of coordination law were the result of a request by a Dutch court. Many of these judgments form the basis of the present coordination law (the *Unger*, *Van Roosmalen, Kits, Ten Holder*, *Daalmeijer*, and *Fitzwilliam* judgments). Given the large number of cases, it is neither possible nor useful to describe all of them here.[19]

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[18] http://www.coe.int/DefaultEN.asp.

[19] For an extensive discussion, see Frans Pennings, *Introduction to European Social Security Law,* Antwerp 2004.

Art. 6 of the Regulation gives general priority to Regulation 1408/71 over Social Security Conventions. This Article provides that Regulation 1408/71, as regards persons and matters which it covers, replaces the provisions of any social security convention binding two or more Member States exclusively, or at least two Member States and one or more other States, where the settlement of the cases concerned does not involve any institution of one of the latter States.

However, Art. 7 poses some restrictions on Art. 6 and provides that some international provisions have priority over the Regulation. Art. 7(1)(a) provides that the Regulation does not affect obligations arising from an ilo Convention ratified by at least one Member State. The European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe have priority over the Regulation as well. In addition, the Agreements of 27 July 1950 and 30 November 1979 concerning social security for Rhine boatmen; the European Convention of 9 July 1956 concerning social security for workers in international transport; and the provisions of the social security conventions listed in Annex iii continue to apply.

There is no case law of national courts we are aware of in which a social security convention with an EU Member State is given priority to Regulation 1408/71. We mentioned the only judgment of the Court of Justice in relation to a Dutch convention *supra*, *i.e.* the *Hoorn* judgment.

As shown above, social security conventions are replaced by the Regulation unless otherwise provided. The question arose as to whether this rule is consistent with Art. 42 EC, in particular in cases where the application of the other convention would be more favourable for the person concerned.

The first time the Court had to answer this question was in the *Walder* case.[20] In that judgment the Court held that it was clear from Art. 5 of Regulation 3 and Art. 6 of Regulation 1408/71 that the principle that the provisions of social security conventions concluded between Member States were replaced by Regulation 3 was mandatory in nature. This principle did not allow for exceptions save for the cases expressly stipulated in the Regulation. The Court added that the fact that social security conventions concluded between Member States were more advantageous to persons covered by Regulation 3 was therefore insufficient to justify an

[20] Case 82/72, [1973] ECR 599.

exception to this principle, unless such conventions were expressly preserved by the Regulation.

This *Walder* judgment led to much criticism and the *Rönfeldt* judgment[21] was therefore welcomed, as several authors thought for a long time that the Court had departed from the *Walder* approach in this judgment.

Mr Rönfeldt was a German national and resident. From 1941 to 1951 he paid contributions for a German retirement pension. Subsequently, he worked in Denmark until 1971 and he paid contributions for a Danish old-age pension. After he returned to Germany, he had to pay German contributions again. The problem in Mr Rönfeldt's case was that the ages for retirement pension entitlement were different between Germany and Denmark. In Denmark, the retirement age was sixty-seven and in Germany this age was sixty-five. In addition, under the German scheme an early retirement pension could be claimed at the age of sixty-three, but for that pension it was required that one had completed thirty-five years of insurance. Therefore, he was refused early retirement benefit.

Regulation 1408/71 requires only that periods of insurance have to be aggregated for the purpose of acquiring a right to benefit (Art. 45) but not for the calculation of a right to benefit (Art. 46). The Convention concluded between Germany and Denmark of 1953, however, provided that periods of insurance completed under the legislation of Denmark had to be counted not only for the establishment of a right but also for the calculation of the German pension.

Art. 6 of Regulation 1408/71 provides, as we have seen, that the conventions concluded between Member States were replaced by the Regulation at the date it came into force.[22] This would have the effect that the Germany-Denmark convention, which provided that the Danish periods would be counted for the calculation of the pension, was no longer applicable. The Court considered that because of Art. 6 Mr Rönfeldt lost advantages which had been awarded to him by a bilateral convention. It ruled that this loss of benefit rights was not compatible with Arts. 39 and 42 EC. The Court had already pointed out in the *Petroni*[23] and *Dammer*

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21 Case 227/89, [1991] *ECR* I-323.

22 *I.e.* 1 April 1973, when Denmark entered the European Community (note that Denmark entered the EC only after Rönfeldt had returned to Germany).

judgments[24] that the purpose of these Articles would not be achieved if employed persons exercising their right to free movement lost advantages to which they would have been entitled by virtue of national law alone. This case law had to be interpreted, according to the Court, as meaning that benefits awarded by virtue of national law also comprise benefits to which one is entitled by virtue of international conventions which are in force between two or more Member States and which are integrated in their national legislation. The latter rules have to be applied if they are more advantageous than the application of Community law. A different interpretation would involve a substantial restriction on Arts. 39 and 42 EC as it would place a person who exercises the right to free movement in a less advantageous position.

Also this judgment was seriously criticised, as it was feared that the *Rönfeldt* judgment would apply in all cases where bilateral Conventions were involved and that this would lead to complicated situations. Bilateral and multilateral agreements are so numerous, so complicated and so varied that it would be unrealistic to require social security bodies to calculate for each migrant worker not only his benefit rights in accordance with national law and Community law, but also in accordance with international conventions. In the *Thévenon* judgment,[25] however, the Court clarified its position in the *Rönfeldt* ruling and it appeared that it did not have such serious effects as first thought.

Mr Thévenon was a French national who had been compulsorily insured as an employee, first from 1964 to 1977 in France and subsequently in Germany. The German social assistance agency considered that the periods of insurance completed by Mr Thévenon in France had to be taken into account for the calculation of the German pension, in accordance with the rules of the General Treatment on social security between France and Germany (1950).

The Court remarked that according to Art. 9 of this Treaty the periods completed under both schemes have to be taken into account for the calculation of the amount of benefit if a German or French employee had worked in both countries under one or more schemes of invalidity

23 Case 24/75, [1975] ECR 1149.
24 Case 168/88, [1989] ECR 4553.
25 Case 475/93, [1995] ECR I-3813.

insurance. Regulation 1408/71 does not take periods abroad into account for the calculation of the amount of benefit. The Treaty thus provides for a more attractive result than the Regulation. The Court considered that it had already ruled in the *Walder* judgment that from Arts. 6 and 7 of the Regulation it follows that Community regulations replace the provisions of treaties concluded between Member States. These provisions have a compulsory character and do not allow for exceptions apart from those explicitly mentioned in the Regulation. Nor do exceptions apply if these treaties would lead to higher benefits than on the basis of the Regulation.

The *Rönfeldt* judgment concerned, according to the Court, a situation in which at the moment when Mr Rönfeldt returned to Germany, Denmark had not yet entered into the EC. The Treaty between these two countries had not yet been replaced by Regulation 1408/71. Therefore, it had to be investigated if the periods completed in Denmark before Regulation 1408/71 applied to Denmark, and if so, how these should be taken into account for the calculation of the pension in the other Member State.

The answer given to this question in the *Rönfeldt* judgment does not apply in the situation of Mr Thévenon, who had not exercised his right to free movement before the coming into force of Regulation 1408/71. This meant that at the time Mr Thévenon went to work abroad, the French-German Treaty, as far as its personal and material scope are concerned, was already replaced by Regulation 1408/71. This employee cannot hold that he had lost social security advantages to which he would have been entitled on the basis of the French-German Treaty.

As a result of this judgment, it is not necessary to investigate in all cases whether the application of the rules of a Treaty between two Member States leads to a more advantageous result than Regulation 1408/71.

In the *Gómez Rodríguez* judgment[26] the question was raised how the *Rönfeldt* judgment (which requires comparison of the Treaty and the Regulation) has to be applied. The question was, in particular, when the comparison was to be made: only once, or every time when there were differences in effect? The judgment concerned the convention between Germany and Spain.

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[26] Case 113/96, [1998] ECR I-2482.

The case concerned the orphans of a worker, a Spanish national, who had been insured as an employed person in Germany and Spain. In 1985 he died in Spain without having drawn a pension. The German benefit agency granted the sons orphans' pension on the basis of the Convention on social security between Germany and Spain. When Spain acceded to the EC the Spanish pension insurance institution had sole competency to grant orphans' benefits from 1 January 1986 (as provided by Art. 78(2)) until they reached the age of 18 (the maximum age under Spanish law). The sons then applied to the German agency for orphans' pensions under German law, which are payable for students up to the age of 25.

The national court asked whether, in such a situation, Arts. 39 and 42 EC preclude the loss of social security advantages for workers which would result from the inapplicability, following the entry into force of the Regulation, of a bilateral social security convention. In this situation, the appellants' father completed his periods of insurance in Spain and Germany before the accession of Spain to the EC. Consequently, the rule identified in *Rönfeldt* applies. It follows that the persons concerned cannot lose the social security advantage which they were guaranteed by the bilateral convention in question. In this case, however, a comparison had already been made between the advantages resulting from the Convention and those resulting from the Regulation. The outcome was that the arrangements under the Regulation were more favourable for the appellants, and therefore the principle identified in *Rönfeldt* cannot be applied.[27] If it were otherwise, every migrant worker in the same position as the appellants could at any time ask for either arrangements under the Regulation or those under the Convention to be applied, depending on the most advantageous outcome for him at the time. Such a comparison of the advantages, made on a regular basis whenever there is a change in the personal circumstances of the persons concerned, throughout the period during which the benefits are granted, would cause considerable administrative difficulties for the competent authorities of the Member States despite there being no basis for the comparison in the Regulation.

Consequently, Arts. 39 and 42 EC preclude the loss of social security advantages for workers only at the first determination of benefit on the basis of the Regulation. Only at that time has a comparison to be made between

[27] This comparison was made on the basis of Art. 118(1) of Regulation 574/71.

the rights to be derived from either instrument and, consequently, not again at a later moment. Following this approach, the main problem with the *Rönfeldt* approach, the administrative charges for the administration, has been taken away considerably.

In the *Thelen* case[28] a convention relating to unemployment insurance concluded between Germany and Austria was involved

Mr Thelen was a German national who lived in Austria from 1986 to 1996 and, during that period, had pursued various jobs which were subject to compulsory unemployment insurance contributions. Having moved to Trier (Germany), Mr Thelen applied for unemployment there in 1996. His claim was rejected on the ground that he had not completed the qualifying period. Mr Thelen had not fulfilled insurance periods in Germany and thus he did not fulfill the requirement laid down in Art. 67(3) of Regulation1408/71 of having completed lastly periods of insurance or employment in Germany. However, that condition was not contained in the Austro-German convention on unemployment insurance. The question thus arose whether Mr Thelen could rely on this convention. Regulation 1408/71 entered into force in Austria on 1 January 1994.

The Court observed that Mr Thelen was already employed in Austria prior to the date Regulation 1408/71 came into force. From the principles developed in the *Rönfeldt* and *Thevenon* judgments, it follows that the substitution of the Convention by the Regulation could not deprive Mr Thelen of the rights and advantages accruing to him from the Convention. That conclusion was not altered by the fact that the case under consideration involved unemployment benefits and not, as in previous cases, retirement or invalidity pensions.

In the *Kaske* judgment[29] the same Austro-German convention on unemployment insurance was involved, now in a case before a court in Austria.

Ms Kaske, who holds both German and Austrian nationality, worked in Austria between 1972 and 1982 during which period she was subject to compulsory unemployment insurance. From 1983 until 1995 she worked and paid unemployment contributions in Germany. In 1995 and 1996 she received unemployment benefit in that Member State. After a brief period of employment in 1996, she returned to Austria where she immediately

[28] Case 75/99, [2000] ECR I-9399.

[29] Case 277/99, [2000] ECR I-1261.

applied for unemployment benefit. Prior to her application, however, she had not completed any periods of insurance or employment, as required by Art. 67(3) of Regulation 1408/71. Accordingly, the aggregation rules of Art. 67 could not be applied with the result that the competent Austrian institution rejected her application for unemployment benefit. Ms Kaske invoked the Austro-German convention on unemployment insurance which does not contain a condition comparable to Art. 67(3) of the regulation.

The question was whether the *Rönfeldt* and *Thevenon* case law also applies if a worker has exercised the right to freedom of movement prior to the entry into force in his or her Member State of origin of Regulation 1408/71 and the Treaty. The Court held that the sole purpose of these principles is to perpetuate entitlement to an established social right not enshrined in EC law at the time when the national of a Member State relying on it enjoyed that right. The *Rönfeldt* judgment derived from the notion of a legitimate expectation that rights previously accrued under a convention are respected. Accordingly, this case law also applies to workers who moved to other Member States prior to the entry into force of the Treaty.

The development of this case law seems to be well supported in the Netherlands. The *Walder* case indeed raised many questions, but as a result of the *Ronfeldt* and *Thevenon* judgments, the problems seen in respect of *Walder* have been solved. There are no particular problems arising from this case law and conventions concluded by the Netherlands. In Section 1.6 supra we suggested that the lack of problems has to do with the character of the Dutch schemes.

2. Personal and Material Scope of Double Taxation Conventions and Social Security Conventions

In the previous section we discussed two main categories of conventions: those which are ‘complete’ conventions and those which are limited to regulating the export of benefits. Here we will focus on the first category.

2.1. Personal Scope of the Double Taxation Conventions and Social Security Conventions

Unless a Social Security Convention provides otherwise, it applies to all beneficiaries and their members of the family in so far as they reside or stay in the territory of the Contracting States (Art. 3). So the conventions apply regardless of nationality of the persons concerned in all these four conventions.

Double Tax Conventions apply to persons who are resident in one or both of the Contracting States (see Art. 1 OECD MC). However, a Double Tax Convention can provide otherwise. So, there is a difference between the personal scope of the Social Security Conventions and the Double Tax Conventions

Social Security Conventions apply to the insured persons and their members of the family. Double Tax Conventions do not include the members of the family. Both, Social Security Conventions and Double Tax Conventions apply regardless of the nationality of the persons concerned. However, in some situations nationality is of importance.[30]

Regulation 883/2004[31] – which is to replace Regulation 1408/71 in the near future – covers all persons covered by a statutory social security scheme as defined in the Regulation. Nobody residing or working in the Netherlands is excluded (except for illegal persons). Regulation 1408/71 covers employed and self-employed persons only.

2.2. The Material Scope of the Social Security Conventions and Double Taxation Conventions

2.2.1. Social Security Conventions

The following categories of benefits fall within the material scope of the Social Security Conventions:

- Sickness and maternity benefits in cash and in kind
- Disablement benefits for employed persons
- Disablement benefits for self-employed persons
- Old age pensions
- Survivors' benefits
- Child benefits

[30] For example Art. 27 2001 Double Tax Convention The Netherlands - Belgium

[31] OJ L 2004, 2001/1.

A more recent development is that new conventions are limited to long-term benefits. This means that sickness and maternity benefits and child benefits are no longer included. This is different, of course, if the conventions are made with EU Member States in order to elaborate provisions of Regulation 1408/71.

The material scope of the Social Security Conventions concerns the legislation concerning the branches of social security enumerated in the convention. The conventions do not include provisions on contributions as such (*e.g.* on the payment and collection of contributions), but contributions are covered in so far as they are part of the branches regulated in the conventions (i.e. the conventions define that a person is subject to one system at a time; this means that s/he is subject to payment of contributions in one country only. This means that social security conventions follow the approach of Regulation 1408/71 that only one social security legislation applies simultaneously and this approach is, of course, advantageous for the promotion of free movement of workers.

In the past, bilateral conventions did not clarify that the rules for determining the applicable legislation had exclusive effect and this was quite unfortunate.

2.2.2. The Double Tax Conventions

All taxes on income fall under the material scope of Double Tax Conventions. This means that they can be applied as far as personal income tax, wage tax, dividend withholding tax or corporate income tax is concerned. These taxes are specified in the Double Tax Conventions. Since social security contributions are not specified in the Double Tax Conventions, they do not fall within the material scope of Double Tax Conventions. In practice, however, it seems that the contributions which are collected by the Tax Office are often treated in the same way as taxes for the purpose of the application of the Double Tax Convention. This is a pragmatic solution to complicated questions which might arise otherwise.

A decisive criterion to distinguish between a tax according to Art. 2 OECD MC and a social security contribution is that a tax has to be paid to the government and that there is no direct connection between the payment of the tax and the individual benefit that a person receives from the government. As far as social security contribution are concerned, one way or another, there is such a connection.

In respect of the question of subsuming social contribution under Double Tax Conventions, in our opinion it makes a difference whether the social security systems are tax or contribution financed. The main reason is the difference in the character of social security contributions and taxes. Social security contributions are more like insurance premiums. Taxes are not. In fact there is no direct benefit in relation to the taxes to be paid.

2.2.3. The Material Scope of Regulation 1408/71

The difference in material scope between Regulation 1408/781 and Regulation 883/2004 is very small: in comparison to Regulation 1408/71, the latter's scope is extended to paternal benefits and pre-retirement benefits.

The qualification of taxes for the purpose of social security coordination was raised before the EC Court of Justice in the *Commission versus France* case.[32] The case concerned the French Social Debt Repayment Contribution (CRDS). This contribution goes to a special public fund which is placed under the joint supervision of the Minister for the Economy and Finance and the Minister for Social Security. The primary purpose of the fund is to finance the deficits accumulated in 1994 and 1995 by the general social security scheme and the scheme's estimated deficit for 1996. The European Commission brought this case before the Court as the contribution also relates to the employment income obtained by employed and self-employed residents in France and taxable in that Member State in connection with employment in another Member State.

The Court considered that by levying the contribution on the employment income of employed and self-employed persons resident in France but working in another Member State, the French Republic disregarded the rule set out in Art. 13 of the Regulation. This Article provides that the legislation of a single State is to apply, insofar as that same income has already borne all the social charges imposed in the Member State of employment, whose legislation is the sole legislation applicable by virtue of Art. 13. The Court did not accept the French argument that the contribution should be categorised as a tax, thereby falling out of the scope of the Regulation. The fact that a levy is categorised as a tax does not mean that, as regards Regulation 1408/71, that same levy cannot be regarded as falling within the scope of that Regulation and is covered by

[32] Court of Justice 15 February 2000, Case 34/98, [2000] ECR I-995.

the prohibition against overlapping legislation. The Court argued that it follows from the *Rheinhold and Mahla* judgment,[33] that the national social security schemes are subject in their entirety to the application of the rules of Community law. Consequently, the decisive factor for the purpose of applying the Regulation is that there is such a direct and sufficiently relevant link between the provision in question and the legislation governing the branches of social security listed in Art. 4 of the Regulation. The CRDS meets this criterion, as it is not a levy designed to meet general public expenses. Instead, its purpose is specifically and directly to discharge the deficit of the general French social security scheme. It forms part of a comprehensive reform of social protection in France aimed at ensuring the future financial equilibrium of that system. The Court considered that this link was not broken by the allocation of the sums in question for the purposes of financing the French social security scheme, otherwise the prohibition against overlapping legislation would be deprived of all effectiveness. Neither the fact that the proceeds of the levy are paid to the fund rather than to the social security institutions directly nor the fact that the levy is collected in the same way as income tax affected the Court's conclusion that the levy is allocated specifically and directly to the financing of the French social security scheme. The CRDS therefore falls within the scope of the Regulation. Consequently, the Commission was right in arguing that the application of the French levy to residents working in another Member State was contrary to Community law.

The same approach was followed in a second infringement procedure started by the European Commission versus France.[34] This procedure concerned the French General Social Contribution (CSG) rules on employment income for employees and self-employed persons resident in France; the contribution was disputed as it had to be paid also by those persons who are subject to the social security system of another Member State. It was argued that this contribution was contrary to Community law.

The Court chose this solution in order to prevent Member States from escaping the effects of Regulation 1408/71. Otherwise, workers could be confronted by the obligation to pay contributions in more than one Member State at the same time.

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33 Court of Justice 18 May 1995, Case 327/92, [1995] ECR I-1223.

34 Case 169/98, [2000] ECR I-1049.

3. Distributive Rules and Coordination of Benefits

3.1. Principles Determining the Applicable Legislation

The Social Security Conventions start with an article that defines the terms used in the convention. Then they describe the material and personal scope. Provisions on equal treatment (in some conventions) and export of benefits follow. These provisions are part of Title I. Title II determines the applicable legislation. Title III gives provisions for specific types of benefits. Title IV concerns the maintenance of the rules. Title V gives rules on the presentation of documents, transitional rules and various rules (protection of data, determination of the currency etc.).

Double Tax Conventions in fact do the same. First of all, they describe the personal and material scope, followed by a definition of the terms being used. Subsequently, the Double Tax Conventions contain several articles governing the question which of the Contracting States is allowed to levy a tax on a certain type of income. In some situations, both Contracting States are allowed to levy tax. For those situations, regulations have been setup in order to avoid double taxation. Two methods are known, the exemption method and the credit method. Thus, in our opinion, there is no crucial difference between Double Tax Conventions and Social Security Conventions.

This does not mean that there is no difference. As far as social security is concerned, only one country is allowed and obliged to apply its social security system to a certain person. This excludes the application of a system of another country at the same time. As far as taxes are concerned, two countries can simultaneously be allowed to levy tax. One country can be allowed to do so for one kind of income, and the other for other kinds of income. For example, if a person lives in country A and earns an income in country B, the Social Security Convention contains rules to decide which of the two countries is obliged to apply its social security system. As far as income tax is concerned the Double Tax Convention contains rules where the labour income can be taxed. Generally, this is the place where the labour is performed. The other country (where the taxpayer is resident) is still allowed to levy tax on any other type of income.

For social security conventions, the main principle is that the rules for determining the legislation applicable have exclusive effect; another

starting point is the *lex loci laboris principle*, to which some exceptions exist, *e.g.* posting.

If a person simultaneously performs activities as an employed person in the territory of both contracting States, this person is subject to the legislation of the Contracting State of the country where s/he resides.

The convention does not give a definition of this term. Usually, in Art. 1 of the conventions 'place of residence' is defined as permanent place of staying.

According to Double Tax Conventions, a person is a resident of a Contracting State in case he is liable to tax, under the laws of that State, by reason of his domicile, residence, place of management or any other criterion of a similar nature (see Art. 4 OECD MC)

3.2. Other Principles Underlying the Conventions

Protection of social security rights of migrant workers implies that at least the following essential problems have to be solved:

1. conflicts of law have to prevented;
2. unequal treatment on grounds of nationality must be forbidden;
3. breaks in the career of a worker resulting from cross border movement, which are disadvantageous to the fulfilment of the conditions for benefit and/or the calculation of the amount of benefit, have to be repaired;
4. territorial requirements for payment of benefit rights have to be removed.

Bilateral Conventions require reciprocity: a convention is concluded only if the Contracting State is willing to open its benefit systems as well. Furthermore, Bilateral Conventions with non-EU countries provide for many identification provisions.

For sickness benefits in kind, in so far as they are still covered by conventions, the competent institution follows the findings of the competent institution of the other contracting State in the territory of which a person has fallen ill. However, the Netherlands can require the person concerned to come to the Netherlands for further examination.

Decisions on reclaiming or claiming of social security contributions and fines are recognised in both countries. There are no differences in this respect between benefits in kind and benefits in cash.

The conventions described above follow the concepts of Regulation 1408/71 where applicable (*i.e.* depending on whether they are realistic given the distance between the countries).

If Regulation 1408/71 does not apply, since the person concerned or the benefit concerned are not within the scope of the regulaton, in the first place Art. 42 of the Treaty is relevant. Art. 42 EC can be invoked directly if some essential rules are lacking which are necessary to realize the objective of this Article. The questions concerned were raised in the *Vougioukas* judgment.[35] In this case, the problem was that periods of employment fulfilled under a special scheme in countries other than Greece were not relevant to the Greek pension for civil servants. Mr Vougioukas contested this rule as it was disadvantageous to him as he had undertaken periods of work in German hospitals. A request for aggregation of periods of insurance must not be refused, the Court ruled, when it may be satisfied, in direct application of Arts. 39 to 42 EC, without recourse to the coordination rules adopted by the Council. This is, the Court said, since the objective of Art. 42 EC would not be attained if, as a result of exercising their right to freedom of movement, workers were to lose social security advantages granted to them by the legislation of a Member State. This might dissuade Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.

Under the present rules, it is not easy to think of a situation where the applicable legislation has to be determined whereas if Regulation 1408/71 is not applicable. An example was the *Kemmler* judgment,[36] where this was necessary for self-employed persons, when they were not yet covered by the Regulation. Since the self-employed are covered now, and since the third country nationals are also covered since 2003 by Regulation 859/2003.[37] This Regulation has one provision only (apart from a transitional provision), which extends the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors.

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35 Case 443/93, [1995] ECR I-4033.

36 Case C-53/95, *Inasti v. Hans Kemmler*, [1996] ECR I-703.

37 *OJ L* 124

3.3. Discussion of the Terms Stay and Residence

The case law of the Court of Justice on the terms 'residence' and 'stay' consists mainly of judgments concerning Art. 71(1) of Regulation 1408/71. This Article gives rules on unemployment benefits for persons other than frontier workers who do not reside in the competent State. Wholly unemployed persons who are not frontier workers and who do not reside in the competent State have the right to choose: they can choose between benefit from the last country of employment (Art. 71(1)(b)(i)) and benefit from the State of residence (Art. 71(1)(b)(ii)).

Art. 71(1)(b) concerns persons who do not live in the competent State and who are not frontier workers. Art. 71(1)(b) relates to persons whose State of residence is so far away from the State of employment that they cannot return at least once a week to the State of residence. This involves that they have a place of stay in the State of employment, whereas this place of stay is different from their place of residence. In other words, the ties with the State of origin are strong enough to call that State the State of residence. An example of this category of workers is found in the group of seasonal workers who work in a State far away from the State of origin.

For the purpose of this Article, the State of residence means the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated, as was ruled in the *Di Paolo* judgment.[38] The duration and the durability of the place of residence of the person concerned before his departure to the State of employment, the duration and objective of his absence, the nature of the activities performed in the other Member State, and the intention of the person concerned, as appears from all circumstances, are relevant in defining his centre of interests. The Court argued that the transfer of liability for payment of unemployment benefits from the Member State of last employment to the Member State of residence is justified for certain categories of workers who retain close ties with the country where they have settled and habitually reside. It would, however, no longer be justified if by an excessively wide interpretation of the concept of residence the point were to be reached where all migrant workers who pursue an activity in one Member State, while their families continue habitually to reside in another Member State, were given the

[38] Case 76/76, [1977] *ECR* 315.

benefit of the exception contained in Art. 71. It follows from these considerations, the Court continued, that the provisions of Art. 71(1)(b)(ii) must be interpreted strictly.

An example of the application of these criteria can be seen in the *Reibold* judgment[39] and the *Knoch* judgment.[40] The *Reibold* judgment concerned an employed person who for the duration of two academic years worked in another Member State; the job was part of an exchange programme of universities. The Court decided that Art. 71(1)(b) is applicable as from the outset it was clear that the duration of this job was to be limited within the habitual framework of the exchange programme, and that the activities of the person concerned were interrupted every three months by lengthy holiday periods during which he stayed in the accommodation which he had kept in the State of origin.

4. Interpretation and Qualification Conflicts Concerning Social Security Conventions and Double Tax Conventions

4.1. Interpretation and Qualification Conflicts

There are no conflicts known concerning the interpretation of bilateral Social Security Conventions. The most frequent conflicts concern situations in which the other party does not provide for sufficient information necessary to maintain the rules. The new conventions have defined the obligations of the States more strictly.

Dutch Double Tax Conventions include an article similar to Art. 25 OECD MC. On the basis of this article, taxpayers may present their case to the competent national authorities of either their state of residence or the state of their nationality in case they feel not treated in accordance with the Double Tax Convention. The contracting States, however, shall in case of disputes over interpretation or application of the Double Tax Convention strive for a conflict resolution by mutual agreement. In The Netherlands, these agreements are not being published.

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[39] Case 216/89, [1990] *ECR* 4163.

[40] Case 102/91, [1992] ECR I-4341.

If Regulation 1408/71 applies, Member States are bound by the case law of the Court of Justice. If there is a dispute on particular issues, Member States can present the case to the European Commission or to the Court of Justice.

The rules of the Regulation are binding, so the Member State does not give as much room for extra requirements in view of maintenance issues as is the case with bilateral agreements. In the Administrative Commission, established on the basis of the Regulation, interpretation questions can be discussed as well. The Administrative Commission will actively, as a non-contentious body, try to solve interpretation matters.

II. Special Issues

1. Specific provisions

1.1. Cross Border Workers and Posted Workers

In general, there are no specific regulations concerning cross-border workers. There was a specific regulation in the Double Tax Convention that the Netherlands had concluded with Belgium in 1970. In 2001, a new treaty has been concluded which does not hold a specific regulation. Because of a transitional arrangement, the regulation in the former treaty is still of importance. The treaty that the Netherlands have concluded with Germany also holds a specific regulation, but at this time that regulation is no longer effective.

If there are rules on posting in social security conventions, they follow the approach of the Regulation, be it that the duration may be 24 months (like Regulation 883/2004) and for countries far away from the Netherlands, the period will be five years. A Person who in the territory of the Contracting State performs activities as an employed person for an enterprise with which he is normally attached and who is posted by this enterprise to the territory of another Member State in order to work for that enterprise and for its account, remains subject to the legislation of the first Contracting State, provided the duration of the activities is for not more than 24 months (*e.g.* Art. 9, Convention with Poland).

Specific rules for income from employment, relevant to Double Tax Conventions, are based on Art. 15 OECD MC. The main rule is that income

from employment can be taxed in the Contracting State in which the employer is resident. An exception is being made for situations in which the employment is performed in the other Contracting State. In that situation, the Contracting State in which the employment is performed is also allowed taxing this income. This means that if a person earns an income in a State other than the State in which he is resident, the income can be taxed in both States. The State in which the employer is resident is obliged to levy tax. The State in which the employment is performed is not allowed to levy tax if:

a. the recipient is present in the other State for a period or periods not exceeding in aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and;
b. the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and;
c. the remuneration is not borne by a permanent establishment which the employer has in the other State.

It is indeed possible that a person is subject to taxation in one country and to social security contributions in another.

An example is a person who is posted from the Netherlands to Germany for 12 months. After 6 months he will fall under German tax law, but he will remain under Dutch social security law. In the reverse situation this effect will also take place.

If benefits are (partly) paid from contributions, this means that a person pays for social security both in the State of employment and in the State of residence.

In the case of posting, for the purpose of social security, the employer and employee have to apply for an E 101 form at the competent institutions of the sending Member State. The consent of the host State is not required for the first period of posting but it is for the second. Prolongation has to be asked for by means of an E 102 form.

The posting rules of the Regulation apply once the criteria of Art. 14 or Art. 14*a* are fulfilled. Consequently, holding a posting certificate is not a constitutive condition for posting. In line with this conclusion, the Court decided that posting certificates can be awarded with retroactive effect.

In the *Fitzwilliam* judgment, the question was raised as to what meaning was to be given to the posting certificate. Is the E 101 a certificate binding on the social security institutions of another Member State and for what period? Is it binding until it is withdrawn by the issuing State or can the

other Member State declare that it is not binding on the grounds that it was issued on the basis of wrong facts?

The Court considered that the certificate is aimed at facilitating freedom of movement for workers and freedom to provide services. The competent institution has to carry out a proper assessment of the facts relevant to the application of the posting rules. Consequently, it has to guarantee the correctness of the information contained in an E 101 certificate. It is clear that the obligations to co-operate arising from Art. 10 EC would not be fulfilled if the institutions of the host State were to consider that they were not bound by the certificate. Consequently, in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State of establishment, such a certificate is binding on the host State. The opposite rule would undermine the principle that employees are to be covered by only one social security system, would make it difficult to know which system is applicable and would consequently impair legal certainty. Consequently, as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of the host State must take account of the fact that those workers are already subject to the social security system of the State of establishment.

However, the competent institution of the Member State which issued the certificate must reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the host State expresses doubts as to the correctness of the facts on which the certificate was based, in particular, if the information does not correspond to the requirements of Art. 14. Should the institutions concerned not reach agreement on this issue, they may refer the matter to the Administrative Commission. If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, the Member State to which the workers concerned are posted may at least bring infringement proceedings under Art. 227 EC in order to enable the Court to examine in those proceedings the question of the legislation applicable to those workers and, consequently, the correctness of the information contained in the certificate.

In our opinion there are no similarities with the certification of residence in the field of Double Tax Conventions. Residence in the field of Double Tax Conventions is to be determined on the basis of Dutch national tax law.

1.2. Pensions

The social security conventions with non-EU Member States regulate the payment of pensions in a provision that concerns the export of benefits. This means that pensions are paid by the country where the person acquired a right to a pension to this person in the Contracting State, subject to the condition that the maintenance and control provisions are fulfilled.

As a rule, pensions are taxed in the State in which a person has his residence (i.e. Art. 18 OECD MC). Art. 19 gives an exception for State pensions.

The conventions do not give a rule on how to calculate the old-age pensions; there are such rules for the disability and survivors benefits schemes.

Under the Rules of Regulation 1408/71, if an employed person or self-employed person has been subject to at least one Type B scheme (in which there is a relation between the duration of the insurance and the level of benefit), the *partial pension* method is applied. Each Member State where the person concerned has been employed has to investigate whether he is entitled to benefits.

The relevant rules are found in Art. 40 which refers to Chapter 3 of the Regulation. Chapter 3 concerns old-age benefits. Consequently, the rules discussed in this section apply both in the case of survivors' and disability benefits (with at least one Type B scheme) and old-age benefits.

The Regulation requires the aggregation of insurance, work or residence periods for the purpose, if necessary, of satisfying the entitlement conditions of Type B schemes. These rules can be found in Art. 45 (1). Aggregation is relevant only for the acquisition, retention and recovery of the right to benefits and *not* for the calculation of benefits. Benefits have to be calculated according to the rules of Art. 46. For the calculation of the amount of benefits, only periods which have been satisfied under the scheme of the State where they have been fulfilled are taken into account. Foreign periods are not counted. Thus, the aggregation rules only help fulfil the conditions for the waiting period.

This method is, in principle, also used in social security conventions.

1.3. Anti-discrimination Clauses

Social Security Conventions which govern the insurance and payment of benefits have non-discrimination clauses. These provide that nationals of the other Contracting State, refugees and members of the family and survivors of the previously mentioned categories have the same rights and duties according to the legislation of the Contracting State as that State's own nationals, provided they live in one of the Contracting States. The non discrimination clauses are limited to the material scope

Dutch Double Tax Conventions are based on the OECD MC which contains a standard anti-discrimination rule.

Regulation 1408/71 contains a general non-discrimination clause (Art. 3). This applicability of this clause is limited to the scope of the Regulation; for our purpose the material scope, in particular, is relevant.

1.4. Extension of Advantages in Bilateral Agreements to Nationals of Non-Member Countries

The case law of the EC Court of Justice has been criticised for being volatile in its treatment of bilateral conventions in relation of nationals of another EC Member State. The question is, simply put, whether a country of a third Member State can invoke a provision of a bilateral convention between two Member States although he is no national of either State. If he is not allowed to do so, he is treated differently and this raises the question of compatibility with the non-discrimination clauses of EU law. The judgments often mentioned in this respect are the *Maria Grana-Novoa* judgment;[41] the *Gottardo* judgment[42] and the more recent *D.*-case,[43] since in the first judgment Ms Grana could not benefit from a convention between two other Member States, in the second Ms Gottardo could do so and in the last judgment, Mr D., a German, could not invoke the convention between the Netherlands and Belgium. These differences in outcome need to be analysed in order to decide whether they are consistent with each other

In the *Grana-Novoa* judgment, the applicant, who was a Spanish national, had performed work subject to compulsory social insurance, first in

41 Court of Justice 2 August 1993, Case C-23/92, [1993] ECR I-4505.

42 Court of Justice 15 January 2002, Case C-55/00, [2002] ECR I-413.

43 Court of Justice, 5 July 2005, Case C-376/03, not yet published in the ECR.

Switzerland and subsequently in Germany. The German authorities had refused her a German invalidity pension on the ground that she had worked for an insufficient number of years in Germany. Mrs Grana-Novoa sought to rely on the provisions of a convention concluded between the Federal Republic of Germany and the Swiss Confederation, the application of which was limited to German and Swiss citizens, in order to have account taken of the periods of insurance which she had completed in Switzerland. The *Bundessozialgericht* (Federal Social Court, Germany) asked the Court to rule on the interpretation of the term legislation in Art. 1(j) of Regulation No 1408/71. The Court ruled that a convention concluded between a single Member State and one or more non-member countries does not come within the concept of legislation, as that term is used in Regulation No 1408/71. The *Bundessozialgerichts* second question, which concerned the principle of equal treatment, was posed only in the event that the first question should be answered in the affirmative and was for that reason not addressed by the Court. Consequently, the outcome in this case was the result of the way in which the questions for a preliminarily ruling were asked, or, put differently, due to the limited scope of a preliminary procedure.

The question of equal treatment was given a second chance in the *Gottardo* case,[44] which the same bilateral convention. It concerned an Italian national by birth who switched to French nationality following her marriage. She worked successively in Italy, Switzerland and France. She would be entitled to an Italian old-age pension only if account were also taken of the periods of insurance completed in Switzerland pursuant to the aggregation principle referred to in Art. 9(1) of the Italo-Swiss Convention. Her application for an old-age pension was rejected on the ground that she was a French national and that the Italo-Swiss Convention did not apply to her. The question to be answered by the Court of Justice was whether the Italian social security authorities are required, pursuant to their Community obligations under Art. 12 EC or Art. 39 EC, to take into account, for the purpose of entitlement to old-age benefits, periods of insurance completed in a non-member country (*in casu* the Swiss Confederation) by a national of a second Member State (*in casu* the French Republic) in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member

44 Court of Justice 15 January 2002, Case C-55/00, [2002] ECR I-413.

State pursuant to a bilateral international convention concluded between that Member State and the non-member country.

The Court answered this question in the affirmative. Having been employed as a teacher in two different Member States, Ms Gottardo has exercised her right of free movement. Her application for an old-age pension on the basis of aggregation of the periods of insurance she has completed comes within the scope both *ratione personae* and *ratione materiae* of Art. 39 EC. In this case it was common ground that the dispute concerns a difference in treatment on the sole ground of nationality. This treatment is, however, in the view of the Italian Government and the benefit administration, justified by the fact that the conclusion by a single Member State – *in casu*, the Italian Republic – of a bilateral international convention with a non-member country, namely the Swiss Confederation, does not come within the scope of Community competence. The Court ruled that if application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the scope of the application of the Treaty, every Member State is required to facilitate the application of that provision and, to that end, to assist every other Member State which is under an obligation under Community law. With regard to a bilateral international treaty concluded between a Member State and a non-member country for the avoidance of double taxation, the Court has pointed out that, although direct taxation is a matter falling within the competence of the Member States alone, the latter may not disregard Community rules but must exercise their powers in a manner consistent with Community law. The Court accordingly ruled that the national treatment principle requires the Member State that is party to such a treaty to grant to permanent establishments of companies resident in another Member State the advantages provided for by the agreement on the same conditions as those which apply to companies resident in the Member State that is party to the Treaty.[45]

It follows, the Court continued, that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Art. 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part,

[45] The Court referred to Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paras. 57 to 59.

are not obliged to comply with any Community-law obligation is of no relevance in this respect. It follows from all of the foregoing that, when a Member State concludes a bilateral international convention on social security with a non-member country which provides that account shall be taken of periods of insurance completed in that non-member country for the earning of entitlements to old-age benefits, the fundamental principle of equal treatment requires that Member State to grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention, unless it can provide objective justification for refusing to do so.

Disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may, if it is true, constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention.

However, the INPS and the Italian Government have failed to establish that, in the case in the main proceedings, the obligations which Community law imposes on them would compromise those resulting from the commitments which the Italian Republic has entered into *vis-à-vis* the Swiss Confederation. The unilateral extension by the Italian Republic, to workers who are nationals of other Member States, of the benefit of having insurance periods which they completed in Switzerland taken into account for the purpose of acquiring entitlement to Italian old-age benefits would in no way compromise the rights which the Swiss Confederation derives from the Italo-Swiss Convention and would not impose any new obligations on that country.

The Court concluded that the competent social security authorities of one Member State are therefore required to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country.

In the *D.*-case[46] the Court decided that there were reasons not to extend the advantages of bilateral tax convention to a national of a non-Member country. It concerned a German national who has real property in the Netherlands and who had to pay wealth tax in the latter country (this was under a predecessor of the current law, see Section 1.3). According to the Law, resident taxpayers were entitled to an allowance (a tax rebate) applied to their net worldwide assets while non-resident taxpayers taxed on their net assets in the Netherlands were not entitled to an allowance. However, the Double Tax Convention between Belgium and the Netherlands, under the heading 'Non-discrimination', provides: 'Natural persons resident in one of the two Member States are entitled in the other to the personal allowances, concessions and reductions which are granted by the latter to its own residents by reason of their civil status or dependents.' Since Mr D. was a German, he was refused this allowance.

The Court accepted that the situation of a resident and that of a non-resident are as a rule not comparable. It considered that the allowance – which is intended to ensure that at least a part of the total net assets of the taxable person concerned is exempt from wealth tax – performs its function fully only if the imposition of the tax relates to all his wealth. Consequently, non-residents who are taxed in that other Member State on part only of their wealth do not in general have grounds for entitlement to the allowance. It follows that a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State and the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not discriminate against him.

The second question was more difficult, since the Belgium-Netherlands Convention has a different approach: under Art. 25 (3) of the Convention, which applies to the two Member States party to the Convention, a natural person resident in Belgium is entitled in the Netherlands to the allowances and other tax benefits which the Netherlands grants to its own residents.

The Court considered that the questions of the referring court are concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention. In the case of a double taxation convention concluded between a Member State and a non-member country, the

[46] Court of Justice, 5 July 2005, Case C-376/03, not yet published in the ECR.

national treatment principle requires the Member State which is party to the convention to grant to permanent establishments of non-resident companies the benefits provided for by that convention on the same conditions as those which apply to resident companies. The question is therefore whether Mr D.'s situation can be compared to that of another non-resident who receives special treatment under a double taxation convention. The Court now refers to the reciprocal character of the Belgian-Dutch convention. The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. A rule such as that laid down in Art. 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance. For this reason the tax allowance as granted under the Belgian convention was not to be extended to nationals of other countries.

This analysis shows that the judgments are consistent with each other, although the outcome will not always be predictable in new cases.

The main difference seems to be that the different treatment of non-nationals in the *Gottardo* case was within the multilateral instrument of Regulation 1408/71, whereas there were no justifications for this difference. In the *D.*-case the convention concerned was a bilateral instrument with reciprocal elements which made it unsuitable for extension to a national of a non-Contracting Party.

Although the case law is complicated in the sense that for future case the outcome will not always be easily predictable, the outcomes in the judgments are correct as they fit well in with the difference in the coordination systems of tax and social security respectively.

Whereas social security coordination is a comprehensive system, that is not the case with tax. Indeed, under tax coordination it is possible to be subject to two different systems at the same time, like in the case of Mr D. As a result, he would be subject to two tax allowances at the same time (which are not pro rata) which may overlap. Application of equal treatment may not only distort the capital and tax system, but also the market of real estate. For this reason, the outcome is fully justified.

1.5. Dispute Settlement

Dutch Double Tax Conventions are based on the OECD MC. Proceedings are similar to those in Art. 25 OECD MC. The application of the provisions does not cause any specific problems for the administration. Dispute settlement is included in Dutch Double Tax Conventions.

Dispute settlement in cases on social security conventions is, insofar as it is governed by the conventions, only between States. Individuals cannot invoke these. They can, as with disputes on tax issues, refer their case to the administrative courts.

Also dispute settlement on cases concerning Regulation 1408/71 is subject to the national rules, i.e. the adjudication system in administrative cases. This means that the claimant has to file a request for revision of the decision, then appeal to the court and, subsequently, to the Central Court of Appeals. If the court has interpretation questions about EU law, it can ask for a preliminary ruling.

1.6. Conclusions

In this chapter, we discussed how social security conventions and tax conventions work in relation to the Netherlands. The cooperation between tax law and social security law has, in the academic world, not been an obvious one and also the administrations in these areas have not always cooperated. More and more, however, there is now a co-operation, since in practice, for individuals and enterprises, the two are closely linked. This is even more true in cross border cases. In any case, migrant workers will very soon feel the effects of gaps in the cooperation of tax and social security administrations and gaps in the coordination of the two systems.

It can also be seen that the principles underlying international coordination in tax and social security are quite different. A main difference is that a person can, in principle, be subject to one social security system at the same time, whereas he can be subject to more tax systems simultaneously. Although this is quite awkward in some cases, it is, first of all, important to understand why this is the case. Social security contributions are paid for benefits and thus have a single function. This function can be left to one State, which is responsible for the coverage of the person, even if it is on two incomes he earns simultaneously in two different States. Tax is used to finance a lot of functions, which cannot be attributed to one country (such as education for the children, maintenance

of roads, culture etc). This difference can, on a more abstract level, be used to explain the differences in the approach in the *Gottardo* case and *D.*-case.

This makes it very difficult to harmonise the tax and social security coordination rules. However, it should be possible to harmonise some of the rules, of which the posting rule is an important one. At present, we see a growing divergence on the duration of the period; in this area a choice for a common period should be made.

A second difference is that tax coordination concerns the payment of money only; social security coordination concerns also payments of benefits. This makes it difficult to adjust the system of coordination of social security to that of the tax coordination and it makes it also difficult to make it much simpler.

A third difference is that coordination of social security is, within the EU, meant to promote the free movement of workers. The EU law which affects tax is related to prohibition of discrimination. Although prohibition of discrimination is related to free movement, these concepts do not fully overlap. This means that there are differences in approach in the case law of the Court of Justice (see again the approach in the *Gottardo* case and *D.*-case).

These differences – and we mentioned just the main ones – make the study of the interaction of the coordination of social security and tax law more interesting.

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Andrew M .C. Smith