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## Legal Aspect of Border Commuting in the Danish-German Border Region

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**Legal Aspect of Border Commuting in the  
Danish-German Border Region**

*Birgit Nahrstedt  
September 2000*

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## **Abstract**

In this paper some legal aspects concerning the border commuting between Germany and Denmark are presented and discussed. The content of the paper falls in three main parts. Firstly, as a consequence of the wish to enhance the process of the European integration the actual extent of cross-border commuting is presented, then a brief discussion of the advantages and disadvantages follows. Secondly, the focus is on the tax systems in the two countries and the differences between these systems concerning cross-border commuting. Also, various labour market aspects are introduced in the discussion. As shown in the paper, commuters may feel themselves discriminated by differences between the Danish and German systems that in the past have triggered off several cases at the European Court of Justice, which is the issue of the final part of the paper.



# Table of contents

1. Purpose and Demarcation .....	7
1.1 Introduction .....	7
1.1.1 Terminology .....	12
1.1.2 Formulation of the Problem.....	14
1.1.3 Demarcation .....	15
2. Frontier Commuting.....	15
2.1 The Extent of Frontier Commuting.....	15
2.2 Advantages and Disadvantages to Frontier Commuting.....	16
3. The Tax System.....	17
3.1 General International Tax Rules.....	17
3.1.1 The Global Principle.....	17
3.1.2 Exemption and Credit Methods .....	19
3.2 The German Tax System.....	21
3.3 The Danish Tax System .....	22
3.4 Summary of the Present Taxation concerning Frontier Commuting.....	24
4. Other Labour Market conditions to Frontier Commuters .....	25
4.1 Social Security.....	25
4.2 The Unemployment Fund.....	26
4.3 The Sickness Benefit System.....	27
5. Selected Cases of Importance to Frontier Commuters within the EU .....	28
5.1 The Roland Schumacker Case.....	28
5.1.1 About the Roland Schumacker Case.....	28
5.1.2 The Outcome of the Schumacker Case.....	32
5.2 Great Duchy of Luxembourg Case.....	34
5.2.1 About the Luxembourg Case .....	34
5.3 The Calle Grenzshop Andresen GmbH & Co. KG Case .....	39
5.3.1 About the Calle Grenzshop Andresen GmbH & Co. KG Case .....	39

6. Conclusion .....43  
References .....46

# 1. Purpose and Demarcation

## 1.1 Introduction

In 1968<sup>1,2</sup> it was determined by the original six EEC countries that the formal limitations concerning labour and residence permits should be abolished. In accordance with article 7 in the statutory instrument (EEC) no. 1612/68 dated the 15<sup>th</sup> of October 1968 about the Free Mobility of Labour within the Community:

*...decided that an employee who is a citizen in a member state in the territory belonging to the rest of the member states benefits from the advantages of taxation as domestic employees.*

With the purpose of increasing the entire mobility of labour, it is inducted in the Treaty of Rome following rules as regards persons, public benefits, and capital in order to avoid that EU citizens residing in an EEC country sustain an economic loss because of their employment in another EEC country. Regarding the free mobility of labour, it is written as follows in accordance with article 48 [The Free Mobility of Labour]:

*The free mobility of labour within the EEC is implemented at the latest at the expiration of the transitional period.*

*It presupposes the abolition of any kind of discrimination founded in nationality towards the employees of the member states as regards to employment, salaries, and other working conditions.*

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- 1 Already in 1952 the Nordic Council composed of Norway, Sweden, Finland, and Denmark was formed with the purpose "to create an economic community in which labour permit in order to work in the concerning countries is not necessary to citizens living in one of the concerning countries". In 1954 the Council had abolished the passport constraint (and other formerly required documents) for travellers between the concerning countries. Furthermore an administrative cooperation exists within the economic community (Handoll, 1995, pp. 55-56).
  - 2 The Benelux European Union was established in 1958 with the purpose of introducing free mobility to people (free mobility, residence, and permanent address) between the Benelux countries (Handoll, 1995, pp. 53-54).



*Subject to the limitations that are justified on account of public order, public security, and public health it implies the obligation to:*

*apply for actually offered posts;*

*the right to move freely within the area of the member states for this purpose;*

*to reside in one of the member states in order to be employed according to the legally or administratively fixed conditions which apply to the occupation of domestic employees;*

*to keep living within the area of a member state according to the stipulated conditions implemented by the statutory instruments given from the Commission after having an engagement at that place.*

*The stipulations in this article do not apply to engagements in the public administration.*

The following measures to the implementation of free mobility are stipulated in article 49 [Measures in Order to Implement the Free Mobility]:

*as soon as this Treaty has come into force, the Council will **adopt according to the procedure in article 189B** and after being submitted to circulate among The Economic and Social Committee for consideration by issuing directives or statutory instruments concerning measures that are necessary in order to implement gradually the free mobility of labour such as this is determined in article 48 particularly by:*

*assuring an intimate co-operation between the national labour authorities;*

*abolishing after a gradually implemented programme such administrative procedures and such administrative practice plus the stipulated respites giving admittance to vacant posts which originate from either domestic*

*legislation or from formerly entered agreements between the Member states and whose retention will impede the free mobility of labour;*

*abolish after a gradually implemented programme all the respites and other limitations which are stipulated either within domestic legislation or in agreements that are formerly contracted between the Member states and that offer employees from the other member states other conditions towards the free choice of employment than those which apply to domestic employees;*

*to implement measures<sup>3</sup> that make it possible to propagate and balance between supply and demand in the labour market in a way that excludes serious danger to the living standards and the employment in the different parts of the country and industries.*

Furthermore, it is applied according to the Maastricht Treaty that the employing country is obliged to create some limited requirements in a way that persons

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3 The European Union has established EURES (EUROpean Employment Services) with the purpose of supporting the mobility of labour within the EU. The employment service, the employers' association and the trade unions in the frontier region Southern Jutland and Landsite Schleswig support EURES.

The purpose of EURES is as follows:

1. To inform about vacant posts and the demand in the labour market in the frontier region.
2. To observe and estimate the situation of the labour market in the frontier region plus elaborate proposals to common borderline exceeding initiatives.
3. To elucidate about education initiatives in the frontier region. To develop and promote borderline exceeding educations. The EU Commission has contributed to the education of euro instructors, who have the assignment to help applicants, people under education and employers with general or specific information, for instance, concerning social security, superannuating pays, sickness benefit, taxation, and rules of notice, etc. In addition, they offer information about vacant posts in the frontier region.

Correspondingly, PROGA (The Project Bureau of Borderline Exceeding Labour Market Initiatives) consisting of a cooperation between trade unions in the frontier region has the following purpose:

1. To support the vocational structural change in the frontier region within the parameters of the possibilities of the labour market.
2. To surmount the difficulties in connection with the integration of the regional labour markets.
3. To encourage common plans towards an active labour market policy.

with a permanent address abroad are not discriminated against their colleagues with permanent address and employment within the same country.<sup>4</sup>

Apart from the fact that in some parts of the public sector citizenship to the residing country is required, the possibility of getting a residence permit<sup>5</sup> is correspondingly only in force to some citizens<sup>6</sup> in the EEC countries.

The Commission has furthermore pointed out that among other things the following barriers as regards free mobility exist among other things:

1. Mutual acknowledgement of diplomas, among these the employers' possibilities of comparing labour force qualifications.
2. Taxation problems.

Taxation problems related to frontier commuting arise when the employees liable to pay taxes in two countries are taxed in a discriminating way proportioned to their colleagues with employment and firm address in the same country.

Moreover, it is in force that both the residing country and the employing country are entitled to collect taxes at the citizen at which the citizen is taxed twice.

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4 Pedersen, 1995, p. 2.

5 For instance there are very restrictive rules connected to the constitution of Luxembourg regarding employment within the public sector. (Please, look above at article 48: Free Movement of Labour Force).

6 The rights to free mobility are according to the treaty applied to the general class of union citizens, who are defined in article 8 (1) with reference to the union treaty, these persons merely have to be citizens in one of the EU countries. In practice, the article means that poor and disabled persons are not included with certainty when it comes to the rights of free mobility by means of which the conception of "all individuals" or "all union citizens" according to the prevalent Danish concept is misleading (Handoll, 1995, p. 123). The right is only applied to the persons who have sufficient economic funds in order to avoid becoming a burden to the social system of the host country with reference to the 1990 directive. This is not in keeping with the harmonising rules seen from the Parliament in its Resolution on Union Citizenship (1991) in which it is written: "free and unlimited rights of mobility and residence in the territory of the Union for all citizens".

In order to avoid an unfavourable and high taxation of frontier commuters, several countries have come to agreements about double taxation at which frontier commuters are not taxed preposterously high.

Frontier commuters do not always have access to the same possibilities concerning deduction as employees with a firm address in the employing country have. One reason is that the rules related to limited taxable income are often applied towards frontier commuters. These are elaborated according to the assumption that the limited taxable working person only earns a less part of the total income abroad and therefore has the possibility of utilising his or her own deductions in the residing country. Frontier commuters earn the whole or the greatest part of their income in the employing country for which reason frontier commuters do not always have the possibility of exploiting every possible deduction. This implies that frontier commuters in a fiscal point of view may find themselves in a worse situation than their colleagues with employment and residence in the same country, which as mentioned is against the purpose of the Rome Treaty as regards free mobility of the labour force across the borders.

Even though Denmark became a member of the EEC on the 1<sup>st</sup> of January 1973, and it subsequently became a lot easier to commute between Denmark and Germany, the two regional labour markets are still very far from one another. Frontier commuting between Germany and Denmark is practically constituted of about 2,300 persons. Nearly 1,000 persons with residence in Germany are employed in Southern Jutland, and about 1,300 persons<sup>7</sup> residing in Southern Jutland are employed in Germany. There is still only an exceedingly limited amount of the labour force that crosses the border<sup>8</sup> in order to work.

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7 Hansen and Schack, 1997, p. 10. It is mentioned that there has been an increase in the number of commuters from 1,200 commuters (in the beginning of the 1990s) till 1,300 (1995) from Southern Jutland to Germany. From Germany to Southern Jutland the amount of frontier commuters has, on the contrary, been constant.

8 Today, frontiers can be conceived as follows: "Frontiers may remain intact, but as abstract, legal, and cultural concepts rather than tangible obstacles". Frontier control that exists after the end of 1992 may subsequently be conceived as restrictions on the free mobility and merely physically there does not exist any barriers by way of example between the Danish-German border, at which the border passage on the whole is conducted quickly.

Within the tax system, differentiated rules prevail and are the cause of some frontier commuters being discriminated in relation to other EU citizens with employment and residence in the same country.

Barriers to frontier commuters also exist within the social national rules: social security, retirement, rules for babysitting, legislation towards confinement, etc. The social rights are by way of example only obtaining in situations that involve economics activities.

Since the EU countries have each their own social and fiscal systems there are still problems while working in a country and having residence in another, i.e. being a frontier commuter.

### **1.1.1 Terminology**

Since there are different definitions as regards frontier commuters, some of these are going to be described.

*Frontier commuters can be defined as wage earners with residence in a country and who are employed in another country.*

Or:

*A cross-border worker is refereed as someone living in a country crossing the boundary each day (or at least one time a week) to work in another neighbouring one. Neither durable migrants nor seasonal workers are included in such a definition. The durable migration within the EEC countries covers about 1.10 % of the EC population in 1990.*

In order to use the definition above, the EEC law court applies the following four objective criteria in order to define "a wage earner":

1. The situation of employment.
2. The amount of working hours, level of wages included.

3. Effective and real economic activity.
4. The physical placement of the workplace.

Re point 1) In order to define the person as a wage earner, the named person has to perform a service to and under management of another in a certain period of time.<sup>9</sup>

Moreover, some rights and duties must be fulfilled in order to define the single person as a wage earner. It is normally required that the wage earner has a wage contract.<sup>10</sup>

Re point 2). The rules of free mobility to wage earners are applied to both full-timers as well as part-time employees. Furthermore, it is possible to work as a part-time employee and simultaneously receive financial support from the residing country.<sup>11</sup> The wage is not necessarily the minimum wage.

Re point 3). A person is not regarded as a wage earner, if the person in question carries out "a marginal helping function".<sup>12</sup>

EURES applies the following definition:

*A frontier commuter is an employee or self-employed businessman who has his job in a EU country and his residence in another that he normally returns to every day though at least once a week. To frontier commuters the regulations within the employing country with reference to taxes and social security (insurance and similar systems) are applied. In Denmark you must*

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9 Please, look at the Lawrie-Blum case.

10 Persons employed by "on-call" contracts are also regarded as being wage earners. The special thing by "on-call" contracts is that persons who have entered into "on-call" contracts do not have guarantee at all for working a certain amount of hours. Correspondingly the wage earner is under no obligation to report for work when the employer engages the wage earner. (Please, look at the Raulin case). The wage earner has in the following only rights (social rights) and duties according to the amount of working hours.

11 Please, look at the Kempf case.

12 Handoll, 1995, pp. 81-84.

*have an engagement of at least 9 hours weekly in order to be regarded as a frontier commuter.*

The Danish authorities apply the following definition with a legal object:

*A frontier commuter is a person who legally resides in Denmark or Germany and at the same time that he on the grounds of his employment is affected by the fiscal and social security rules in the adjacent country.*

The last-mentioned definition will be employed in the following since this is the most appropriate within this formulation of the problem.

### **1.1.2 Formulation of the Problem**

When people consider becoming frontier commuters, several factors must be examined first. How does the fiscal system work in the country to which the person considers to move? How are frontier commuters taxed in relation to people who reside in the employing country? Is it convenient to move to the employing country or is it more convenient to stay? Are there still areas in which the frontier commuters are discriminated in relation to non-frontier commuters? These are merely some of the questions that must be considered before the definite decision of becoming a frontier commuter is taken. It is, however, seldom that completely concrete answers to the above mentioned questions are given, as it is difficult to have clear and concise answers to these. This fact results in legal cases within the European Court concerning the specific conditions, which exist to frontier commuters.

This article serves a threefold purpose. Firstly, the differences between some of the social and fiscal conditions in Denmark and Germany that are of interest for both potential and actual cross-border commuters will be described. Especially, for people with residence in Denmark, and who are employed in Germany, including German residing employed people in Denmark. Secondly, the focus will be on some of the discrimination factors gone through three legal cases within the European court concerning specific conditions to frontier commuters.

Two cases that have been relevant to fiscal conditions, which frontier commuters are facing or have been facing, and a case concerning social security will be examined.

### **1.1.3 Demarcation**

This article is solely limited to the dealing with a part of the problems, which belong to frontier commuters. Among the most essential problems<sup>13</sup> frontier commuters mention tax rules, retirement regulations, and finally rules concerning social security. Since the topics are rather comprehensive, focus will be on some few selected elements among these. More quibbling relations within tax payment such as investment and financial circumstances will not be examined. Taxation circumstances that are of determining importance to independent businessmen will not be contained within the limits of this article, nor will retirement regulations be a topic, which will be brought into focus. Moreover, there will not be focused on problems concerning mutual recognition of diplomas, which may seem practices that distort competition to employees and independent businessmen.

## **2. Frontier Commuting**

### ***2.1 The Extent of Frontier Commuting***

Commuting<sup>14</sup> exists from Germany to the following cities in Southern Jutland: Bov (5.3 per cent of the employees within the municipality), Bredebro (3.2 per cent), and Toender (2.8 per cent). The largest commuting from municipalities in Southern Jutland to Germany is as follows: Bov (3.6 per cent of the employees with residence within the municipalities), and Toender (2.3 per cent). All considered, an amount of nearly 1,300 persons commute from Southern Jutland to Germany, while the commuting from Germany consists of nearly 1,000 per-

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13 Please, look at Hansen, 1997, p. 88.

14 Please, look at Hansen, 1994, p. 84.



sons.<sup>15</sup> The amount of frontier commuting is thus to be considered as minimal.<sup>16</sup> The minimal amount of commuters might be imputed to differences between labour, social national, and tax rules (among these their interpretation), including linguistic and cultural differences.

## **2.2 Advantages and Disadvantages to Frontier Commuting**

Seen from both a national and a private economic perspective both advantages and disadvantages are to be found by commuting across the frontiers. At first, national advantages and disadvantages will be mentioned, and afterwards private economic advantages and disadvantages are going to be described.

Seen from a national point of view, frontier commuting has the advantage of reducing the lack of labour force in the frontier region by employing the labour force from the countries, which border the region and reducing bottleneck situations, too, if any. (Please, look at article 49: *Measures in Order to Implement the Free Movement*). Moreover, unemployed people have the possibility of applying for a job in other EU countries by means of which the extent of unemployment is reduced. For instance in the case of Southern Jutland, the present economic upturn will be able to continue, if it is possible to attract attention to Southern Jutland from other regions in Denmark and from Northern Germany. The disadvantage by frontier commuting is a possible loss of taxes included the

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15 Hansen, 1994, pp. 86-91. Moreover, de Falleur and Vandeville have estimated that the amount of frontier commuters residing in Germany and employed in Denmark consists of 1,015 (1990) persons. The amount of frontier commuters with residence in Denmark and employment in Germany consists of 1,180 (1990) persons. Correspondingly, Beatson mentions that the amount of frontier commuters residing in Denmark and employed in Germany consists of nearly 1,000 and in reverse order 1,500 persons with residence in Germany and employment in Denmark (1989). As can be seen, there exist some uncertainty according to the number of cross-border commuters.

16 By comparing the extent of commuting to and from the northern German area with a corresponding Danish area. (This means for instance that the surrounding area to Flensburg is compared to the surrounding area to Aalborg). Then the frontier commuting is at a minimum compared to the amount of commuters to be expected. Also, it is possible to calculate the expected outcommuting from Aabenraa to Germany by comparing the cross-border commuting with the outcommuting from Aabenraa over the council border to Kolding. This has, however, not been done yet.

extra administrative expenses, which are a consequence of the above mentioned.

Seen from a private economic perspective, the advantage of frontier commuting exists to families in which one of the spouses is employed in one country while the other partner is employed in another country since the family still has the possibility of possessing a common residence.<sup>17</sup> To bilingual families, the advantage is that they can each keep their job in their own country with the national cultural ways of working, which exist in their relative workplaces and still have a common residence. Frontier commuting is thus desirable seen from a private economic point of view, too. Speaking about disadvantages, that frontier commuters often have to use more time on administration in relation to enquiries from public authorities compared to non-frontier commuters.

### **3. The Tax System**

#### **3.1 *General International Tax Rules***

##### **3.1.1 The Global Principle**

According to international OECD guidelines, the global principle is applied, which causes that the residing country has the right to taxation of all the incomes, which the person has. Moreover, the employing country has the right to tax the earning of the person within the other taxes. The argument to this division is that the ability to pay taxes from the concerned person depends on this person's total income including the concerned person's personal and familiar conditions. The chosen operational method starts with considering the residence of the concerned person as being the centre of the person's quality of life. In other words, it is applied that the residing country has the superior right of taxation. In addition, it is from a starting point the residing country, which has the

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<sup>17</sup> The Council Directive 68/360 has the purpose of trying to remove the restrictions on movement and dwelling within the EU countries both to the EU citizens and their families.

necessary information's for the purpose of calculating the taxpayer's total ability to pay taxes with consideration for this person's personal and familiar conditions.

Generally spoken, frontier commuters are thus liable to pay taxes in both states, but in practice the concerned frontier commuter is totally liable to pay taxes in the residing country and restrictedly liable to pay taxes in the employing country.

Unlimited liability of taxes is defined as the situation in which this person's total annual income notwithstanding the character (income due to trades and industries, income from employment, interests, proceeds, etc.) and regardless of whether the income comes from or does not come from the residing country.

Limited liability of taxes means that only some well-defined types of income get taxed. For instance, it has to be mentioned that the employing country only taxes incomes from employment earned within the employing country.

The wage earner must reside in a country, stay in another country for at least six months before the concerned person is completely liable to pay taxes within the employing country for which reason the following only is of interest to people, who have been frontier commuters for at least six months.

Denmark and Germany have entered into an agreement about double taxation in which it is mentioned that the taxes collected by a frontier commuter's residing country are going to be reduced with the taxes which have been collected within the employing country. The regulations in the Danish-German double taxation are essentially in conformity with the regulations within the OECD model agreement.

Within the double taxation field, the member countries have entered into a convention which gives the possibility of an arbitrate solution. This convention has come into force on the 1<sup>st</sup> of January 1995 according to the departmental order no. 1023 from the 13<sup>th</sup> of December 1994.

### 3.1.2 Exemption and Credit Methods

The taxes are calculated from the employee's total income incl. the foreign wage and allowance. Henceforth, the taxes are reduced after the rules in the double taxation agreement with the employing country.

The following methods<sup>18</sup> in order to reduce the taxes are:

- Total credit
- Ordinary credit
- Matching credit
- Total exemption
- Exemption with progression

The fundamental difference between both methods in relation to rescind double taxation is that the exemption methods are based on the various types of income while the credit methods employ taxes as a way of allowance.

When the credit methods are employed, the residing country calculates taxes on the basis of the taxpayer's total income regardless of where this income has been earned. The taxes, which have been paid in the employing country, are subsequently conceived as an allowance. The result of employing this method is that taxes are always paid after having been calculated according to the highest of both countries' rate of taxation. The tax payment to the employing country must be substantiated towards the Inland Revenue department of the residing country. By total credit the taxpayer has by calculating his tax to the residing country a possibility of deducting the total amount, which this same person has been paying in the employing country. By ordinary credit an allowance can be achieved that is limited to the part of the taxes paid in the residing country that is proportionally reduced according to the income taxed in the employing country. This means that the maximum amount, which can be deducted, is what the

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18 Please, look at Customs Duties and Taxation: Taxes and Duties, no. 2–96, pp. 11–13 and pp. 114–118.

taxpayer should have paid, if this income had been earned and should have been taxed in the residing country.

The matching credit method implies that the taxes are reduced with the amount that the employing country could have collected. This method is only interesting when the foreign taxation of the payment is calculated after special easy terms.

When the exemption methods are used, then the residing country does not tax the income, which has been earned in the employing country. In that case, the relinquish of taxation takes place without consideration of whether and to what extent taxation takes place in the employing country.

By total exemption the residing country does not tax the income at all which has been earned and taxed within the employing country.

By the exemption with progression method the income earned in the employing country forms part of the earnings from which the rate of taxation is calculated, thus the progression within the taxation system is maintained. The taxed part of the income is not taxed in the residing country.

Subsequently, each country must decide which taxation method the country wants to apply. Moreover, each country has its own right to decide whether it taxes some types of income using a particular method, while other types of income can be taxed using other methods in order to remove double taxation.

The far most applied taxation method in Germany is the exemption method and in Denmark it is the credit method. The purpose of applying the different methods is to favour the frontier commuters as much as possible. After several applications to the public authorities, it will often be possible to apply the method in Denmark, which is the most convenient for the single frontier commuter.

## **3.2 The German Tax System**

The German tax system is characterised by having six different tax classes. The single employee is placed within this system considering whether he is married or single and how many children he has got. The main rule is that single wage earners are taxed in a harsher way than married ones. For every child to whom the concerned wage earner has a duty of maintenance he gets a wage earner allowance. In other words, single persons without children are placed in the more burdensome tax class compared to married persons with children. The following six tax classes exist within the German tax system:

Single wage earners.

- I: Unmarried wage earners with children.
- II: Married wage earners whose spouse earns far less than the concerned wage earner.
- III: Married wage earners whose spouse earns nearly the same as the wage earner himself.
- IV: Married wage earners whose spouse forms part of class III.
- V: Wage earners with wages from several employers. The wage from the wage earner's primary employer is taxed with a rate from one of the other groups, and the wage from the resting employers is taxed with a rate that is applied here.

Until the 11<sup>th</sup> of October 1995 the frontier commuters with residence in Germany have been placed within the relatively expensive tax class, (class I). To frontier commuters with children this fact has meant that the persons concerned have been obliged to pay more taxes than equivalent wage earners with residence in Germany.

The wage tax itself is mainly constituted of below 20 per cent of the gross income of a single wage earner without children. On the contrary, the statutory expenditures to health, unemployment and pension insurance were often amounted to more than 50 per cent of the total taxation and duty burden. The

ecclesiastical taxes are amounted to between 8 and 9 per cent. The expenditures to these compulsory contributions are solely determined from the wage earner's gross income without considering any spouse or children.

All wage earners have a tax-free minimum allowance and standard allowances due to transport expenses including extra expenses related to maintenance of family members under education or nursing, which are granted under assessment. In addition, individual allowances can be granted, if the wage earner has substantial expenses that exceed these standard expenses. Moreover, the ecclesiastical taxes can be subtracted from the total income tax.

Frontier commuters do not pay ecclesiastical taxes.

### **3.3 *The Danish Tax System***

Within the following examination of the Danish tax system only the rules that differ considerably from the German tax system and the rules that are most relevant to frontier commuters will be brought into focus.

Contrary to the German tax system, the wage earners in Denmark are equally taxed regardless of whether they have a spouse and/or children.

In Denmark, a division of the taxes in the following categories is made: Minimum tax, medium tax, maximum tax, income tax, county council district tax, local tax and ecclesiastical tax.

Frontier commuters do not pay county council district tax and local tax, but on the contrary a total local tax, which is equivalent to the average percentage rate of total Danish county council district taxes as well as local taxes. In 1994, the average county and local taxes were at a level of 29 per cent.

The labour market contribution or the often mentioned "gross tax" is not a general A-income tax, but on the contrary an extra duty in order to finance partially the Danish labour market and social policy. Moreover, an obligatory addi-

tion depending on the income is being paid: Additional Pension Scheme of the Labour Market (Arbejdsmarkedets Tillægs Pension (ATP)).

Frontier commuters also pay the labour market contribution.

Generally, an ordinary personal allowance exists, and all the other allowance options are individually determined.

Wage earners residing in Denmark have the possibility of subtracting expenses related to the daily transport, if the distance from the home to the workplace exceeds 24 kms. The transport allowance<sup>19</sup> is at the time 0 DKK when the distance referred to is between 0 and 24 kms, 1.25 DKK per km between 25 kms and 100 kms. When the transport distance exceeds 100 kms the transport allowance is 0.625 DKK. The transport allowance is given regardless of whether the transport has taken place by car, train, bus, ferry,<sup>20</sup> aeroplane, etc. Moreover, allowances due to trade union expenses, unemployment fund expenses, contributions to charity, private pension schemes including investment expenses due to consumption and estate loans do exist.

Frontier commuters, on the contrary, do not have the possibility of subtracting expenses to the national unemployment fund.

On the contrary, married frontier commuters with residences in Germany have the possibility of subtracting a specific standard amount, the frontier commuter amount or section 9 F–allowance. This amount is at this moment 29,300 DKK.

Frontier commuters who earn the main part of their income in Denmark (here defined as minimum 90 per cent of the taxable income) have the possibility of submitting an estimate of future income. The employer himself has to inform within the income tax return about the wage the person concerned has earned

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19 Please, look at Skatten 98.

20 If part of the transport is by ferry then the employee has the possibility of subtracting substantial expenses for the ferry calculated according to the lowest ticket price. The transport distance of the ferry is not included within the statement of the distance between residence and workplace.



working for a foreign employer, even though this person is not obliged to pay the A-tax to Denmark when taxes are paid in advance to the employing country. The employer is thus to be registered within the tax system of the employing country by the local Financial County Council, which issues an income tax card that has to be delivered to the employer. After this the taxes are withheld by the employer at the payment of wages on the basis of the income tax card for which reason the employee himself does not have to inform the authorities about the wage the person concerned is earning.

### **3.4 Summary of the Present Taxation concerning Frontier Commuting**

The residing country of a frontier commuter formally has the right to tax the total income of the person concerned regardless of the employing country. In addition, the employing country has the right to tax the frontier commuter's wage when this is merely earned within the country concerned. A foreign wage will thus not be taxed both here and abroad, but wages including different rises such as holiday remuneration, free transport, residence, telephone, etc. which are achieved abroad have to be included in the calculation when the Danish income has to be summed up. The foreign wage has consequently in the following to be calculated according to Danish rules, and if the wage has been paid in a foreign exchange, it has to be converted into DKK according to the exchange movement at the moment of acquisition. Reduction can be given, if it is proved that the purchasing power of the earned wage is considerably inferior to the amount converted into DKK.

It is applied that frontier commuters between Denmark and Germany pay taxes of their wages in the country in which they earn them, while the social authorities are kept in the residing country. Thus, it is possible to consider of where it is most convenient to reside. From the state's point of view there is no greater loss of yield according to the authorities, as frontier commuters travel both ways. People are although of the opinion that a non-symmetrical distribution as regards the flow of money from the publish authorities to the frontier commuters. The frontier commuters residing in Denmark are formally taxed of the

types of income that have been earned in Germany, and at the same time the person concerned gets an allowance related to the taxes which have been paid in the employing country.

On the contrary, the EU countries are not automatically obliged to allow admission of persons into their social security system, if these persons in advance are compulsory members of assurances in other member states. The cause of this situation is that harmonisation of the national social security rules do not exist at present.

## **4. Other Labour Market conditions to Frontier Commuters**

### **4.1 Social Security**

When you have to estimate where it is worthwhile taking residence, it is apart from the fiscal conditions also relevant to estimate the extent of the social expenses.<sup>21</sup> To a Danish employee, it will normally be convenient to avoid paying contributions according to the German social legislation, since this is remarkably more expensive than the Danish one. Depending on the wage earner's income, the German social expenses may amount to nearly 20,000 DEM yearly from which the employer and the employee each pay half the amount.

The employee is usually covered by the legislation on social security within the employing country. Some rules of exception are though valid, thus the em-

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21 As regards social pension schemes, look at the article "Supplementary Social Security Schemes". This article has the purpose to examine problems as regards pensions to frontier commuters. One of the problems is that application of exceeded rights of pension from the employer in one country to another either is not possible or when it is possible then the transfer is imposed a considerable source-deducted tax. The payments from persons residing in an EU country to a pension fund in another EU country will not always be entitled to allowances. In spite of article 51 (Measures concerning Social Security to Itinerant Employees) regulations within pension schemes have not been established. Generally it is applied that pension schemes to frontier commuters have not been the object of the EU legislation yet, for which reason a further harmonisation within the pension scheme area (Lutjens, 1993, pp. 164–169) is necessary.

employee has the possibility of being within the Danish Social Security. This is effective when the employee is delegated and paid by a Danish employee. That means that when the establishment within the employing country is a 100 per cent Danish owned subsidiary company, then the employee has the right to be covered by the legislation on social security. In order to be covered by the Danish Social Security you have to substantiate it using the form E 101 DK, which has to be certified by the Ministry of Social Affairs. Situations in which the Danish Social Security does not cover the employee can be avoided when the employee with the help from the Ministry of Social Affairs applies for it. The Ministry of Social Affairs has the possibility of entering into an agreement with the qualified authority as previously arranged, in which it is confirmed that the person concerned is covered by the Danish Social Security. For instance when it comes to a Danish employee, then he has the possibility of being employed in Germany by a German employer for three years and constantly be covered by the Danish social legislation.<sup>22</sup>

## **4.2 The Unemployment Fund**

In Denmark, it is voluntary whether the employees want to be assured in one of the State's approved unemployment insurances. Often it is the trade unions that administrate the unemployment insurances (though with the exception of the unemployment fund to self-employed persons and the academics' unemployment fund). Members of the unemployment insurances will receive the unemployment benefit in case of unemployment (total or partial unemployment).

In Germany employees are covered by the social legislation and the employees pay compulsory unemployment insurance at the same time as they pay income tax. Frontier commuters with residence in Germany and employment in Denmark will in a situation with full-time unemployment be able to receive unemployment benefit from the German unemployment insurance and by partial unemployment receive unemployment benefit from the Danish unemployment insurance, if the frontier commuter has been employed a whole year within the last 78 weeks. A similar system exists in Denmark.

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<sup>22</sup> Thomsen, 1993, pp. 2–4.

Frontier commuters residing in Germany, who pay the compulsory labour market contribution in Denmark, expose themselves to discrimination in relation to Danish residents since the first named can only make use of the parental leave, but has no access to the other Danish leave schemes such as the education leave and the sabbatical leave. Danish wage earners residing south of the border cannot get the leave in Denmark unless the Danish employer contributes to compensation, if any, of the missing wage. The 40–50 frontier commuters who are employed by the county of Southern Jutland have the possibility to obtain leave payments. The council up to an amount of 169,000 DKK has introduced this because of a specific case in which a nursing auxiliary residing south of the border wanted to have the education leave and instead obtained a compensation of the missing wage.

### **4.3 *The Sickness Benefit System***

In Denmark all persons have the right to get benefits when they become ill, which also applies to the frontier commuters, who are employed in Denmark for over 15 hours. All frontier commuters apart from family members have a claim to receive a National Health Service medical card, which gives the right to free treatment or subsidy in Denmark. When the spouse is assured in Germany, the German sick-benefit association must fund the medical treatment of the family. In Germany all wage earners with a yearly income below 68,400 DEM are under an obligation to effect a sickness insurance.

In Germany the financing of the sick-benefit associations takes place by paying a compulsory contribution which amounts to 14–16 per cent of the part of the gross income that is below 68,400 DEM. Contrary to the Danish system the frontier commuter's membership of a German sick-benefit association leads to the right of the family of the person concerned to receive social security benefits by treatment of diseases.

While the amount of sick-benefits in Denmark comes to 90 per cent of the gross income, the same amount in Germany comes to 80 per cent of the gross income.

In both Germany and Denmark there is a maximum amount when it comes to receiving sick-benefit.

In Denmark pregnant women (including female frontier commuters) have the right to receive sick-benefit. Women have the possibility of being on maternity leave four weeks before and twenty-six weeks after the birth. In Germany women (including female frontier commuters) have the right to maternity benefit (Mutterschaftsgeld) six weeks before and eight weeks after giving birth. They also receive besides maternity benefit wage (Mutterschaftsgeld) from the employer that means that she altogether receives an income, which corresponds to the average wage from the past twelve weeks. These benefits: maternity benefit (Mutterschaftsgeldzuschuss) and sick benefit (Krankenkassenzuschuss) are paid by the German employer and are paid out as net sums not subordinated to German taxation. These amounts are subsequently liable to taxation in Denmark compared to the findings of the High Court of taxation.<sup>23</sup>

## **5. Selected Cases of Importance to Frontier Commuters within the EU**

### **5.1 The Roland Schumacker Case**

#### **5.1.1 About the Roland Schumacker Case**

On the 14<sup>th</sup> of February 1995 the European Court delivered a prejudicial judgement<sup>24</sup> in favour of the Belgian citizen Roland Schumackers regarding "the limited taxable" and "the unlimited taxable" treatment of frontier commuters within the EU. In this case the attention is principally focused on the Treaty's article 48. The superior question in this case is: *Which importance for the national regulations as regards income tax has the community principle*

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23 Findings of the High Court of taxation dated the 12<sup>th</sup> of June 1997, 66-1222-120, pp.560-561.

24 Judgement of the 14<sup>th</sup> of February 1995, case C-279/93. Collection I page 225-267. Regional country (Finansamt ) Köln-Altstadt versus Roland Schumacker.

*about people's free movement such as implemented in the EEC Treaty's article 48?*

The regional county (Finansamt) Köln-Alstadt is plaintiff while the Belgian citizen Roland Schumacker is the defendant.

**The background of the case** is that Roland Schumacker resides in Belgium with his wife and their children and receives his total salary from Germany during the period from May 1988 to December 1989. He has been employed in Belgium first, but in the period from the 15<sup>th</sup> of May 1988 to the 31<sup>th</sup> of December 1989 he has only been employed in Germany. On the contrary, his wife is unemployed and has received unemployment benefit in Belgium in 1988 without earning any income the following years. The income of the Schumacker family has from 1989 consisted only of Roland Schumacker's wage. According to the double taxation agreement between Belgium and Germany from the 11<sup>th</sup> of April 1967, Germany has the right of taxation, since Germany is the employing country, thus Schumacker's employer has withheld the taxation at the source from his income as follows from tax class I.<sup>25</sup> Thus he has had a lot of trouble utilising the same possibilities of allowance as his colleagues with residence in Germany that he considers unfair.

**The case:** The Federal Republic of Germany and Belgium have concluded an agreement concerning double taxation, which is based on the OECD model. According to the German law about income tax (Einkommensteuergesetz (EStG)) people without any kind of residence in Germany are liable to pay taxes in a limited way, which means that people are taxed of their total income earned in Germany by the German authorities. This implies that people are placed within the unfavourable tax class I (tax class for unmarried German citizens without children and for inhabitant not residing in Germany regardless their familiar situation) and that some allowances (for instance expenses to professional education) and some reductions, especially regarding familiar conditions (for instance in consequence of the number of maintained children) are not valid to these. To people residing in Germany with the same familiar situation

as Schumacker will be placed in the far more favourable tax class III with possibilities of allowance and tax reductions especially due to their familiar situation. If Schumacker resided in Germany, he then would have been able to derive advantage from the Splitting scale (on which tax class III is based) which means that the spouse's income is added and fictitiously divided with 50 per cent of the income to each of the spouses whereupon each of the spouses' income is equally taxed.

**The course of the case** started by Schumacker called attention to the taxation authorities that he did not have the same possibilities of allowance as his colleagues residing in Germany. Schumacker complained to the regional country (Finanzamt) and with the judgement from the 22<sup>nd</sup> of June 1989, the regional country (Finanzamt) refused to calculate the income tax of Schumacker according to the principles in tax class III. The the court of the regional country (Finanzgericht) agreed with him and imposed the regional country (Finanzamt) to calculate Schumacker's 1988 tax once more and also to calculate and to fix the 1989 income tax according to tax class III. The case moved from the federal tax authorities (Bundesfinanzhof) to the EU Court in which the federal tax authorities (Bundesfinanzhof) made 4 prejudicial questions about limited or non-limited liability of taxation as regards taxation of wage earnings of people with or without residence in the employing country.

**The argument** from the German tax authorities is that the category of individuals, who are restrictedly liable to pay taxes so far as concerns people with residence in the employing country that are taxed of their total global incomes, which is due to the fact that the residing country has far the best and easiest way to get information's about personal and familiar conditions of people and allowance in consequence of the duty to maintain their own families. People with residence in another country than the employing country are restrictedly liable to pay taxes in such a way that they are taxed on an objective basis without considering their personal and familiar situations. The personal occupation of the taxpayer is only taken into consideration in the residing country where the taxation concerns all his income, including personal allowances and special facili-

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25 Please, look at paragraph 3.2 about the German Tax System.

ties (including the splitting scale) seeing that he does not get them several times. The different arrangements that residing and non-residing people within the employing country are affected by makes it possible to avoid double favours after which the German authorities refer to the OECD model convention to avoid double taxation, in which a contracting country is obliged to allow people with residence in another contracting country the familiar and personal taxable favours which it allows to people who reside in the employing country. In other words, there is no discrimination between the unrestricted and the restricted liability to pay taxes, because they are not in comparable situations, but there is a different way of handling different situations. On the contrary, Schumacker argued that a citizen in a member country has the right to free movement, as article 48 allows him in order to work in another member country. People who only have earnings in the employing country are discriminated in such a way in relation to people who have a residence in the employing country that they both in a specific way find themselves in the same situation seen from a taxable point of view. Furthermore, the Commission has carried out the recommendation 94/79/EEC about taxation of certain incomes earned in another member country than the residing country:

*The free movement of people can be obstacles by regulatives concerning income taxation of physical persons that causes that non-residing people are imposed a greater level of taxation that residing people in a similar situation.*

The first mentioned might not be refused.

*The tax benefits and allowances that are applied to residing people so far the major part of the incomes are earned in the country into which the activity is followed.*

The major part of the incomes is defined by the Commission defined as at least 74 per cent of the income earned in the country concerned. The German and Dutch regulations have imposed this limit to a level of 90 per cent.



**The Court expresses** and makes use of article 48 of the Treaty in order to stick to the fact that a citizen from another country than the employing country in relation to collecting direct taxes can not be less propitiously treated than a citizen in the member country who is in the same situation. In addition according to the article 48 of the Treaty, people with residence in another country than the employing country are prevented from being harder taxed than an employee residing within the employing country when the persons earn totally or nearly totally their full income in the employing country in such a way that personal and familiar conditions must be considered.

### **5.1.2 The Outcome of the Schumacker Case**

Because of this verdict the Danish taxation minister has put forward a proposal on the 11<sup>th</sup> of October 1995 about an amendment to the P.A.Y.E. law regarding frontier commuters. On the 8<sup>th</sup> of December 1995, the Danish Parliament (Folketinget) adopted the proposal. The proposal applies people, who have worked their way up to at least 75 per cent of their total income in Denmark. These frontier commuters are now getting allowances as follows:

- Payments to private deferred annuity assurances and to unemployment funds.
- Investment expenses and founding commissions related to private debt.
- Alimonies to divorced spouses.
- Investment expenses related to own residence. When both spouses own the residence a half investment allowance is granted to the frontier commuter in such a way that he will be able to utilise his total allowance.
- On the contrary the net annual value is taxed according to Danish rules.
- Furthermore the pedestrian frontier commuter allowance has been repeated. Whether it is most convenient to the frontier commuter to keep the pedestrian frontier commuter allowance or to make use of the new possibilities of allowance is an individual matter. From a practical point of view frontier commuters' expenses entitled to be deducted have to surmount 30,000 DKK yearly, before they get a better financial position according to the new rules.

In the same way the Schumacker case has affected decisions in Germany. Here it has been adopted that frontier commuters with residence in Denmark and who earn at least 90 per cent of their income in Germany have the same right as German citizens to deduct as follows:

- Allowance related to spouse also when the family resides in Denmark. In practice, this means that the frontier commuters concerned are placed in a far propitious tax class than in the case before the verdict and the following altered legislation.
- Expenses to divorce spouses.

In the following, attention will be put on the most favourable conditions/rules applying for frontier commuters as regards settling both before and after the Schumacker–case. (Here, focus is only put on taxable conditions without looking at housing conditions and other social conditions).

Before the Schumacker case solitary people with residence in Denmark and employment in Germany were taxed far more gently than solitary people with residence in Germany and employment in Denmark.

To a family with children with one spouse as a frontier commuter it was worthwhile to settle down in Denmark while one of the spouses commuted to Germany. The reason for this was that families with residence in Denmark had the possibility to transfer any negative capital income to the one of the spouses who had employment in Denmark.

After the Schumacker case solitary people residing in Germany and with employment in Denmark are taxed far more gently than solitary people with residence in Denmark and employment in Germany.

A family with children in which one of the spouses is a frontier commuter is taxed nearly equally without consideration of whether the commuting process takes place from Denmark to Germany or vice versa.

The new tax regulations signify that frontier commuters now in general have the possibility to adopt the same allowances as persons who are total liable to pay taxes in Denmark and in Germany.

In general terms it is applied that frontier commuting families with high incomes as well as younger families that are establishing themselves by buying a residence are going to get somewhere with help from the altered rules that are a consequence of the Schumacker case.

Where it is most convenient to stay depends as well on how own property, if any, will be financed. Financing of real estates in Germany is a lot different from the generally accepted way in Denmark, as a larger part of the financing of real estates consists of a major part of own capital in Germany than in Denmark. This is among other things due to Denmark having possibilities of deducting investment expenses in connection with a purchase of a real estate. In addition, prices on real estates in Germany are in general considerably higher than in Denmark.

## **5.2 *Great Duchy of Luxembourg Case***

### **5.2.1 *About the Luxembourg Case***

The European Court passed a sentence<sup>26</sup> on the 26<sup>th</sup> of October 1995 in which it was maintained that the Great Duchy of Luxembourg has set the obligations aside which are incumbent on the Great Duchy of Luxembourg according to the EC Treaty article 48, subsection 2 about the Free Movement within the Community and in article 7, subsection 2 within the statutory instrument of the Council (EØF) no. 1612/68 from the 15<sup>th</sup> of October 1968 about the Free Movement of Labour Force within the Community.

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26 Judgement of the 26<sup>th</sup> of October 1995, case C 151/94, collection I, pp. 3685-3708: The Commission of the European Community versus the Great Duchy of Luxembourg.

The Commission of the EC is plaintiff while the Great Duchy of Luxembourg is the defendant.

**The background of the case** goes as far back to the Biehl case which is about refundment of overpaid tax in a member country by a citizen who has had employment in Luxembourg a part of the year. This overpaid tax has been devolved on Luxembourg and the tax can neither be demanded paid back nor regulated within the taxation of the next year. The Luxembourg case is about Luxembourg not having changed the rules as requested by the Commission neither during nor after the Biehl case but has maintained the regulation about citizens in a member country who have had paid employment in the area of the Great Duchy of Luxembourg can not demand to get an eventually overpaid tax paid back. Furthermore, the matter in question is about the way in which an overpaid tax from people that do not fulfil criteria is eventually paid back, which is done according to an "estimation of reasonableness" and not according to stipulated rules.

In order to estimate **the case** it is necessary to know how taxes in Luxembourg<sup>27</sup> are calculated, which is done as follows:

- 1) The income from Luxembourg and abroad of the person liable to pay taxes is added.
- 2) The tax level is found on account of the total income of the person liable to pay taxes according to relevant tables.
- 3) The actual tax in Luxembourg which has to be paid can now be calculated with point of reference in the tax level found from point 2). An adjustment of the tax that must be paid in Luxembourg takes place in such a way that it corresponds to the part of the wage earner's total income that has been earned in Luxembourg.
- 4) The tax in Luxembourg that must be paid is compared with the tax that by the wage earner's employer is held back as P.A.Y.E. tax with reference to determine whether a refundment of any overpaid tax must take place. As a consequence Luxembourg does not in practice tax non-foreign earned in-

come, unless the taxpayer has a residence within the country, though consideration is being shown for it by determination of the tax level that according to the progressive system must be used at incomes earned in Luxembourg.

Furthermore, it is applied to the residents that if the taxpayer's income mainly consists of incomes below a stipulated level and the P.A.Y.E. tax is currently paid through the employer, then they are not obliged to present an income tax return. In this case the tax authorities, the employers and/or the pension funds are going to estimate the tax conditions.<sup>28</sup>

If the single (foreign residing) employee has been overpaying taxes, then certain persons have the possibility to request the refundment of overpaid taxes according to the tax legislation in Luxembourg (loi concernant l'impôt sur le revenu or LIR) article 145, subsection 1:

*Only persons who are liable to pay taxes and during a whole tax year have had a taxable settlement or usual residence within the Great Duchy of Luxembourg as well as taxpayers that do not fulfil this condition but that have been engaged as employees for at least nine months of the tax year and have been employed continuously within the mentioned period, have the possibility to demand a regulation of the taxation of the income from employment.*

If the persons concerned do not reside in Luxembourg then these persons will have the possibility to, as far as they in time find out in time that they have been overpaying taxes, apply for refundment of the overpaid tax.

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27 In Luxembourg the tax is calculated by using the exemption method with progression.

28 Hereby there is also an indirect discrimination of frontier commuters in particular since their pension funds, employers and tax authorities do not have sufficient knowledge with reference to frontier commuter's personal and familiar conditions.

Referring to the last mentioned situation as regards any refundment of overpaid tax, the following "Estimation of reasonableness" is applied according to the law of tax control (Abgavenordning or AO) clause 131, subsection 1:

*"The Finance minister has in particular cases (included when there are particular cases as for instance by unfavourable weather conditions or other exceptional circumstances) the possibility totally or partially to remit taxes as far as the collection would be unfair considering the existing circumstances or to decide that already paid taxes should be paid back or credited the taxpayer".*

The development of the estimation of reasonableness has taken place as a part of the administrative practice of the tax-managing director. The problem of the above mentioned estimation of reasonableness is that the single employee can not certainly know whether he will get any overpaid tax back among these how the rules are going to be, if the present or future tax managing director changes his practice.

Among **arguments** within the case the government of Luxembourg mentions about the application of the law of refundment of overpaid tax that it may be necessary to deny refundment of overpaid tax in order to ensure the progressively within the tax system of Luxembourg for which reason any refundment requires a permanent residence in Luxembourg.

The Commission on the other hand is of the opinion that it is not adequate that itinerant employees have the possibility of asking for refundment of taxes according to an estimation of reasonableness since this is not enough to ensure the protection of the rights that are imputed to the labour force as far as regards the Treaty according to the article 48. According to the general rules it is applied that the rights of the citizens with reference to the legislation of the Community must clearly appear from **binding legal provisions** regardless of these rights being consequences of directives or as in this case of immediately workable provisions within the Treaty. Moreover it is applied that when the legislation in a member state is incompatible with the legislation of the Community, the

member country must make an alteration in such a way that the legislation is compatible with the legislation of the Community. How the consequences of the legislation must be implemented is a decision of the member countries as far as directives are concerned.

**The course of the case** is as mentioned above based on the Biehl case by which the council of Luxembourg (Conseil d'État of Luxembourg) submitted a prejudicial question to the Court with reference to take a stand on the law about income tax (loi concernant l'impôt sur le revenu or LIR) article 154, subsection 6:

*"Tax, which is contained within the wage, cannot be exacted to be paid back when the withhold has taken place towards wage earners that are only liable to pay taxes in a part of the year either because they settle down abroad or because they leave the country in course of the year"*.

Is comparable with the legislation of the Community, the Commission started the case against Luxembourg. The Commission sent a letter to the Great Duchy of Luxembourg on the 27<sup>th</sup> of November 1989 in which the Commission informed that the article 145 and 154, subsection 6 from the law about income tax (loi concernant l'impôt sur le revenu or LIR) were contrary to article 48, subsection 2 from the Treaty and article 7 subsection 2 from the statutory instrument. This happened before the Court delivered the judgement in the Biehl case in which the Court established that the the law about income tax (loi concernant l'impôt sur le revenu or LIR) article 154, subsection 6 is contrary to article 48, subsection 2 from the Treaty, and subsequently the Commission sent the letter on the 4<sup>th</sup> of February 1992 referring to the judgement in the Biehl case. On the 12<sup>th</sup> of May 1992 the government of Luxembourg reacted to the letter and sent a response to the Commission without satisfying the Commission. This resulted in the Commission taking legal proceedings on the 3<sup>rd</sup> June 1994 against the Great Duchy of Luxembourg.

In both cases **the Court has expressed** and made reference to article 48, subsection 2 from the Treaty including article 7 from the statutory instrument no. 1612/68 dated 15<sup>th</sup> of October 1968. Moreover the Court refers to the fact that

citizens in a member country are supposed to benefit from the same tax advantages as employees from the own country. Should this not be the case, a concealed discrimination is taking place. Whether it be about clear discrimination (for instance different payments between the national population and the other EU nationalities) or concealed (for instance by differences within the taxation methods between the national population and the other EU nationalities) discrimination is prohibited with reference to the practice of the Court for which reason the Great Duchy of Luxembourg will lose this case.

### **5.3 The Calle Grenzshop Andresen GmbH & Co. KG Case**

#### **5.3.1 About the Calle Grenzshop Andresen GmbH & Co. KG Case**

The European Court delivered judgement on the 16<sup>th</sup> of February 1995 in a case,<sup>29</sup> in which it is established that employees at Calle Grenzshop Andresen GmbH & Co. KG are covered by the article 14, subsection 2, litra b), no. i) in the statutory instrument no. 1408/71 by which health insurance frontier commuters are covered.

The company Calle with residence in Germany is plaintiff while the ordinary health insurance in the region of Schleswig-Flensburg (Allgemeine Ortskrankenkasse (AOK) für den Kreis Schleswig-Flensburg) is the defendant.

**The background of the case** is that Calle Grenzshop has a shop from which business is carried out selling provisions, alcohol, and gift articles. The shop itself is a member of a chain of shops in the German/Danish frontier region. In the firm mainly Danish employees with residence in Denmark are employed. Calle Grenzshop notified none of the Danish employees to the German insurance companies.

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29 Judgement from the 16<sup>th</sup> of February 1995, case C-425/93, Coll. I, pp. 269–300. Calle Grenzshop Andresen GmbH & Co. KG versus the ordinary health insurance in the region of Schleswig-Flensburg (Allgemeine Ortskrankenkasse (AOK) für den Kreis Schleswig-Flensburg).



One of the employees, Boerge Wandahl, has been employed at Calle Grenzshop since 1979 as a salesman and later on from 1981 as a business manager. The job as a business manager he executes in Germany and moreover he works ten hours weekly in Denmark. The job in Denmark consists as well of elaborating the policy of the firm within the headquarter of the company, as of performing co-ordinating and controlling procedures. The employee concerned is thus a frontier commuter from Denmark to Germany and at the same time delegated from the German firm to Denmark several times a week.

Thus, the case is about whether the plaintiff is obliged to pay a contribution to the German social insurance to his own employees. The subscription to Boerge Wandahl is of an amount of 74,627.33 DEM for the period the 1<sup>st</sup> April 1982 to the 31<sup>st</sup> August 1987 that the ordinary health insurance in the region of Schleswig-Flensburg exacts from Calle Grenzshop. Since Calle Grenzshop has drawn up an E 101 scheme from the Danish Ministry of Social Affairs from which it is evident that Boerge Wandahl since the 1<sup>st</sup> January 1985 has met the requirements in order to be covered by the Danish health insurance programme, Calle Grenzshop is of the opinion that it is not obliged to pay the amount mentioned above.<sup>30</sup>

**The course of the case** started on the 21<sup>st</sup> December 1987, in which the ordinary health insurance in the region of Schleswig-Flensburg (Allgemeine Ortskrankenkasse (AOK) für den Kreis Schleswig-Flensburg) laid down the claim that Calle Grenzshop should pay 74,627.33 DEM as a social insurance subscription to Boerge Wandahl for the period the 1<sup>st</sup> April 1982 to the 31<sup>st</sup> August 1987. Calle Grenzshop objected to this settlement since Calle Grenzshop referred to article 14, subsection 2, litra b), no. i) in the statutory instrument no. 1408/71. By settlement of the claim on the 17<sup>th</sup> of August 1990, the ordinary health insurance in the region of Schleswig-Flensburg (Allgemeine Ortskrankenkasse (AOK) für den Kreis Schleswig-Flensburg) protested against the ob-

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30 Thus it is applied as the prevailing rule that employees within the Community have to be covered by one and just one health insurance programme and therefore just in a single member country. The object to this is that any future problems with payments from different health insurance programmes can be avoided since, there will only be one single health insurance programme.

jection put forward by Calle Grenzshop. Subsequently, Calle Grenzshop took legal proceedings against the social security appeal board in Schleswig (Sozialgericht Schleswig), but by judgement of the social security appeal board (Sozialgericht) from the 4<sup>th</sup> of December 1992 Calle Grenzshop was informed according to article 14, subsection 2, litra b), no. i) in the statutory instrument no. 1408/71 that he should be covered by the German social insurance programme. Subsequently, on the 9<sup>th</sup> of February 1993 Calle Grenzshop appealed the judgement delivered by the social security appeal board (Sozialgericht) to the federal social security appeal board (Schleswig-Holsteinisches Landessozialgericht). At this moment Calle Grenzshop put forward an E 101 scheme drawn up by the Danish Ministry of Social Affairs on the 27<sup>th</sup> of January 1993 by which it is told that Boerge Wandahl since the 1<sup>st</sup> January 1985 has fulfilled the conditions in order to be covered by the Danish health insurance programme. The federal social security appeal board in Schleswig-Holstein (Schleswig-Holsteinisches Landessozialgericht) postponed the case and expected a response from the EC Court, as they asked the Court to take a stand on the relevant prejudicial questions with relation to this case.

Both parts make use of **arguments related to the case** article 14, subsection 1. Article 14, subsection 1, litra a) and litra b) has the object of examining the conditions of people, who normally have been employed earning wages in the region of two or several member states. Where litra a) is applied to persons, who belong to the driving, sailing, or flying personnel in certain transport companies, litra b) is applied to persons that do not belong to the conditions described under litra a).

The ordinary health insurance in the region of Schleswig-Flensburg (Allgemeine Ortskrankenkasse (AOK) für den Kreis Schleswig-Flensburg) uses the argument that Boerge Wandahl can not come within article 14, subsection 1, litra a) in the statutory instrument no. 1408/71:

*”A person that in the region of a member state is employed earning wages from a firm to which he normally is attached and that is delegated to a region belonging to another member state by this company in order to per-*

*form a job paid by this company is continuously covered by the legislation in the first mentioned member state presupposing that the duration of this employment is not expected to surmount a year<sup>31</sup> and that he is not delegated in order to relieve another person whose period of stationing has expired”.*

Since Boerge Wandahl’s period of stationing elapses in a period of more than one year for which reason this provision cannot be used in this connection. On the contrary, Calle Grenzshop makes use of the argument that since Boerge Wandahl also has been an employee in Denmark then he must get insurance in Denmark. At this point Calle Grenzshop refers to: Article 14, subsection 1, litra b):

*”Other persons than the persons treated beneath litra a) are covered:*

- i) by the legislation in the member country, in which area the concerned person is residing under the condition that he performs part of his work in this area or provided that he is employed in several companies or by several employers that have their homes or residences within the areas of several member states.*
- ii) by the legislation in the member country in which area the company or the employer that employs the concerned person has his home or his residence providing that he is not residing in one of the member states from which he perform his work.*

**The Court** stated that Boerge Wandahl is covered by the article 14, subsection 2, litra b) no. i) in the statutory instrument no. 1408/71 for which reason Calle Grenzshop wins the case. In other words, it is applied that persons with a residence in another member country and with employment in a company with an employing location in another member country and who at the same time regu-

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31 This period of delegation that is limited to a period of twelve months may be extended with reference to litra b) from the article and with the consent from the authorities providing that the duration of the work which must be performed on account of unpredictable circumstances may be longer than supposed.

larly for several hours a week are employed in the residing country are covered by the social- and health insurance of the residing country.

## **6. Conclusion**

In this article different factors, which are relevant to frontier commuters have been analysed. Legally seen, a free labour market has existed in decades within the EU countries, more precisely since the Rome Treaty from 1957, at which time the free movement of labour was introduced. In relation to the commuting that could be expected between Denmark and Germany, this commuting is rather limited. Since there on the whole is an equal amount of commuters from Denmark to Germany and vice versa, it is estimated that the welfare related reasons are not the most important causes to the limited extent of frontier commuting. On the contrary the limited extent of frontier commuting may be caused on account of language problems and cultural barriers between the countries. Nethertheless, problems arise by being a frontier commuter between Denmark and Germany, and these problems are mainly caused on account of problems related to tax regulations and social insurances.

As well Denmark as Germany have entered into an agreement about double taxation that essentially follows the guidelines from OECD about the global principle in which it is applied that the residing country has the right to tax all the incomes that the persons earn regardless of the place of employment. In the residing country the tax is calculated and at the same time the employee pays tax of his wage in the employing country. How the tax is calculated within the residing country depends on the chosen taxation formula.

Following taxation methods are used: The exemption and the credit method including variants from these including different combinations of the methods mentioned. Both methods are distinct one from another in the way that the method of exemption takes its starting point in the incomes whereas the use of the credit method brings the tax paid in the employing country into focus. In Denmark the credit method is applied, in Germany the exemption method. The

choice of the methods mentioned has taken place considering the most favourable position of the involved frontier commuters.

The employee is usually covered by the legislation about social insurance within the employing country. Within social insurance the German systems differ from the Danish ones by the German social security systems being based on active employment, while the residence is of an ultimate importance in Denmark. (This is a fact especially regarding the field of pension). In other words frontier commuters residing in Germany pay taxes, unemployment insurance and contributions to the Danish labour market having only the rights and social security benefits that are applied in Germany. This is one of the most essential problems that exist to frontier commuters between Denmark and Germany.

One of the most crucial judgements as concerns frontier commuters delivered by the European Court is the Roland Schumacker case. As a result of this case the Danish Parliament (Folketinget) has adapted that frontier commuters must have further possibilities of getting more types of allowance, such as allowance related to investment expenses of own property, allowance related to investment expenses of private dept, etc. In the same way the judgement has occasioned a lower tax to frontier commuters with residence in Denmark with employment in Germany since these subsequently have been placed in lower tax classes within the German tax legislation than before the Schumacker case.

Concerning the Luxembourg case it has been established that everybody, including also frontier commuters, has the right to get any overpaid tax paid back when it has been paid to the employing country.

The Calle Grenzshop case touches social security of the employees. Generally, it is applied that employees that move within the Community have to be assured in one and only one single member country. In this way it is assured that payments from the social security programmes can only come from one country and that will thus not arise any problems estimating from which country any payment must come. When frontier commuters live in Denmark and work both in Denmark and Germany having drawn up an E 101 scheme certified by the

Danish Ministry of Social Affairs, then this frontier commuter will be covered by the Danish social security, for which reason this person and the employer are not obliged to pay contribution to the German social security programme.

Both in the Schumacker and in the Luxembourg cases including the Biehl case itinerant employees must be treated according to article 48 of the Treaty. Moreover, it must be applied that the citizens' rights according to the legislation of the Community must be evident referring to binding provisions. This is applied regardless of whether the rights are a consequence of directives or of immediately applicable provisions within the Treaty. The authorities must make alterations of any legislation, which is not compatible with the legislation of the Community.

In both cases, it is applied that the familiar and personal conditions of the persons concerned do not form part of the calculation of the taxes for which reason the persons are obliged to pay more in taxes. Once more the Court refers to article 48 and points out that persons without residence within the employing country are not obliged to pay a larger amount of taxes than 75 per cent/90 per cent as a consequence of their residence in another country than the employing country.

Even if a lot of cases have been conducted within the European Court, which has done it more than convenient to be a frontier commuter today compared to a few years ago, there are still a lot of problems as regards frontier commuters. In the cases, that have been examined here, the judgements of the Court have in all three cases been favourable to the frontier commuters that point in the direction that the problems to frontier commuters become still fewer. Among still existing problems of a legal character the whole pension field can be mentioned, even though it has not been intended to examine this matter within this dissertation. In a superior aspect we make the conclusion that no concise response can be given referring to where it is most convenient to reside for economic reasons, as it depends a lot on the person concerned or the economic, the residential and sociological conditions of the concerned family.

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