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# Article

## The Design of Covid-19 Recovery Contributions: Taxes or Social Security Contributions?

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*To cover the large financial spending caused by the Covid-19 pandemic, countries worldwide are forced to take substantial fiscal actions. This contribution takes a closer look at the extent to which EU law has an influence (restrictive or otherwise) on the freedom of Member States to opt for (additional) taxes and/or social contributions as a means to finance the (additional) deficits in their social security system. First, a brief numerical overview will be given of the various sources of financing and expenditures of social security in the European Union (II). Subsequently, the question will be addressed to which extent the concept of social security contributions under European Union law interferes with the national definition of taxes (III). The most relevant rulings of the European Court of Justice (CJEU) in this respect will be discussed (IV) followed by a number of final considerations (V).*

**Keywords:** Covid-19 Recovery Contributions, Concept of tax, Social Security Contribution, Wealth Tax, Tax on (Real) Estate, Financing of Social Security, Regulation (EC) No 883/2004, Double Tax Convention, National (Tax) Sovereignty, Annual Tax on Securities Accounts

## 1 Introduction

Worldwide, the Covid-19 pandemic is causing a great deal of human and material damage. The high death toll[1] and the disruption of daily economic and social life force countries to adopt unprecedented measures, not only to tackle the pandemic itself, but also to counter its detrimental economic and social consequences. Globally, the response of fiscal policy has been impressive. Fiscal actions prevented the collapse of national health systems and provided emergency lifelines to households and firms.[2] These actions have also impeded more severe economic contractions and larger job losses.

Combined with an overall decline in tax revenues, fiscal and social security spending have caused a sharp increase in government deficits. According to the International Monetary Fund, average overall deficits as a share of gross domestic product (GDP) in 2020 reached 11,7% for advanced economies, and 5,5% for low-income developing countries. Worldwide, the average public debt reached 97% of GDP in 2020 and is projected to stabilize at around 99% of GDP in 2021. Moreover, the Covid-19 pandemic has also increased preexisting poverty and inequalities in income and wealth.[3]

To meet the extraordinary pandemic-related funding needs and to tackle the rising inequalities, policymakers consider introducing recovery contributions, which are generally targeting income and wealth.[4] While these recovery contributions are mostly intended to be temporary, the pandemic may also provide a momentum to consider more structural reforms of a country's tax and social security system in view of a better redistribution and reduced inequality.[5]

This contribution takes a closer look at to what extent EU law has an influence (restrictive or otherwise) on the freedom of Member States to opt for (additional) taxes and/or social contributions to finance the deficits in their social security system. First, a brief numerical overview will be given of the various sources of financing and expenditures of social security in the European Union (II). Subsequently, we will specifically address the extent to which the concept of social security contributions under European Union law interferes with the national definition of taxes (III). The most relevant rulings of the CJEU in this respect will be discussed (IV), followed by a number of final considerations (V).

The trigger for me to examine this question was the recent introduction in Belgium of an annual tax on securities accounts (Law 17 February 2021[6]). This tax

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1 Globally, as of 16 July 2021, there have been 188.332.972 confirmed cases of COVID-19, including 4.063.453 deaths, reported to WHO. (*see* https://covid19.who.int/ (accessed 16 July 2021)).

2 International Monetary Fund (IMF), *Fiscal Monitor. A Fair Shot*, Washington ix–xi (Apr. 2021).

3 *Ibid.*, at 31.

4 A. Klemm, S. Hebous, G. Michiels & N. Nersesyan, *Covid-19 Recovery Contributions*, IMF, Fiscal Affairs, Special Series on Covid-19 1–4 (16 Apr. 2021). International Monetary Fund (IMF), *supra* n. 2, at 38.

5 Klemm, Hebous, Michiels & Nersesyan, *supra* n. 4. International Monetary Fund (IMF), *supra* n. 2, at 38.

6 Law 17 Feb. 2021 introducing an annual fee on securities accounts, Belgian Official Gazette, 25 Feb. 2021.

is due if, during a reference period, the average value of taxable financial instruments on that account exceeds EUR 1,000,000. Initially, the Belgian government intended to allocate the proceeds of this annual tax exclusively to the financing of the social security system, so that, given the major impact of the health crisis on the financing of social security, '*the tax thus becomes the visible contribution of the most well-off to maintaining the social security that has protected the population of our country in crucial times in terms of health and income*'.[7] In its opinion on the original draft, the Legislation Section of the Belgian Council of State had pointed out that because of this exclusive earmarking for financing social security, the annual tax could possibly qualify as a social security contribution under European law, which could potentially give rise to unintended consequences resulting from the conflict rules of the European Social Security Regulation. Therefore, the Belgian legislator decided to separate this annual levy from the financing of social security. The proceeds of the annual levy now go entirely to the general treasury and are not directly allocated to the financing of social security (see more below sub III).

## 2 The financing of social security in the European Union

There is a wide variety in the mechanisms used by Member States to finance social security. Most systems are financed in a mixed way: partly by social security contributions and partly by taxes. The funding can be obtained through general income taxes or through specific taxes intended to finance a part of social security, such as a share of VAT receipts or levies on services such as insurance.

In 2017, social security expenditure in the EU-27 was predominantly funded by social security contributions (58.3%), i.e., contributions made with the explicit purpose of providing social benefits. These are both employer contributions and contributions from protected persons (individuals and households). In 2017, the share of EU-27 receipts paid by employers' contributions amounted to more than one third of the total social security contributions (36.3%), while the contributions from protected persons amounted to around one fifth of this total (22%).

The second largest source of funding for social security in the EU-27 is general tax revenue (38.2% of total receipts). The last, and smallest, component (3.6%) is made up of other revenues such as income from property, donations, income from lotteries and levies on insurance services.

For 2017, the following groups of countries can be distinguished: in a first group of six EU Member States, general taxes form the largest component of revenue. This is the case for Denmark, Malta, Ireland, Sweden, Cyprus and Finland. In Denmark, the share of taxes was as high as 77.8% of total receipts earmarked for social security. In the other EU-twenty-seven Member States (except Portugal), social security contributions accounted for the largest share of receipts earmarked for social security. In Estonia, the share of social security contributions in total receipts was even more than three quarters (77.0%). The cluster of Member States where social contributions were the largest component can be divided into a group of eleven Member States where employers' contributions (actual or imputed) accounted for at least 65% of all social contributions (Belgium, Czech Republic, Estonia, Spain, France, Italy, Latvia, Lithuania, Poland, Portugal and Slovakia) and a group of ten Member States where employers' contributions accounted for less than 65% of all social contributions (Bulgaria, Germany, Greece, Croatia, Hungary, Luxembourg, the Netherlands, Austria, Romania and Slovenia). Other receipts usually represent a relatively small share of social protection receipts. In 2017, only in the Netherlands and Poland this contributed more than 10% to the total receipts.[8]

Studies have shown that between 2005 and 2016, a trend can be observed in the EU whereby the share of social security contributions in the financing of social security is decreasing versus an increase in the share of tax revenues.[9] It also turned out that in almost all countries, the contribution of the state came (almost) entirely from general tax receipts, and only in four countries did a significant share come from so-called earmarked taxes: 10% in Luxembourg (4% of total social security financing), 21% in Poland (4% of total financing), 26% in Belgium (10% of total financing) and even 65% in France (24% of total financing).[10]

Over the years, an increase in social security *expenditure* could also be observed across the EU. In 2016, it amounted to 28% of GDP on average in the EU. In the period from 2005 to 2016, the expenditure increased by roughly two percentage points.[11] On the expenditure side, three categories of countries are distinguished in the EU: the so-called 'high spenders' (> 28% of GDP), 'medium spenders' (between 21% and 28% of GDP) and 'low spenders' (< 21% of GDP). Belgium, together with the Scandinavian countries, belongs to the first category.

7 Belgian House of Representatives, *Parliamentary Documents* 2020–2021, Doc 55–1708/1, at 33 and 46.

8 Eurostat, Social Protection Statisitics – financing, 3 (4 Nov. 2020), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Social_protection_statistics_-_financing (accessed 16 July 2021).

9 S. Spasova & T. Ward, *Social Protection Expenditure and Its Financing in Europe: A Study of National Policies*, European Commission Directorate General for Employment, Social Affairs and Inclusion, Brussel 12 (2019).

10 *Ibid.*

11 For more details on this evolution, *see ibid.*, at 11 and 39–41.

The countries of Southern Europe generally belong to the second category and the countries of Central and Eastern Europe to the last category.[12]

## 3 The interference of the European definition of social security contribution with the national definition of taxes

Two sets of rules apply to determine in which Member State a person has to pay such contributions or taxes in a cross-border situation: the social security conflict rules in Regulation (EC) No 883/2004 and the referral rules in the double taxation conventions. Therefore, it is essential to determine which set of rules is applicable to a given charge.[13] From the CJEU's case-law we can infer that the contributions themselves also fall under the regulation's scope, more specifically under the conflict rules of Title II, including the principle of levy in the State of employment and the rule that persons to whom the Social Security Regulation apply are subject to the legislation of only one single Member State.[14]

Less clear, though, is how a distinction is to be made between levies and contributions which come under the social security regulation and those that do not. The CJEU has had several opportunities in the past to provide further clarification on this.

A first important opportunity related to the so-called French CSG and CRDS cases. These cases dealt with the levy of the *Contribution Sociale Généralisée* (CSG) ('General Social Contribution')[15] and the *Contribution pour le Remboursement de la Dette Sociale* (CRDS) ('Social Debt Repayment Contribution')[16] on employment income and substitute income.[17] Under French tax law, all natural persons domiciled in France for income tax assessment purposes were liable to pay CSG and CRDS, in particular on their employment income and substitute income. This was also the case even if according to the, at that time, applicable Regulation 1408/71 these persons were not subject to French social security law, for instance because they were working in another Member State. However, the CJEU stated that there is a direct and sufficiently relevant link between the CSG and the CRDS and the legislation governing the branches of social security listed in Article 4 of Regulation 1408/71. Therefore, according to the Court, these levies can be regarded as covered by the regulation.[18]

In this respect, it should be noted that the existence of a direct link between the contribution and the payment is relevant for determining the material scope of double taxation treaties. The last (fifth) sentence of paragraph 3 of the Commentary on Article 2 of the OECD Model Convention (which defines the concept of 'taxes covered') states that '*social security charges, or any other charges paid where there is a direct connection between the levy and the individual benefits to be received, shall not be regarded as taxes on the total amount of wages'.* [19] However, in the area of social security, the criterion of whether or not there is a direct link between the levy and the individual benefit is a matter of debate, because – as explained above (sub II) - many social security systems are financed in a complex way.

According to the CJEU, the decisive criterion for the application of the rules of referral in the EU regulations in the field of social security is that a contribution should be *specifically intended* to finance the social security system of the Member State, regardless of whether it is offset by benefits or not.[20] That specific intention is apparent if the legislation expressly provides that the levies and contributions are collected for a specific branch of social security or if this can be inferred from the purpose of the contributions as indicated by the context of the legislation concerned.

Although the CJEU has already ruled on several occasions whether certain taxes that contribute directly or indirectly to the financing of social security are covered by the rules for determining the applicable legislation of Regulation No 883/2004, certain questions still remain unanswered to date. After all, there is a large variety of

12 *Ibid.,* at 17–32.

13 Note that the material scope of social security regulation as defined in Art. 3 of Regulation 883/2004 is not affected by the question of how the scheme in question is financed. This means that both benefits financed by social security contributions and benefits financed by general budgetary resources (i.e., taxes) fall under the rules of the regulation. (*see also* CJEU26 Feb. 2015, C-623/13, de Ruyter, para. 24 and 26, ECLI:EU:C:2015:123).

14 *See also* CJEU 26 Feb. 2015, C-623/13, de Ruyter, para. 36 and 37, ECLI:EU:C:2015:123.

15 The CSG is a contribution of 7.5% levied on a wide range of incomes, from employment income, over substitute income to income from assets and investments. The proceeds from these are directly allocated to funding the National Family Allowance Fund, the Old-Age Solidarity Fund and the compulsory sickness insurance scheme.

16 The CRDS is a contribution of 0.5 %, likewise levied on a wide range of incomes, and it is intended to help in paying back a very large loan taken out to pay off the debts accumulated by the various social security branches in the past.

17 *See also* B. Peeters & H. Verschueren, *The Impact of European Union Law on the Interaction of Members States', Sovereign Powers in the Policy Fields of Social Protection and Personal Income Tax Benefits*, 5-6 EC Tax Rev. (262), at 270–271 (2016).

18 CJEU 15 Feb. 2000, C-34/98, *Commission v. France*, para. 35, ECLI: EU:C:2000:84 and CJEU 15 Feb. 2000, C-169/98, *Commission v. France*, para. 33, ECLI:EU:C:2000:85, also confirmed by CJEU 26 Feb. 2015, C-623/13, *de Ruyter*, para. 23, ECLI:EU:C:2015:123.

19 *See* a.o. P. Brandstetter, *'Taxes Covered', A Study of Article 2 of the OECD Model Tax Conventions* 280p (Amsterdam, IBFD Publications 2011); K. Van Raad, *The Concept of Tax in the OECD Model*, in *The Concept of Tax* vol. 3, s. l. 259–263 (B. Peeters ed., Eatlp International Tax Series, IBFD 2005); M. Lang, *'Taxes Covered'- What Is a 'Tax' According to Article 2 of the OECD Model?*, in *The Concept of Tax* vol. 3, s. l. 265–277, esp. 268–269 (B. Peeters ed., Eatlp International Tax Series, IBFD 2005).

20 CJEU 15 Feb. 2000, C-34/98, Commission *v.* France, para. 40, ECLI:EU:C:2000:84 and CJEU 15 Feb. 2000, C-169/98, Commission *v.* France, para. 38, ECLI:EU:C:2000:85; CJEU 26 May 2005, C-249/04, Allard, para. 16, ECLI:EU:C:2005:329 and CJEU 26 Feb. 2015, C-623/13, de Ruyter, para. 26, ECLI:EU: C:2015:123.

direct and indirect taxes that is allocated, directly or indirectly, to financing social security.

In the *Piatkowski case*, the CJEU had to rule on a levy by the Netherlands of social security contributions on income in the form of interest paid by a company established in the Netherlands to Piatkowski, a Dutch national resident in Belgium to whom both the Dutch and Belgian social security legislation was applicable under Regulation No 1408/71. According to Article 7 of the Law relating to the financing of social security (Wet Financiering Volksverzekering (WFV)), the basis for calculating the national insurance contributions is the contribution income of the person liable. Under Article 8 WVF, 'contribution income' is defined as the taxable income or the taxable domestic income for the purposes of the Netherlands' Law on Income Tax. The CJEU stated that the rule prohibiting the levy of double contributions applies not only to income from gainful employment and income from self-employment, but extends to *all income*.[21]

This position was also confirmed by the CJEU in the important de Ruyter case.[22] It applied the principles set out in the CSG and CRDS cases to levies that are not imposed on the employment income and substitute income of workers, but on *income from assets* when these levies are allocated *specifically and directly* to the financing of certain branches of social security or to discharge their debts.[23] The absence of a link between the income from a taxable person's assets and the pursuit of a professional activity by this person, is not relevant for the Court. The EU social security coordination rules apply to all persons who make use of their right to freedom of movement, irrespective of the circumstances thereof, and also in case the objective of the movement is not pursuing an economic activity in the host State.[24]

Limiting the application of the provisions of Regulation 883/2004 to the income that migrant persons derive from their employment relationship would lead to disparities in the application of the mandatory rules of conflict in that regulation. It would require residents of a Member State, who are insured under the social security scheme of another Member State to finance in addition, even if only partially, the social security scheme of the Member State of residence. This would give rise to an unequal treatment since all other residents of the latter Member State would only be required to contribute to one social security scheme.[25] The fact that this income from assets is not subject to a levy in the form of social security contributions in the Member State of employment, does not alter this conclusion.[26]

The CJEU subsequently confirmed its position in the *de Ruyter* case, in the *Hoogstad* case[27] and in the *Lobkowicz* case,[28] in both cases analogically applying the same principles to Officials of the European Union, and in the *Jahin* case dealing with natural persons who are members of a social security scheme of a third country.[29]

All these judgments concern levies on 'income' from assets. However, the question arises whether the Court's reasoning should be applied more broadly and, for example, also apply to levies on (the possession of) assets (or on wealth taxes).[30] As indicated above, this question was raised at the introduction of the annual tax on securities accounts in Belgium (Law 17 February 2021). The preliminary draft that the Government had submitted to the Legislation Section of the Council of State contained a Chapter 4 (Articles 20 and 21 of the preliminary draft) according to which the proceeds of the annual tax on securities accounts were allocated in full to the financing of social security.[31] In its opinion, the Legislation Section of the Belgian Council of State paid particular attention to this issue and came to the conclusion that the annual tax as conceived in the preliminary draft qualifies as a social security contribution

[21] CJEU 9 Mar. 2006, C-493/04, *Piatkowski*, para. 30, ECLI:EU:C:2006:167 .

[22] CJEU 26 Feb. 2015, C-623/13, *de Ruyter*, para. 39, ECLI:EU:C:2015:123. Mr de Ruyter is a Dutch national resident in France, but employed by a company in the Netherlands and therefore, in accordance with the conflict rules of the EU social security coordination, subject to the Dutch social security scheme.

[23] CJEU 26 Feb. 2015, C-623/13, *de Ruyter*, paras 10, 28–29, ECLI:EU:C:2015:123 in respect of the years from 1997 to 2004, Mr de Ruyter had declared in France his income from Netherlands sources. That income was made up of his salary, income from investment capital, industrial and commercial profits and income from purchased life annuities paid by two Netherlands insurance companies.

[24] CJEU 26 Feb. 2015, C-623/13, *de Ruyter*, paras 30–34, ECLI:EU:C:2015:123. *See also* CJEU 3 Apr. 2008, C-103/06, *Derouin,* para. 20, ECLI:EU:C:2008:185.

[25] CJEU 26 Feb. 2015, C-623/13, *de Ruyter*, para. 39, ECLI:EU:C:2015:123.

[26] CJEU 26 Feb. 2015, C-623/13, *de Ruyter*, para. 41, ECLI:EU:C:2015:123.

[27] CJEU 26 Oct. 2016, Hoogstad, C-269/15, para. 27–37, ECLI:EU:C:2016:802 regarding deductions made by the Belgian National Pensions Office from a supplementary pension capital paid to Mr Hoogstad, a Dutch national not resident in Belgium, who took up residence in Ireland after completing his professional career in Belgium. The Court concludes that that deduction is contrary to the regulation. According to the Court, the regulation precludes Belgian legislation under which contributions which are directly and to a sufficient extent linked to the laws governing the branches of social security listed in Art. 4 of Regulation No 1408/71, as amended, are subject to deduction from benefits of supplementary pension schemes even when the recipient of those supplementary pensions does not reside in the Member State concerned and is subject, pursuant to Art. 13(2)(f) of that regulation, as amended, to the social legislation of the Member State in which he resides.

[28] CJEU 10 May 2017, Lobkowicz, C-690/15, para. 48, ECLI:EU:C:2017:355, regarding taxes on income from real estate).

[29] CJEU 18 Jan. 2018, C-45/17, Jahin, para. 41, ECLI:EU:C:2018:18, regarding various levies on income from real estate and on a capital gain realized on the transfer of immovable property.

[30] On the relationship between personal income tax and social security contributions, *see* e.g., also recently: J. Tepperová, *Personal Income Tax and Social Security Coordination in Cross-Border Employment – a Case Study of the Czech Republic and Denmark,* 2 Euro. J. Soc. Security 23–41 (2019). However, wealth taxes are not discussed in that contribution.

[31] Belgian House of Representatives, *supra* n. 7, at 27–36.

because of the specific allocation of the proceeds to social security. The Council, expressly referring to the case law of the CJEU, writes:

> *Charges of which the proceeds are directly and specifically intended to finance certain branches of social security or social security as a whole fall within the scope of Regulation (EC) No 883/2004. That seems to be the case for the draft annual tax on securities accounts. The fact that this tax is not connected with the exercise of an economic activity is irrelevant in that regard. Contrary to what the representatives of the Government maintain, it is also irrelevant whether or not the payment of this tax in itself gives rise to a direct and identifiable consideration in the form of benefits. It follows from the conflict rules in Regulation No 883/2004 that a person who is in a cross-border situation, for example because he lives in one Member State and works in another, can be subject only to the legislation of one Member State and that other Member States cannot impose social security obligations on that person, including the payment of social security contributions. The Court of Justice has explicitly applied that principle to taxes on both income from an employment relationship and 'income from property'.*[32]

> *Therefore, it is concluded that the scheme, as it is conceived, cannot be applied to persons who are subject to the social security legislation of another EEA Member State and of Switzerland under Regulation (EC) No 883/2004. This could be remedied by omitting Articles 20 and 21 from the preliminary draft.*[33]

The Belgian government has followed this last suggestion of the Legislation Section. In the final draft submitted to the House of Representatives, chapter 4 on the allocation of the proceeds of the annual tax on securities accounts to social security was no longer included. Although the Explanatory Memorandum does not explicitly refer to this adaptation, it can be deduced that the Government wanted to follow the advice of the Council of State No. 68.240/3 on this point.[34]

## 4 Evaluation

First of all, it should be noted, that in the French cases the CJEU only provided clarity on whether the levies in question fall within the scope of the EU social security coordination regulations. The Court did not really deal with the question as to whether these levies qualified as a social security contribution or as a tax. The Court left that aside. The Court did not re-qualify these levies as a tax according to national law. Nothing prevents that these levies remain a tax under French law and that other relevant rules of national tax law apply. However, the fact that a levy is classified as a tax under national law does not mean that the same levy cannot be regarded as falling within the scope of Regulation 883/2004.[35] Consequently, it cannot be excluded that social security contributions also fall within the scope of double tax treaties. However, in an EU/EEA context, the conflict rules of the European Social Security Regulation prevail over those of the double tax convention applicable between the Member States concerned.[36]

Furthermore, the CJEU also confirmed in the *Derouin* case that it is for the legislature of the Member State concerned to determine the income to be taken into account for the calculation of such social security contributions and to determine their tax base.[37] This means that a Member State is entitled to forgo, unilaterally or in the context of a double tax convention, the inclusion of income earned in another Member State in the calculation of the tax base for such contributions.[38] According to the CJEU, there are indeed no provisions in the social security coordination regulations that require a Member State to do so.[39]

However, in the *de Ruyter* case, the French Government raised the argument that the application of the conflict rules of the EU social security regulations to personal income infringed the competence of the Member States to organize the financing of their social security systems or their competence to levy taxes. The CJEU did not expressly reply to that argument, but Advocate General Sharpston observed that the fact that the national rules at issue concern the financing of social security by taxation does not exclude the application of the Treaty rules on the free movement of workers. As such, it does not affect the freedom of Member States to secure social security funding through fiscal measures. According to the Advocate General:

> *it concerns (rather) the freedom to tax only in so far as the latter affects the income of migrant workers or, more generally, all nationals of one Member State who, in the exercise of one of the fundamental freedoms guaranteed by the Treaties, are subject or have been subject to the social security legislation of one or more Member States.*[40]

Moreover, the Advocate General submitted that the CJEU's reasoning not necessarily means that any tax

32 Note in the opinion: 'CJEU 26 Feb. 2015, C-623/13, de Ruyter, ECLIEUC:2015:123, paras 35 to 42, in particular para. 40. The Opinion of Advocate General E. Sharpston in that case does make an exception for consumption taxes such as VAT and excise duties (*see* paras 47 to 53 of those Opinions), but the draft on the annual securities account tax cannot be regarded as such a consumption tax'.

33 Belgian House of Representatives, *supra* n. 7, at 27–36.

34 *Ibid.*, at 5.

35 CJEU 15 Feb. 2000, C-34/98, Commission *v.* France, para. 34, ECLI:EU:C:2000:84 and CJEU 15 Feb. 2000, C-169/98, Commission *v.* France, para. 32, ECLI:EU:C:2000:85. *See also* CJEU 3 Apr. 2008, C-103/06, Derouin, para. 22, ECLI:EU:C:2008:185 and CJEU 26 Feb. 2015, C-623/13, de Ruyter, para. 24, ECLI:EU:C:2015:123.

36 A. J. M. Jiménez, *Defining the Objective Scope of Income Tax Treaties: The Impact of Other Treaties and EC Law on the Concept of Tax in the OECD Model*', in *The Concept of Tax* vol. 3, s. l. 279–299, esp. 284 (B. Peeters ed., Eatlp International Tax Series, IBFD 2005).

37 CJEU 3 Apr. 2008, C-103/06, Derouin, para. 24–26 ECLI:EU:C:2008:185.

38 Peeters & Verschueren, *supra* n. 17, at 262, 271.

39 CJEU 3 Apr. 2008, C-103/06, *Derouin*, para. 27 ECLI:EU:C:2008:185.

40 Opinion of 21 okober 2014 in C-623/13, *de Ruyter*, paras 45–46. ECLI:EU:C:2014:2307.

which contributes to the financing of social security is regarded as having a direct or sufficiently relevant link with social security legislation. For instance, consumption taxes, unlike income taxes, are levied by a State on purchases of goods and services on its territory, irrespective of the place of residence and the place of employment of the consumer. Consequently, argued the Advocate General, if a person as Mr de Ruyter buys goods and services on French territory, that purchase normally gives rise to the payment of consumption taxes in France only, even if the person is employed (and insured) in another Member State.[41] Thus, charges included in the price of goods and services or levies on financial or other transactions, do not seem to fall under these rules even if they are allocated to financing social security.[42] In her Opinion, the Advocate General explicitly addresses the hypothesis of a consumption tax of which the revenue is wholly or partly but specifically earmarked for the financing of social security. For consumption taxes, she considers that it is highly unlikely that there is a sufficiently direct and relevant connection between that consumption tax and the social security legislation in that Member State, even if that tax is specifically intended to finance social security. She also explicitly mentions VAT and excise duties in that context.[43]

She concludes her reasoning as follows[44]:

> *More generally, unlike charges levied on income, consumption taxes become due (in addition to the net price) because a good or service is purchased. Exempting persons who are insured in, and subject to the social security legislation of Member State A from paying consumption taxes levied by Member State B that are specifically intended to finance its social security scheme would create an incentive to purchase the goods and services in question in Member State B rather than in Member State A. The ensuing competitive disadvantage for the goods and services marketed in Member State A (at least if they are subject there to similar consumption taxes) would be difficult to reconcile with the logic and spirit of the internal market.*

However, the Advocate General does not address the hypothesis of a pure wealth tax or a (subscription) tax such as an annual tax on securities accounts, the proceeds of which are specifically earmarked for the financing of social security. For this type of taxes, it is in my opinion not excluded that they qualify as social security contributions in the light of the conflict rules of the EU regulations on social security. In line with the opinion issued by the Legislation Section of the Belgian Council of State on this matter, as implemented by the Belgian Government, it seems to me that, contrary to what applies to consumption taxes, for such categories of taxes the presence of a direct and sufficiently relevant coherence with social security legislation is more likely and, in the case of a specific allocation to the financing of social security, can qualify as social security contributions.

## 5 Conclusion

Apparently, the Belgian legislator wanted to avoid the application of the conflict rules of the EU social security coordination regulations when voting the annual tax on securities accounts (Law 17 February 2021). In order to achieve this objective, the tax was simply redesigned as a general tax, not earmarked for financing the Belgian social security system. The mere fact that, as a result of this choice, the social security deficit would increase and would have to be covered by general (unearmarked) tax revenues does not change anything. It does indicate how Member States can easily avoid the application of the conflict rules of the EU social security coordination regulations.

Taxes allocated to the general budget of a State and not intended to finance, either directly or indirectly, the social security systems are clearly not covered by the rules on the determination of the applicable legislation of Regulation (EC) No 883/2004. In this case, only the rules of the double taxation conventions apply.

However, this situation may lead to a situation where persons have to contribute to the financing of social security systems in more than one state, which may be problematic from a free movement point of view. The CJEU itself noted in the *de Ruyter* case that the principle of free movement of workers would not be respected if a migrant worker had to finance not only the social security system of the State of employment but, as a resident and taxpayer of another Member State, also the social security system of the Member State of residence, albeit only partially. According to the CJEU, that would result in an unequal treatment, since other residents of the latter Member State would have to contribute only to its own social security system. A similar situation arises when a migrant person has to pay social security contributions in a State where social security is mainly financed by such contributions, and at the same time has to pay general taxes in a State where social security is partly or even mainly financed by general taxes. This person runs the risk of facing a double burden caused by the fact that he has made use of the right to free movement within the EU. After all, general taxes are not specifically intended to finance social security and are only subject to the conflict of tax rules contained in double taxation treaties and not to the conflict of tax rules of EU social security coordination regulations.

Therefor the specific problems – as discussed above – caused by the interaction at the national level of the financing of social security through general taxes and through specific taxes and premiums deserve more attention in EU policy.

[41] Opinion of 21 Oct. 2014 in C-623/13, *de Ruyter*, paras 47–50. ECLI:EU:C:2014:2307.
[42] In the same vein: P. Schoukens & D. Pieters, *The Rules Within Regulation 883/2004 for Determining the Applicable legislation*, Euro. J. Soc. Security 114–115 (2009).
[43] Opinion of 21 Oct. 2014 in C-623/13, de Ruyter, paras 51. ECLI: EU:C:2014:2307.
[44] Opinion of 21 Oct. 2014 in C-623/13, de Ruyter, paras 53. ECLI: EU:C:2014:2307.