

Pan-European pension moves a step nearer

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A recent ruling by the ECJ should prevent member states from discriminating against the pension contributions paid to funds in another EU member state, as **Peter Schonewille** reports

On 30 January 2007 the European Court of Justice ruled that Danish tax rules are against the EC Treaty, insofar as they do not allow tax deductibility of pension contributions paid to foreign funds, while allowing such tax deductibility for contributions paid to domestic funds. In a statement László Kovács, the European Commissioner responsible for Taxation and Customs Union, welcomed the ruling and called it the culmination of almost six years of work by the Commission to create a single market for occupational pensions without tax obstacles.

The Commission started this process with the Pension Taxation Communication of April 2001.

In this communication the Commission examined the case law of the Court of Justice and concluded that the member states cannot discriminate against pension contributions paid to foreign funds. If they apply an EET (contributions exempt, investment results of the fund exempt, benefits taxed) or ETT system in domestic situations they had to extend this to situations where the fund is located in another member state.

It found that under the rules of the EC Treaty there were no justifications for the member states to dissuade foreign pension providers from offering their services on a national market and dissuade individuals from taking out pension insurance with foreign institutions.

After publishing the communication the Commission, in a series of meetings in a council working group, tried to work with the member states to find political solutions for the problems.

However, after one-and-a-half years of discussions, the Danish Presidency concluded that it was impossible to achieve the unanimous agreement necessary for new EU tax law and the talks were ended.

The Commission then opened or continued infringement procedures against the nine member states which were still discriminating against payments to foreign pension funds: Belgium, Denmark, Spain, France, Ireland, Italy, Portugal, Sweden and the UK.

All of them took the Commission's position into account and modified their legislation accordingly, without awaiting a ruling by the Court of Justice, with the exception of Denmark and Sweden.

Denmark is now expected to comply with the ruling. There were reports in the Danish press that the ruling would necessitate a complete overhaul of the Danish pension taxation system. It is not clear what the basis for these reports is.

All other member states with an EET or ETT system, except Sweden, allow the tax deduction of contributions paid to foreign pension funds without major difficulties. Where Denmark would be concerned that it might not get sufficient information from foreign funds it could perhaps find inspiration in the Irish or Dutch laws on pension taxation: they provide that, for non-mobile workers who wish to take out pensions from foreign funds, the foreign funds are obliged to give the same information to the Irish and Dutch tax authorities as Irish or Dutch funds. If they do not comply, they do not get the same tax deduction. Such a solution appears to be equitable. In fact it was mentioned by the Commission in its communication and was supported by Advocate-General Jacobs in his opinion on the Danner case, a ruling on the Finnish pension taxation law.

For non-mobile workers Denmark can probably even maintain its ETT system, with a tax on the investment results of the fund (also called a yield tax), following the same logic: if the foreign fund would not levy the yield tax and pay it to the Danish tax authorities, it would not qualify for exemption of the contributions.

For mobile workers, that is workers who move to Denmark and who wish to remain in the pension fund to which they were contributing before they moved, Denmark cannot require the exchange of information and the payment of the yield tax. But in principle this should not be a problem for the Danish tax authorities. Since mobile workers are supposed to be mobile, they would move on after some years in Denmark.

In so far as Denmark would have agreed source taxation on the pension benefits it should be able to levy such source taxes, even if the pension fund is estab-

lished outside Denmark. Where necessary Denmark could ask the member state where the pension fund is located for assistance in recovering the tax claim on the basis of the recovery directive, a directive which provides that the member states can ask for the help of other member states if they need to recover taxes from non-residents.

In reaction to the ruling by the court on Denmark, Sweden immediately announced that it would also comply with the ruling, with retroactive effect to 2 February 2007, the day of the announcement.

The Commission had referred Sweden to the Court of Justice in December 2006, after it had reacted to the Skandia/Ramstedt ruling of the court on its discriminatory pension taxation rules by eliminating the restriction condemned by the court, but introducing a new restriction.

As a result pension contributions to a pan-European pension fund can now be paid without tax discrimination from all member states, with question marks only remaining for Bulgaria, Cyprus, Romania and Slovakia.

It is interesting to see that almost all member states have EET or ETT. Germany is in the process of changing all its pension systems to EET.

In the context of the implementation of the pension fund directive, Poland

and Hungary claim that they do not have a second pillar. If they were to introduce EET like all the other member states have done, Luxembourg would remain the only exception with its TEE system.

Finally it is worth noting that the court's ruling on Denmark also applies with so many words to life insurance.

In other words, if member states allow tax deductibility of life insurance contributions paid to domestic life insurers, they also have to allow tax deductibility for contributions paid to foreign life insurers.

Six years after the Commission's Pension Taxation Communication the main tax obstacle to pan-European pension funds has been eliminated. It is now up to the market to make use of the new legal environment.

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Types of pension tax system among EU member states

Country	Pension taxation system	Discrimination
Belgium	EET	Abolished on 1/1/2007
Bulgaria	EET	No information
Czech Republic	No second pillar	No
Denmark	ETT	Condemned by the court
Germany	EET/TEE	No
Estonia	EET	Abolished on 1/1/2007
Greece	No second pillar	No
Spain	EET	No
France	EET	No
Italy	ETT	No
Cyprus	EET	No information
Latvia	EET	No
Lithuania	EET	No
Ireland	EET	No
Luxembourg	TEE	No
Hungary	TEE (claims to have no second pillar)	No
Malta	No second pillar	No
Netherlands	EET	No
Austria	EET	No
Poland	TEE (claims to have no second pillar)	No
Portugal	EET	No
Romania	EET	No information
Slovenia	EET	No
Slovakia	EET	No information
Finland	EET	No
Sweden	ETT	Abolished on 2/2/2007
UK	EET	No