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By PwC Deutschland | 29 January 2018

European Court of Justice: Social security payments by EU residents in third countries.

The European Court of Justice (ECJ) decided that the law requiring a French national resident in a third country to make social security contributions on income arising from assets was justifiable.

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Background

Mr Jahin was a French national, who had lived in China since 2003, where he worked and paid into a private social security scheme. Between 2012 and 2014, he was subjected to various social security levies in France on income from real estate and on a capital gain realised on the transfer of immovable property.

In the appeals process the Conseil d'État (Council of State, France) referred the question to the ECJ , of whether Article 63 TFEU (free movement of capital) prohibited a rule, which subjected a French national, who resided in a third country other than an EEA Member State or Switzerland and who paid into a social security scheme in that third country, to social security levies on income from assets located in France, whereas a French national covered by a social security scheme of another Member State would be exempted from such levies following the rule that only the legislation of a single Member State can apply in social security matters.

Free movement of capital

The Court noted that Article 63 (1) TFEU provided for the free movement of capital, firstly, between Member States amongst themselves and, secondly, between Member States and third countries. Accordingly it was clear that the territorial scope of the free movement of capital laid down in Article 63 TFEU also extended to capital movement between Member States and third countries. It was also settled case-law that such movement included investments in property within the territory of a Member State by non-residents. Accordingly, the transfer of immovable property under the circumstances before the Court fell within the concept of 'movement of capital' within the meaning of Article 63 TFEU and should not be subject to restriction.

The legislation under review could be viewed as giving rise to such a restriction on the movement of capital, as it was likely to discourage non-residents from making investments in France or to discourage French residents from investing in other states.

As a consequence the Court considered that the legislation under review constituted a restriction on the free movement of capital between a Member State and a third country, which was, in principle, prohibited by Article 63 TFEU.

Justification

The Court then went on to examine whether the derogation provided by Article 65(1)(a) TFEU could be applied. This rule allows a Member State to apply provisions which may be considered to fall foul of Article 63 where the provision in question distinguishes between taxpayers who are not in the same situation with regard to their place of residence.

According to settled case law, the derogation must be interpreted strictly and it must be established that the difference in treatment applies to situations which are not objectively comparable or that the difference can be justified by overriding reasons in the general interest.

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The question before the Court in this case was therefore whether there is an objective difference in situation, in terms of their residence, between a French national covered by a social security scheme in another Member State and a French national, who is affiliated to a social security scheme in a third country.

Referring to Article 11 of Regulation No 883/2004 on the coordination of social security systems, according to which EU nationals should only be subject to the social security system of a single Member State, the Court noted that this rule had been devised to avoid difficulties arising from the simultaneous or overlapping applications of social security systems when EU nationals move within the EU.

The Court held that there was an objective difference between the situation of an EU national residing in a third country and affiliated to a social security scheme in that third country and, the situation of an EU national of one Member State affiliated to a social security scheme of another Member State, in so far as that only the latter national, by reason of his movement within the EU, can benefit from the principle that only the social security legislation of a single Member State can apply.

On the other hand there is no objective difference between the situation of a national of a Member State who is resident and affiliated to a social security scheme in a third country, and that of a national who resides in his own Member State and who is affiliated to a social security scheme there, since neither have made use of the freedom of movement within the EU and cannot, therefore, rely on the principle that only the social security legislation of a single Member State can apply.

Thus according to the Court, the difference between an EU national moving to a third state and one moving within the EU, provided a justification to the legislation under review. In this regard the Court noted that any other interpretation would mean that an EU national residing in a third country would be given protection under the regulation, although that regulation only applies to EU nationals who are subject to security in more than one Member State. Moreover, as the EU treaty did not extend the free movement of workers to persons who migrate to third countries, it was important that the interpretation of Article 63 (1) TFEU for the free movement of capital as it applies to third countries did not enable persons to benefit from the freedom of movement for workers although they were in fact outside its territorial scope.

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Keywords

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