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NEWSLETTER N°13

Pensions - Transfer of national
pension rights – Art. 11 Annex VIII SR

Transfer of national pension
rights: a deduction from
the updated, actually
transferred capital is not
always allowed

Case C-132/18 P, Commission / Tuerck, of
15 May 2019

Case T-728/16, Tuerck / Commission, of 5
December 2017



Staff Matters

Legal News from Union Syndicale

This newsletter focuses on the calculation of transferred pension rights from the national pension scheme to the European Union pension scheme. The General Court had decided that the Commission was not allowed to always deduct from the updated capital actually transferred, an interest at 3.1%¹ per year in respect of the period between the date on which the application for transfer was made and the date of the actual transfer. When the national scheme has supplied the value of the pension rights as at the date of registration of the application, the calculation of years of pensionable service under the Staff Regulations must be made on the basis of the full amount. The Court of Justice confirmed that decision by dismissing an appeal of the Commission against the Court's ruling.

Please continue to send us your suggestions for topics to address, or your questions and comments, at StaffMatters@unionsyndicale.eu.

¹2.9% since 1 January 2019.

Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.



Facts of the case

In May 2010, the applicant applied for a transfer to the Union pension scheme of pension rights which she had acquired prior to entering the service of the Union. About three years later, the PMO (Office for the Administration and Payment of Individual Entitlements) approved the application as validly made and forwarded it to Deutsche Rentenversicherung Bund (a German federal pension insurance body; 'the DRV'). Another two years later, the DRV responded indicating that the transferable capital representing the pension rights previously acquired by the applicant amounted, as at the date of the application for a transfer, May 2010, to EUR 141 652.07.

For the purpose of determining the pensionable years to be credited to the applicant for the transfer of her pension rights, the PMO deducted from the sum of EUR 146 714.33 actually transferred by the DRV an interest rate of 3.1% per year in respect of the period between the date of the application for a transfer and the date of the actual transfer. On this basis, it calculated and deducted a capital appreciation of EUR 20 666.28 between those dates. Thus, the amount of the pension rights taken into account for determining the pensionable years to be credited was reduced to EUR 126 048.05. In her action against that decision the applicant claimed a breach of Article 7(1) of the General Implementing Provisions (GIP), and of Article 11(2) of Annex VIII of the Staff Regulations (SR).

Court Decision

The Court draws from Art. 11(2) of Annex VIII SR and Art. 7(1) of the GIP that decisions crediting pensionable years are based on the amount of transferable capital, after deduction, where applicable, of an amount representing capital appreciation between the date of the application for a transfer and the date of the actual transfer. **This simple interest at the rate of 3.1% is deducted from the updated capital actually transferred only where the competent national or international body is unable to supply the value of the pension rights as at the date of registration of the application.** Thus, in a situation where the competent national or international authorities have provided the value of the pension rights as at the date of registration of the application, **no deduction from that amount is allowed** and the calculation of years of pensionable service under the Staff Regulations must therefore be made on the basis of the full amount.

The Court further points out that this operation falls within the sole competence of the authority administering the pension scheme with which the interested person was insured before he entered into the service of the European Union. Further, Member States enjoy broad discretion in adopting their national legislation implementing Art. 11(2) of Annex VIII SR.



The DRV had supplied the PMO with what it regarded as the provisional calculation of the transferable amount as at the date of registration of the application. According to that letter, the transferable amount as at 27 May 2010 was EUR 141 652.07, of which EUR 340.22 was interest. The Court concludes that the DRV did supply the value of the pension rights acquired as at the date of registration of the application. Thus it was possible to distinguish between the amount representing the pension rights acquired by the applicant up to the date of registration of the application for a transfer, on the one hand, and the amount representing appreciation of that capital between the date of the application for a transfer and the date of the actual transfer, on the other.

As regards the calculation of the number of years of pensionable service to be taken into account within the Union pension scheme, which is a separate calculation from that of the capital representing the acquired pension rights, the Court states that there is no obligation to deduct a 3.1% interest from the updated capital actually transferred. The only deduction required by the regulations is that of the amount representing capital appreciation between the date of the application for a transfer and the actual date of transfer of the capital updated to that date.

The Court concludes that the Commission erred in law when making a deduction, from the updated capital actually transferred, of simple interest at 3.1% per year in respect of the period between the date on which the application for transfer was made and the date of the actual transfer, while the DRV supplied the value of the pension rights acquired by the applicant as at the date of registration of her application.

Comments:

1. The various national provisions in the field of pensions are characterised by a great diversity and complexity. Art. 11(2) of Annex VIII to the SR is not intended to harmonise these rules. Also Art. 48 TFEU and Art. 153(4) TFEU show that the right of the Member States to define the fundamental principles of their social security systems is recognised by European Union law.
2. The judgments in Case Tuerck follow the line prepared by the ECJ in Case C-166/12, Časta, of 5 December 2013, in which the Court of Justice recognized that the Member States enjoy broad discretion in adopting their national legislation to implement Art. 11 Annex VIII SR.
3. Due to the variation of rules implementing the provisions for transfer of pension rights from the domestic schemes to the EU scheme, the question always arises whether the EU pension scheme has to apply (or must not apply) the simple interest rate of 3,1% in respect of the period between the date of the application for a transfer and the date of the actual transfer. It is important to remember that a deduction of appreciation by the EU pension scheme only applies where the national pension scheme was unable to supply the value of the pension acquired as at the date of registration of the transfer application.