

Decision in the above case on how the European Commission handled an infringement complaint (CHAP(2020)00014) concerning the taxation of non-residents in France for tax purposes

Decision

Case 2018/2020/NH - **Opened on** 18/12/2020 - **Decision on** 09/07/2021 - **Institution concerned** European Commission (Settled by the institution) |

Dear Sir or Madam,

Thank you for the comments you sent to the European Ombudsman on 10 June 2021 on the above case.

After carefully analysing all the information submitted to us, we have decided to close the case with the following conclusion:

The European Commission has settled the issue raised in your complaint. [1]

The reasoning behind that conclusion will be explained below.

However, I wanted to clarify, first of all, the scope of our inquiry. In your comments, you express your bafflement about the fact that the Ombudsman's inquiry team informed you of its preliminary analysis of the substance of the Commission's reply, while your complaint concerns only the Commission's failure to reply to the exact question in your infringement complaint. Yet, in order to determine whether the Commission has now responded correctly on the exact ground of your complaint, the inquiry team must analyse all the elements, including the substance, of the Commission's reply. At the same time, it is indeed not the role of the Ombudsman to reassess the Commission's interpretation of EU law. As such, the Ombudsman would question the Commission's reply only in case of an indication of a manifest error of assessment.

I understand from your comments that you are still not satisfied with the Commission's reply. In particular, you consider that the Commission has still not answered the main question you put to it, which concerns the existence of discrimination (within the meaning of the *Schumacker* ruling) introduced by Article L 136-6 I a of the French Social Security Code between residents and non-residents. You consider that such discrimination constitutes an infringement of the free



movement of capital (Article 63 and 65 TFEU).

I note that the Commission had already answered the issue of discrimination in an e-mail dated 24 November 2020: ‘ *Thus, the imposition of the same French social security contributions on taxpayers who are in a comparable situation does not constitute discrimination.* ’ In that email, the Commission states that its analysis is based on paragraph 43 of the *Jahin* ruling.

As regards the question of a possible infringement of the free movement of capital, the Commission had already replied to you on 19 December 2020, stating that Article L. 136-6 of the French Social Security Code is not contrary to the principle of free movement of capital: ‘ *Indeed, whether or not they are affiliated to the social security scheme in France has no effect on the equal possibility of access to assets in France and of holding income from real estate there, provided that they pay social security contributions. Therefore, from that point of view, that provision does not prevent the free movement of capital.* ’

I understand that you were not satisfied with this answer, in particular the sentence “ *provided that they pay social security contributions* ”, which you consider to be “silly”. The Commission considers that there is no barrier to the free movement of capital since everyone — residents and non-residents — can acquire assets in France. The condition is that everyone has to pay social contributions. You wonder whether paying these social security contributions without entitlement to social security benefits constitutes discrimination, but the Commission may give its view on this only if a potential discrimination would stem from the application of EU law (e.g. an EU national being obliged to pay social security contributions for an asset in France). The Commission may not take a stance on a difference of treatment as regards social security contributions between two French citizens, one being a resident for tax purposes in France and the other being a resident for tax purposes in a third country. This is a purely French situation. The Commission refers in this regard to the *Jahin* ruling.

You consider that the *Jahin* ruling does not apply to your situation because it shows significant differences as regards the legislation at issue, the subject-matter of the legislation, the nature of the discrimination, the populations affected by that discrimination, and the legal arguments. The Commission considers that the Court’s reasoning in *Jahin* applies *mutatis mutandis* to your specific situation.

I note that the Commission’s reply to our inquiry, dated 7 May 2021, signed by Commissioner Nicolas Schmit, takes up and confirms the above conclusions.

The reason why we decided to open an inquiry into your complaint was that the Commission had not responded precisely to the subject matter of your complaint, and that doubts remained as to whether it had understood the substance of your question. We find that the Commission has now answered your concerns, but that you do not agree with its analysis. However, we find no indication of a manifest error of assessment by the Commission. As a result, we close the inquiry with the conclusion that the Commission has settled the matter complained about.

During your exchanges with the Commission, you expressed your wish to appeal internally



against a decision or reasoning taken by a Head of Unit. You also insist that your complaint should have been dealt with by DG FISMA and not by DG EMPL. However, the Commission's analysis — across all DGs — has now been confirmed at the highest level by a Commissioner, which has led to an increased monitoring of the reply.

I am sorry that the Commission's explanations do not seem to convince you. I hope, however, that the above clarifications are helpful.

Yours sincerely,

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 09/07/2021

[1] Full information on the procedure and rights related to complaints can be found on this link <https://www.ombudsman.europa.eu/fr/document/70707> [Link].