No exemption for in-house lawyers from the duty to contribute to the statutory pension insurance scheme

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On 3 April 2014, the Federal Social Court (*Bundessozialgericht* - BSG) handed down three judgments in which it held that lawyers whose employer is not a law firm, i.e. in-house lawyers, who according to the newspaper "Handelsblatt" after all total about 40,000 in Germany, are not entitled to an exemption from the duty to make contributions to the statutory pension insurance scheme. The decisions of the 5th Senate have attracted a great deal of attention from law societies, lobby groups and employers' representatives. In particular, a degree of uncertainty as to the scope and the implications of the judgments has arisen, not just among lawyers, but also among all of the other professional groups that are organised in professional societies or retirement schemes for professional societies.

We should point out that the following comments are subject to the Federal Social Court's written judgments. According to the information we have from the Court, they are unlikely to be available before the end of June 2014 at the earliest.

Exemption entitlement of lawyers, in particular in-house lawyers

Background

In-house lawyers are lawyers who are not employed by law firms, but who work instead in house as employees, for example, in the legal departments of large companies, and who are thus compulsorily insured in the German state pension insurance scheme pursuant to § 1(1) sentence 1 no. 1 of the Code of Social Law (Book VI). Through their admission to the legal profession, in-house lawyers are, in addition, also compulsory members of the law society that has jurisdiction for them as well as of the relevant retirement scheme for lawyers. If for no other reason than to avoid a double financial burden, they generally have a financial interest in obtaining an exemption from the duty to make contributions to the statutory pension insurance scheme so that they can pay solely into a retirement scheme for lawyers. The reason for this is that the lawyers' retirement schemes unlike the statutory pension insurance schemes are funded schemes (defined contributions plans), and thus offer a different, more attractive sort of old-age benefit. If a lawyer who is not exempt from the duty to make compulsory contributions remains part of Deutsche Rentenversicherung (the German statutory pension insurance scheme) and has, in addition, to pay the minimum contributions to a lawyers' retirement scheme without any employer contribution, he will in all probability receive a lower pension in spite of higher financial expenditures than if he had paid solely into a lawyers' retirement scheme.

Exemption from the duty to contribute to the statutory pension insurance scheme is only available upon application from the lawyer concerned. However, he will only be entitled to an exemption if and to the extent that the requirements of § 6(1) sentence 1 no. 1 of the Code of Social Law (Book VI) are met. This section provides *inter alia*:

"§ 6 Exemption from the duty to contribute to the statutory pension insurance scheme

(1) The following persons are exempt from the duty to contribute to the statutory pension insurance scheme

1. persons […] for an occupation […] in respect of which they are required by law or required by a duty based on statutory provisions to be a member of a public-law

insurance institution or pension institution serving their professional group (retirement scheme for a professional society) and at the same time are by law a member of a professional society…"

To what extent, if at all, the work of in-house lawyers satisfies these statutory requirements has been the subject of controversy in the case law and in legal literature since time immemorial. The core problem in this context is the degree to which the professional group of in-house lawyers match the traditional, and at the same time, dynamic professional profile of a lawyer.

Decisions of the Federal Social Court

After various higher social courts had handed down conflicting judgments, the Federal Social Court categorically rejected an exemption from the compulsory pension insurance duty for in-house lawyers in its judgments of 3 April 2014, thereby ending for the moment a long-running dispute between in-house lawyers and Deutsche Rentenversicherung. All three cases concerned appeals by in-house lawyers against decisions of Deutscher Rentenversicherung Bund rejecting their applications for exemptions (File ref. B 5 RE 3/14 R; B 5 RE 9/14 R; B 5 RE 13/14 R).

The 5th Senate of the Federal Social Court ruled in all three cases that the appellants had no entitlement to an exemption. The Federal Social Court reasoned that in-house lawyers are not "due to their occupation" (cf. § 6(1) sentence 1 no. 1 of the Code of Social Law (Book VI)) compulsory members of the law society or the retirement scheme for lawyers. According to the Court, the fact that they are bound to take instructions from their employers means that they are not practising law in the course of their employment relationship. Regarding the professional profile of a lawyer, the Federal Constitutional Court (*Bundesverfassungsgericht*) has ruled that a person who as an employee or civil servant provides ongoing advice to his employer does not qualify in such capacity as a practising lawyer (Federal Constitutional Court, Order of 4 November 1992 – 1 BvR 79/85, NJW 1993, 317). Thus, in the Federal Constitutional Court's opinion, the role of an in-house lawyer does not conflict with that of a practising lawyer, but nor does it qualify as such. An in-house lawyer is only an organ of the administration of justice in his self-employed, insurance-free role outside his employment relationship ("double profession theory").

The Federal Social Court based its decisions on the wording of the law in § 6(1) sentence 1 no. 1 of the Code of Social Law (Book VI) ("due to their occupation"), which requires that the duty to contribute to the statutory pension insurance scheme and to a retirement scheme for a professional group derive from the one and the same occupation. According to the Court, it is precisely the occupation at issue which must trigger the duty to make insurance contributions to both security schemes. However, since an in-house lawyer is not a practising lawyer, it is precisely not "due" to his occupation that he is a compulsory member of the law society and the lawyers' retirement scheme.

Moreover, the Federal Social Court expressly stated in its reasoning that the "four-criteria theory", developed by Deutsche Rentenversicherung in its legal practice, was not decisive in this context. Thus a review in a specific case as to the degree to which an in-house lawyer provides legal advice, makes legal decisions, drafts legal documents and explains legal requirements in his work as an employee should not be decisive.

In the view of the Federal Social Court, the lack of an exemption also does not lead to disproportionate disadvantages for the lawyers affected. In its opinion, it is true that rejection of an entitlement to exemption results in a certain double burden for in-house lawyers because they are obliged to pay into the statutory pension insurance scheme and also have to pay a minimum amount into the lawyers' retirement scheme; however, this does not amount to unconstitutional discrimination against them.

The effects on existing and new employment relationships with in-house lawyers

The Federal Social Court states explicitly that those in-house lawyers who had already obtained an exemption from the pension insurance provider at the time of the decisions of 3 April 2014 have a legally protected interest in the continued validity of these decisions and thus enjoy legal protection. As a result, the change in the Federal Social Court's interpretation of the law will not initially affect those in-house lawyers who have been issued an exemption notice in relation to their current job.

However, it should be noted that the Federal Social Court's ruling always restricts the exemption granted pursuant to § 6(5) sentence 1 of the Code of Social Law (Book VI) to the "respective" occupation for which it was

specifically issued (BSG, judgment of 31 October 2012 – B 12 R 3/11 R, NJW 2013, 1624). A change of occupation, which can occur not just if the person changes from one employer to another, but even if the work he performs for his current employer changes significantly, will mean that the earlier exemption no longer applies to the new occupation. Consequently, an exemption notice does not by any means provide a complete exemption from the duty to make insurance contributions for any occupation other than the one specifically exercised because the exemption is not tied to the individual but rather to the work performed. Thus if, after 3 April 2014, an in-house lawyer changes jobs or his existing job changes so much as to amount to a "new" occupation, he will initially lose the legal protection afforded to his exemption, and will have to submit a new exemption application for the new occupation. However, his new application will be subject to the new legal regime resulting from the Federal Social Court's decisions of 3 April 2014. This means that if the in-house lawyer's new occupation were again that of an in-house lawyer, he would not be exempt from the duty to make insurance contributions to the statutory pension scheme. This situation is likely to prove to be a mixed blessing for many in-house lawyers who are faced with deciding whether or not to stay with their current employer or whether or not to change the type of work they perform for their current employer because a change would expose them to the risk of losing their existing exemption from the duty to make insurance contributions to the statutory pension scheme in relation to the new employment relationship. However, we should emphasise that not every change to the work performed for the same employer will lead to a "new" occupation. In fact the change must be "significant" so that trivial alternations would not from the outset necessitate a new exemption application. Thus, as is apparent from a case-law report of Deutscher Rentenversicherung Bund on 10 January 2014, if a hospital doctor moves from one ward to another or is promoted from being a ward doctor to a more senior position in the hospital, this will not constitute a significant change in his field of work. If we apply this information to the case of an in-house lawyer, it means in our opinion that a transfer from the legal department to the human resources department of the same company would indeed amount to a "new" occupation. On the other hand, a transfer to another sphere of activity within the legal department would most likely not give rise to a necessity to apply for an exemption.

Naturally, the same is true for those in-house lawyers wishing to take up employment with an employer which is not a law firm if they were not in an employment relationship exempted from the duty to make contributions to the statutory pension insurance scheme on 3 April 2014, and thus had no existing interests subject to legal protection. In the light of the new Federal Social Court rulings, they can expect that their applications for exemption will be rejected.

This assessment is subject to the condition that the Federal Social Court's decisions are able to withstand review by the Federal Constitutional Court when it hears a constitutional complaint against them. There have already been indications from various quarters that such a complaint is planned. The focus during complaint proceedings will be on violations of the right to equal treatment before the law (Article 3(1) of the Basic Law (*Grundgesetz* - GG)) and the decisions' conformity with the fundamental right to freedom of occupation (Article 12(1) of the Basic Law). However, until a possible decision by the Federal Constitutional Court, the Federal Social Court's remains determinative.

Liability risks

Employers need to consider their liability risk as a whole where they enter into a new employment relationship or where an existing employment relationship is significantly changed. Liability risk can arise if the in-house lawyer does not apply for a (new) exemption, contributions are, as a result of this, only transferred to the respective retirement scheme, and the pension insurance provider subsequently classifies the employment as a new and non-exempt relationship which was subject from the start to the duty to make contributions to the statutory pension scheme.

It is true that employers and insured employees normally share the burden of contributions to the statutory pension insurance scheme equally between themselves pursuant to § 168(1) no. 1 of the Code of Social Law (Book IV); however, according to § 28e (1) sentence 1 of the Code of Social Law (Book IV) employers bear sole responsibility to the pension insurance provider for the payment of the contributions to the statutory pension insurance scheme. This means that the employer will generally be liable for the previous period in which no contributions were transferred to the statutory pension insurance scheme in spite of the absence of an exemption from the duty to make contributions. The employer will be obliged to make retrospective payments of the whole amount, i.e. both the employer's share and the employee's share, to the pension

insurance provider for a maximum period of up to five years. This is the case even if the delay in the payment of the contributions is not due to any fault on the part of the employer. The employer is entitled to deduct an amount equal to a maximum of three months' contributions from the employee's monthly salary for non-payment of the contributions so that he may possibly have to pay most of these himself. In such a case he will depend on being able to reach a mutual agreement with the retirement scheme for lawyers to the effect that the contributions erroneously transferred to it are transferred to the pension insurance provider. He does not need the employee's consent in order to do this.

Scope of the decisions

Impact on other employed lawyers

As far as lawyers are concerned, the impact of the decisions of the Federal Social Court are likely to be mainly on lawyers who work as in-house lawyers and who are not employed by a law firm. In the opinion of the Federal Social Court, it is only in this case that there is an irreconcilable tension between the professional profile of a lawyer as an independent organ of the administration of justice on the one hand, and his duty to take instructions in connection with the provision of ongoing legal advice to his respective employer on the other hand, which precludes the classification of his work as that of a practising lawyer.

Subject to what is contained in the written reasons for the judgments, lawyers employed by a law firm, in particular associates at large or medium-sized law offices are, as a rule, unlikely to be affected. In spite of this professional group's duty to follow instructions, which is anyway an essential precondition for the existence of an "occupation" within the meaning of § 6(1) sentence 1 no. 1 of the Code of Social Law (Book VI) and the fact that the section even applies, these employees nonetheless mostly perform the specific "traditional" professional tasks that lawyers usually perform and do so in a largely independent manner. In particular - and this is what is crucial - they are not limited to providing ongoing advice to their employer. Nevertheless, the question remains as to whether and to what extent the Federal Social Court will also comment on this professional group in the written reasons for its judgment.

Impact on other professional groups

A topic that has until now hardly been discussed is whether the Federal Social Court's rejection of an entitlement to an exemption for in-house lawyers will also affect other professional groups which are also organised in professional societies and nation-wide in about 80 retirement schemes. These are mainly employed members of "traditional" liberal professions which are organised in societies, i.e. physicians, dentists, veterinarians, pharmacists, architects and tax accountants.

In the case of these professions, the question as to whether an employee is performing specific professional tasks *which themselves trigger* compulsory membership of the professional society and retirement scheme with jurisdiction for him will also arise from time to time.

Members of health care professions are likely to continue to be entitled to an exemption from the duty to contribute to the statutory pension insurance scheme pursuant to § 6(1) sentence 1 no. 1 of the Code of Social Law (Book VI) in any event where an employed physician performs specific medical tasks traditionally performed by medical practitioners (e.g. doctor in a hospital, employed dentist in a dentist's surgery or company doctor). In spite of the fact that they are bound to follow the instructions of their respective employers, these doctors perform the tasks typically performed by members of their profession and work as *doctors*. In their case the duty to make contributions to the statutory pension insurance scheme and to their professional group's retirement scheme is likely to be triggered by the one and the same activity. In addition, the professional profile of the medical professions is not really comparable to the (in particular, traditional) professional profile of the legal profession in a way that would make an employment relationship and the performance of medical tasks specific to doctors mutually exclusive. The profile of the medical professions is characterised by the practice of medicine and does not presuppose that a person is self-employed. Instead, an employed doctor is independent in his actual work (treating patients), and essentially subject to the rules that apply to the art of healing. The same is likely to be true of pharmacists. However, as was the case under the previous case law, no exemption will be available for doctors and pharmacists whose work is in a role not specific to their profession (such as that of a teacher, hospital director or researcher in a pharmaceutical company). Thus, all in all, the decisions of the Federal Social Court are generally unlikely to impact the health care professions.

Nor is it likely that architects will be affected as a professional group. The usual administrative practice is to assume that a person's use of the professional title "architect", "interior designer" or "landscape architect" indicates that he is performing work typical for his profession, and is thus exercising an exemptible occupation because he can only exercise this occupation if he is on the society of architects' list of architects. This applies irrespective of whether he is in an employment relationship. If the architect does not use one of the professional titles mentioned, the presumption does not apply so that it will be necessary in an individual case to ask whether his work is specific to his profession.

As far as tax accountants employed by an organisation are concerned, the proximity of their professional profile to that of lawyers means instead that there is a chance that the courts will adopt the view that "in-house tax accountants" are not tax accountants for the purposes of their employment relationship, and that therefore they are not members of the society of accountants or retirement scheme for accountants "due" to this occupation. It is true that it is currently administrative practice to usually assume that tax accountants who use that professional title are performing work typical for their profession. In light of the Federal Social Court's recent decisions, there is, however, a risk that no entitlement to an exemption will be recognised in the future. This is because it would be possible to argue that the professional profile of a tax accountant cannot be reconciled with the provision of tax advice solely to one employer or the duty to follow instructions which applies in the case of an employer which is not a firm of tax accountants.

Note

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