

[HEALTH – SOCIAL PROTECTION – PENSIONS]

The special tax of 45% that applies to top hat pensions exceeding €304,320 is contrary to the French constitution

(Conseil Constitutionnel 20 novembre 2015, 2015-498 QPC)

The French system of retirement that applies to all employees, whatever their level, is organized within statutory schemes, for which employers and employees contribute to the social security (that pays a so-called base pension) and to additional schemes (so-called Agirc and Arrco schemes). All these statutory systems are pay-as-you-go schemes.

The level of the contributions in these statutory schemes is significant. In the social security scheme the global contribution is more than 15 % of the salary capped at €3,170. An additional contribution is paid in the Agirc and Arrco schemes. For executives, the global cost of this contribution on the higher part of the remuneration is more than 20 %.

However, no contribution is paid on the salary above “Slice C” (above €304,320 in 2015). Therefore some companies have set up additional schemes for senior management (“top hat schemes”), that primarily benefit to those earning more than €304,320, but also some times to those whose remuneration is below this level. In order to qualify for exemption of social charges, these schemes must provide that the pension is paid only for those who achieve their career in the group. Hence top hat schemes are also used to incentivize the executives to stay with the company or the group until their retirement.

Top hat schemes are subject to a number of social security contributions due by the employer and by the employee. Because the hostility of the successive governments for such schemes, which usually benefit only to the top management of the companies, the rate of these contributions has been increasing over the years. Today the tax due by the employer is, on employer option, either 24% of the sums paid to the insurance company, or 48% of part of the book reserve, or 32% of the pension paid to the retiree.

In addition to those, a special contribution, due by the employer, has been imposed effective 2010 for high pensions (pensions exceeding €304,320). This special contribution was originally 30%, and was increased at 45% by the social security law for 2015 (law of December 22, 2014).

The *Conseil Constitutionnel* was asked by the *Conseil d'Etat* (QPC decision of September 11, 2015) to judge whether this tax is conform to the general principle of « equal treatment with respect to tax», because of i) its very high level that the claimants argued was confiscatory and ii) reaching the threshold has excessive consequences.

In the decision of November 20, 2015 the *Conseil Constitutionnel* rejects the argument on the breach of equal treatment because of the confiscatory level of the tax, but accepts it on the grounds of the threshold.

Regarding the level of the tax, the *Conseil* quotes Article 13 of the Declaration of the Rights of Man and Citizen of 1789: "For the maintenance of the public force, and administrative expenses, a common contribution is essential: it must be equally distributed between all citizens, in proportion to their possibilities". It states that this requirement is not met if the tax were confiscatory or posed to a class of taxpayer an excessive burden in view of contribution possibilities. Applying this rule to the 45% tax, it rejects the argument of the claimants, and judges that this additional tax does not impose an excessive burden.

Regarding the threshold, the *Conseil* acknowledges that the effect of the threshold is excessive: the argument of the claimants was that a €303,320 pension, for example, does not give rise to the tax, whereas a €1,000 higher pension entails a 136,944 tax being due.

The law being judged contrary to the Constitution, a new text should be voted.

It is not the first time that issue of the taxation of the top hat schemes is brought to the Constitutional Court, on the grounds of alleged non conformity to the general principle of equal treatment with respect to tax. In 2011 an association of retirees had protested against the creation of a social contribution on their pension (14% on the part above €1,000 per month) and argued that this social contribution was not conform with this general principle. By a decision of October 13, 2011, the *Conseil Constitutionnel* rejected their claim and stated that this contribution is conform to the constitution.

Anne CIRET