Workplace pensions with foreign funds

Lourdes López Cumbre
Professor of Employment Law, Universidad de Cantabria
Academic Council Member, Gómez-Acebo & Pombo

1. Duty to appoint a representative resident in Spain

1.1. Spanish legislation on pension schemes provides that it is incumbent upon pension funds, domiciled in another EU Member State but seeking to provide workplace pension schemes subject to Spanish law (i.e., schemes in which the arranger is the employer and the members the employees), to nominate as its representative either a natural person (individual) with habitual residence in Spain or a legal person (undertaking) with an establishment therein (art. 46 of Royal Legislative Decree 1/2002, of 29 November, approving the consolidated version of the Pension Schemes and Funds Act [hereinafter, PSFA]). Such representative must be authorised to respond to complaints brought by scrutiny committees, members and beneficiaries and to represent the fund before Spanish judicial and administrative authorities, as well as in respect of tax obligations arising from business within the Spanish territory.

Similarly, art. 86 of Royal Legislative Decree 6/2004, of 29 October, approving the consolidated version of the Unified Regulation and Supervision of Private Insurance Act [hereinafter, URSPIA], provides that insurers domiciled in another Member State intending to operate in Spain under the system of free provision of services are also required to nominate a representative for tax obligation purposes referred to therein in respect of business within the Spanish territory. Such representative must comply, on behalf of the insurer, with the obligation to withhold and pay the amounts due on transactions in Spain and to disclose information to the tax authorities in a timely manner.

1.2. The Court of Justice of the European Union [hereinafter, CJEU], in its Judgment of 11 December 2014 (Case C-678/11, European Commission v Kingdom of Spain), questioning the compatibility with EU law of the said provisions under art. 46 PSFA and art. 86 URSPIA (along with others of a tax nature), has just ruled that the aforementioned obligation is contrary to art. 56 of the Treaty on the Functioning of the European Union.

The Commission submitted that this obligation constitutes a restriction on the free provision of services by individuals and companies resident in Member States other than the Kingdom of Spain who wish to provide tax representation services to undertakings or individuals operating in Spain, placing an additional burden on such pension funds and insurers.

Spain, on the other hand, submitted that this obligation is justified by the need for effective tax control and the fight against tax fraud. It also contended that the measures in dispute do not go beyond what is necessary to achieve these objectives of public interest and that, in the case of non-resident taxpayers, the intensity of control and the degree of effectiveness of actions to combat tax fraud is clearly

superior when there is an immediate interlocutor, such as a tax representative. In its opinion, these objectives are not effectively achieved through the mutual assistance of Member State authorities in the form of exchange of information and recovery of claims as regulated, respectively, by Directives 77/799 and 2008/55. Moreover, the obligation to withhold as appropriate is simply a reflection of the obligation to withhold tax on earnings from employment. Hence, although managers of pension funds domiciled in Spain withhold themselves, complexities of calculation make it necessary for pension funds and insurers domiciled in other Member States to designate a tax representative resident in Spain to perform, among other tasks, such withholdings. If there were no obligation to withhold in the case of these non-resident undertakings, the latter would enjoy a financial advantage over undertakings domiciled in Spain, which would run counter to the principle of equal treatment and the proper functioning of the internal market.

2. Obligation contrary to EU law insofar as it infringes the free provision of services

2.1. It is obvious that the contested obligation makes the provision of services by undertakings to persons resident in Spain more difficult and less attractive than the provision of similar services to those same people by undertakings domiciled in Spain not subject to this obligation. Nonetheless, established CJEU case law concludes that domestic measures liable to obstruct or make less attractive the exercise of fundamental freedoms guaranteed by EU law are permissible provided that said measures pursue a public interest objective, are suitable for ensuring attainment thereof and do not go beyond what is necessary for such attainment.

However, according to the CJEU, Spain has failed to demonstrate that compliance with tax disclosure, withholding and payment on account obligations cannot be ensured using less harmful means than the appointment of a tax representative resident in Spain, whilst the Commission believes that such obligations may be undertaken by non-resident pension funds and insurers without being compelled to bear the cost of nominating a tax representative resident in Spain.

2.2. It should be noted that at least one of the above provisions (art. 86 URSPIA) was amended by the Sustainable Economy Act 2/2011 of 4 March, precisely to eliminate not so much the obligation to nominate a representative, as the need for such to be resident in Spain. Therefore, in relation to this legislation - not in respect of pension schemes and funds – the obligations are maintained (appointment of a representative making the appropriate withholding or payment on account and disclosing to the tax authorities transactions carried out in Spain), but the representative is no longer required to be a resident in Spain. Said requirement, however, remains in art. 46 PSFA, providing that representatives in Spain of workplace (workplace only) pension scheme funds of other Member States must be either an individual with habitual residence in Spain or an undertaking with an establishment therein. An aspect this that will have to be amended in response to the analysed pronouncement.