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GMS Flash Alert

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European Union - Dutch Taxation of Pension Capital Referred to European Court

The European Commission (EC) has referred the Netherlands to the European Court of Justice (ECJ) in a matter concerning the taxation of transfers of pension capital by mobile workers.[1] The EC is of the opinion that current Dutch legislation for the transfer of pension capital to another EU member state is a serious obstacle to the free movement of workers under article 45 in the Treaty of the Functioning of the EU (TFEU), the freedom to provide services under article 56 in TFEU, and the freedom of capital under article 63 in TFEU.

WHY THIS MATTERS

If the Court finds that the Dutch tax treatment of transfers of pension capital is in breach of EU law, the Netherlands will need to adjust its national legislation. This would lead to less complicated procedures when an employee wants to transfer pension capital to another EU member state. It would also be reasonable to expect an increase in the number of transfers of pension capital to other EU member states.

Background

The majority of employees in the Netherlands accumulate pension capital while participating in an employer-sponsored pension plan. Employees who start working for a new employer are in principle entitled to transfer their pension capital to the pension administrator of their new employer.

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The Dutch Wage Tax Act 1964[2] states that a transfer of pension capital to the pension administrator within the Netherlands is, in principle, exempt from Dutch withholding tax. If an employee begins working for a new employer in another EU member state, the pension capital transfer is subject to wage withholding tax, unless several conditions are met. The conditions for an exemption from taxes on a transfer of pension capital to another EU member state are set out in the Decree of the Ministry of Finance concerning the international aspects of pensions[3] and include the following:

- After the transfer of pension capital, the pension capital may not be paid out as a lump sum;
- The employment agreement must be signed for a duration of at least five years;
- The employee has to prove that the pension benefit related to the pension capital to be transferred is subject to personal income tax in the employee's country of residence; and
- The employee must prove to the tax authorities that the pension plan of the new employer is common in the member state where the new employer is established.

Steps Taken by the EC

In July 2018, the EC sent a reasoned opinion[4] to the Netherlands for its policy of taxing transfers of pension capital by mobile workers to EU member states which allow pension out-payments by pension funds in other forms than annuities[5]. As this dialogue between the EC and the Netherlands has not resulted in an agreement, the EC has now referred the case to the ECJ.

As the case has only just been referred to the ECJ, it will probably be more than a year (if not more) before the case is resolved.

KPMG NOTE

The current conditions in Dutch law for an exemption from taxes when pension capital is transferred to another EU member state contain a significant amount of administrative burden. If the ECJ removes these conditions, it will be much less complicated for employees to transfer pension capital to another EU member state.

FOOTNOTES:

1 EU Commission infringements for May 2020: https://ec.europa.eu/commission/presscorner/detail/en/INF_20_859.

2 See *Wet op de loonbelasting 1964* (Dutch Wage Tax Act 1964) at: https://wetten.overheid.nl/BWBR0002471/2020-01-01 .

3 Decree of October 9, 2015, nr. DGB2015/7010M (*Staatscourant, Jaargang 2015, Nr. 36798, Gepubliceerd op 27 oktober 2015*). For more background see GMS *Flash Alert* 2015-139 (18 November 2015).

4 EU Commission infringements for July 2018: https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_18_4486 .

5 EU member states that allow pay-outs of pensions as lump sums: Belgium, Czech Republic, Denmark, Greece, Hungary, Ireland, Italy, Luxembourg, Austria, Slovakia, and Spain.

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