PENSIONS TAXATION

ECJ clears way for tax free transfers

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In a landmark decision, the European Court of Justice (ECJ) has ruled against Belgium for taxing transfers of pension capital to pension funds established in other member states, after adopting the pension fund directive (Directive 2003/41/EC), which establishes the possibility to set up pan-European pension funds, should follow by eliminating the tax obstacles to the functioning of the same funds that they brought to light by adopting the directive.

It should be noted that the ruling only has consequences for those member states that currently exempt domestic transfers and tax outbound transfers. Member states that do not allow domestic transfers can continue to tax outbound transfers, provided the rate is the same.

In theory, member states that currently discriminate against outbound transfers by taxing them could repair their infringement by introducing the same tax on domestic transfers. Under EC law they would be free to do so. However, for political reasons, they may not wish to choose this route, as it goes against the interests of employers and employees, and would introduce an obstacle to labour mobility in their national markets.

There may be member states that do allow domestic transfers, tax free or not, but which prohibit outbound transfers. That situation is not covered by this ruling, but it seems likely that the ECJ would rule that such a restriction on outbound transfers, since domestic transfers are allowed, runs against the EC Treaty articles on the freedom of movement of workers and the freedom to provide services. The Commission also claimed that the taxation of outbound transfers was a forbidden restriction of the freedom of movement of workers, self-employed persons, and persons who are not economically active.

The ECJ on 5 July 2007 and agreed with the Commission on all accounts. It needed very few words for its judgment and was probably assisted by the fact that Belgium did not defend itself.

In fact, Belgium had already extended the tax exemption to transfers to pension funds and insurance undertakings established elsewhere in the European Economic Area (EEA) per 1 January 2007. This may have had something to do with the Belgian ambition to be the preferred location for pan-European pension funds. It would be ironic to call for pan-Euro tendon pension funds to come to Belgium while at the same time discriminating against capital transfers to such funds in other E.U. member states.

The ruling therefore has no direct effect on Belgian law. It may, however, be a clear signal to other member states who have similar laws that the time has now come either to amend them to eliminate discrimination or to face a showdown in the ECJ. Logic would have it that member states, after adopting the pension fund directive (Directive 2003/41/EC), which establishes the possibility to set up pan-European pension funds, should follow by eliminating the tax obstacles to the functioning of the same funds that they brought to light by adopting the directive.

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There are no other requests for preliminary rulings on the transfer of pension capital pending with the ECJ, nor has the Commission reported any pending infringement cases at the Directorate General dealing with direct tax infringement matters.

In April 2005 the European Federation for Retirement Provision and PrincewaterhouseCoopers issued a press release saying that they were to undertake a joint EU-wide study of potential infringements concerning the cross-border transfer of pension capital. But the study was never followed up by complaints to the Commission, which investigates every complaint that it receives.

It may be clear that any complaint along the lines of the restrictions described above would have a large chance of resulting in the opening of a formal infringement procedure on the basis of Article 226 of the EC Treaty.

The ECJ has also ruled against Belgium for not granting tax relief for employer and employee pension contributions paid to pension providers in other member states in the same way as pension contributions paid to Belgian providers. This part of the ruling was completely in line with its earlier ruling on Commission vs. Denmark, Case C-150/04 of 30 January 2007, on which this writer reported in the March issue of IPE.

It also covered the cross-border payment of life insurance contributions, which should receive the same tax relief as payments to domestic providers. The ruling confirms that EU law guarantees life insurance companies that they can sell their services without tax discrimination to clients in member states without having an establishment there.

The ruling is important because it is the first ever on tax obstacles to the functioning of European pension funds. It is the first ever on tax obstacles to the functioning of European pension funds. The ruling seems to signal the end of fiscal obstacles to the functioning of European pension funds.

The EU court of Justice has also ruled against Belgium for requiring foreign insurers to appoint a fiscal representative in Belgium before being able to do business in there. Belgium required this representative to assure the payment of the annual tax on insurance contracts. On this point Belgium did defend itself, but the ECJ ruled that the requirement to appoint a fiscal representative was disproportionate for three reasons.

First, Belgium could get any information that it needs to assess tax from other member states’ authorities on the basis of the Mutual Assistance Directive (Directive 77/799/EC). Second, where necessary it could collect the tax from the insured person himself. Third, it could count on the other member states’ authorities to help it collect the tax on the basis of the Recovery Directive (Directive 76/308/EC).

These arguments are generally applicable to each member state that still requires insurance companies to appoint a fiscal representative. The ruling seems to signal the end of fiscal obstacles to the functioning of European pension funds.

IPE ruled that Belgium’s tax law was obstructing the freedom to provide services.

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