

ECJ Preliminary Ruling Request (VAT): *Fiscale Eenheid Achmea* (Case C-640/22) – Rechtbank Gelderland Submits Referral on Whether Pension Fund Can be Classified as Special Investment Fund for VAT Exemption Purposes and Neutrality Principle's Implications

30 January 2023

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On 30 January 2023, a preliminary ruling request lodged on 12 October 2022 was published in the OJEU. By this, the Rechtbank Gelderland (District Court of Gelderland, the Netherlands) made reference to the Court of Justice of the European Union (ECJ) for a preliminary ruling in the case *Fiscale Eenheid Achmea BV v. Inspecteur van de Belastingdienst Amsterdam* (Case C-640/22) on (i) whether unit-holders in a pension fund can be regarded as bearing investment risk; (ii) if it means that the pension fund constitutes a special investment fund for the purposes of the exemption provided by article 135(1)(g) of the [VAT Directive \(2006/112\)](#); and (iii) if neutrality principle requires to assess if the funds are comparable to other funds that are not undertakings for collective investment in transferable securities funds (UCITS) but are regarded by the Member State as special investment funds.

The Rechtbank Gelderland requested the ECJ to answer the following question:

"Must Article 135(1)(g) of the VAT Directive [[VAT Directive \(2006/112\)](#)] be interpreted as meaning that unit-holders in a pension fund such as the one at issue in the main proceedings can be regarded as bearing investment risk, and does this mean that the pension fund constitutes a 'special investment fund' within the meaning of that provision? Is it relevant in that regard:

- whether unit-holders bear an individual investment risk or is it sufficient that unit-holders as a collective – and no one else – bear the consequences of the investment results?
- what the magnitude of the collective or individual risk is?
- to what extent the amount of the pension benefit depends also on other factors, such as the number of years of pension accrual, salary level and the actuarial interest rate?
- that the pension fund has no active accrual from 1 January 2018 and is obliged to proceed with a collective value transfer to an insurer or another pension fund because of the low policy coverage ratio?

Does the principle of tax neutrality require that, for the application of Article 135(1)(g) of the VAT Directive, in the case of funds which are not UCITS, it must be assessed not only whether they are comparable to UCITS but also whether, from the perspective of the average consumer, they are

comparable to other funds that are not UCITS funds but are regarded by the Member State as special investment funds?"

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