Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 14 March 2024[1]

Joined Cases C-639/22 to C-644/22

X (C-639/22),
Stichting BPL Pensioen (C-643/22),
Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf (BPFL) (C-644/22)
v
Inspecteur van de Belastingdienst Utrecht (C-639/22, C-643/22 and C-644/22)
and
Fiscale Eenheid Achmea BV (C-640/22),
Y (C-641/22)
v
Inspecteur van de Belastingdienst Amsterdam (C-640/22 and C-641/22)
and
Stichting Pensioenfonds voor Fysiotherapeuten
v
Inspecteur van de Belastingdienst Maastricht (C-642/22)

(Requests for a preliminary ruling from the Rechtbank Gelderland (District Court, Gelderland, Netherlands))

(Requests for a preliminary ruling – VAT Directive – Exemptions – Management of investment funds – Notion – Comparability to a UCITS – Pension funds – Investment risk of investors)

I. Introduction

1. In multiple requests for a preliminary ruling from the Netherlands the question arises whether and under what conditions certain occupational pension funds can be regarded as special investment funds within the meaning of Article 135(1)(g) of Directive 2006/112/EC on the common system of value added tax ('the VAT Directive').[2] Under that provision, Member States

[1] Original language: German.

[2] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the version applicable to the year at issue (2009); last amended in this respect by Council Directive (EU) 2022/890 of 3 June 2022 amending Directive 2006/112/EC as regards the extension of the application period of the optional reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud and of the Quick Reaction Mechanism against VAT fraud (OJ 2022 L 155, p. 1).

are to define 'special investment funds'. The Netherlands has not yet defined the occupational pension funds at issue as special investment funds and therefore considers that management services provided for them are liable for VAT.

2. The notion of 'special investment fund' to be defined by Member States is superposed to some extent in EU law by the UCITS Directive. Consequently, the Court has in the past addressed the question whether the management of pension funds is exempt from VAT if and because those funds are comparable to a UCITS.[3] There is now an opportunity to refine that case-law.

3. It must also be clarified under what conditions taxable persons may rely directly on the exemption in Article 135(1)(g) of the VAT Directive. In particular, the question arises of the extent to which the principle of neutrality restricts the discretion enjoyed by Member States in defining 'special investment funds'. Specifically, it must be examined whether a VAT exemption granted to certain pension funds (in the third pillar of the national pension system) must also be extended to other pension funds (in the second pillar in this case).

II. Legal framework

A. European Union law

1. The VAT Directive

4. Article 135(1)(g) of the VAT Directive provides:

'1. Member States shall exempt the following transactions:

(g) the management of special investment funds as defined by Member States'.

2. The UCITS Directive

5. Article 1(2) of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ('the UCITS Directive')[4] provides:

'(2) For the purposes of this Directive, and subject to Article 3, UCITS means an undertaking:

(a) with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of capital raised from the public and which operate on the principle of risk-spreading; and

[3] Judgments of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139), and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144).

[4] Directive of the European Parliament and of the Council of 13 July 2009 (OJ 2009 L 302, p. 32) in the version applicable to the year at issue; last amended in this respect by Directive (EU) 2021/2261 of the European Parliament and of the Council of 15 December 2021 amending Directive 2009/65/EC as regards the use of key information documents by management companies of undertakings for collective investment in transferable securities (OJ 2021 L 455, p. 15).

(b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Member States may allow UCITS to consist of several investment compartments.'

B. Netherlands law

6. Article 11(1)(i)(3) of the Wet op de omzetbelasting 1968 (Law on turnover tax 1968) provides:

'1. Subject to conditions to be laid down by public administrative regulation, the following shall be exempt from tax:

(i) the following … services:

3. the management of assets pooled by investment funds and investment companies for the purposes of collective investment.'

III. Facts of the six requests for a preliminary ruling

7. All the requests for a preliminary ruling concern special occupational pension funds. In Cases C-639/22 (X), C-641/22 (Y), C-642/22 (Stichting Pensioenfonds voor Fysiotherapeuten), C-643/22 (Stichting BPL Pensioen) and C-644/22 (Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf – BPFL) they have brought proceedings themselves. They used services provided by non-resident managers, in respect of which they owed VAT as recipients. In Case C-640/22 (Fiscale Eenheid Achmea BV), the applicant, which is resident in the Netherlands, itself provided management services to a pension fund, in respect of which it owed VAT.

8. The occupational pension funds at issue each claim that they are 'special investment funds' within the meaning of Article 135(1)(g) of the VAT Directive. The management services would in that case be exempt from VAT. This is rejected by the Netherlands tax authority with reference to the structure of the Netherlands retirement pension system and the specific organisation of the occupational pension funds at issue.

9. The organisation of the occupational pension funds specifically at issue in the main proceedings is illustrated by Case C-644/22. The applicant in that case is an occupational pension fund for the food sector. Participation in the pension fund for employees is made compulsory by law.

10. The rules of the applicant's pension scheme are based on a pension benefit agreement within the meaning of the Netherlands Law on pensions and provide, inter alia, for a lifelong or time limited retirement pension. The basis for assessment of the pension is the pensionable salary less an annually determined allowance. In this respect, the level of the pension entitlements and benefits depends primarily on the level of employment income and years of service.

11. Pension benefits are financed on a fully funded basis. In addition, certain requirements are laid down in the Netherlands legislation governing the pension fund's policy coverage ratio, that is, the ratio between the available assets of the fund (assets) and the present value of its existing pension obligations (liabilities). Compliance with these requirements is ensured by means of State supervision.

12. Insured employees acquire pension rights which can be adjusted annually on the basis of the consumer price index (indexation). Any increase in pension rights or entitlements (supplement) must be covered by investment returns. In addition, no supplements may be granted if the coverage ratio has fallen below a certain level. In the past a supplement has been granted only in 2009.

13. In an extreme case, the occupational pension fund may also be required to reduce pension entitlements and rights. Due to a low coverage ratio, the applicant submitted a recovery plan along such lines to De Nederlandsche Bank (the central bank of the Netherlands) on 31 December 2020. The recovery plan provides for a 0.85% reduction in accrued pensions as of 31 December 2021.

14. The other requests for a preliminary ruling (C-639/22, C-640/22, C-641/22, C-642/22 and C-643/22) are each based on similar circumstances.

15. In Case C-641/22, the only other special feature was that the employers had guaranteed for the period from 2014 to 2020 an amount of EUR 250 000 000 for the targeted pension accrual.

16. In Case C-640/22, there has no longer been any active accrual of assets in the pension fund at issue since 1 January 2018. In addition, the pension fund was obliged to proceed with a collective value transfer to an insurer or another pension fund because of the low policy coverage ratio.

IV. Preliminary ruling procedure

17. The applicants are challenging the VAT assessment before the Rechtbank Gelderland (District Court, Gelderland, Netherlands), which is the court having jurisdiction. The court stayed the proceedings and referred the following first question in all the cases and a further second question in Case C-644/22 to the Court of Justice for a preliminary ruling under Article 267 TFEU:

1. Must Article 135(1)(g) of the VAT Directive 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?

In Case C-641/22 additionally:

– that the employer has guaranteed for the period 2014 to 2020 up to an amount of [EUR] 250 000 000 in order to achieve the targeted pension accrual?

In Case C-640/22 instead additionally:

– 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?

2. 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?

18. All six requests for a preliminary ruling were joined in accordance with Article 54 of the Rules of Procedure for the purposes of the written or oral procedures, and the judgment.

19. In the proceedings before the Court, the six applicants (X, Y, Stichting BPL Pensioen, Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf, Fiscale Eenheid Achmea BV, Stichting Pensioenfonds voor Fysiotherapeuten), the Kingdom of the Netherlands, the Kingdom of Denmark and the European Commission submitted written observations and took part in the hearing on 5 October 2023.

V. Legal assessment

20. The applicants rely on Article 135(1)(g) of the VAT Directive, under which Member States must exempt from VAT 'the management of special investment funds as defined by Member States'.

21. The first question relates to the notion of 'special investment fund' in so far as it is superposed[5] in EU law (A.). The second question, on the other hand, concerns the power to define 'special investment funds' conferred on Member States by Article 135(1)(g) of the VAT Directive and the restrictions to which they are subject, in doing so, under EU law (B.).

A. The first question

22. The first question seeks to ascertain the characteristics that a pension fund must have, and in particular what investment risk its unit-holders must bear, for it to be regarded as a 'special investment fund' (1.). The question also arises – at least in the alternative – whether the provision is directly applicable to taxable persons (2.).

[5] See, with regard to the predecessor provision in Article 13B(d)(6) of Directive 77/388/EC, which had essentially the same wording as Article 135(1)(g) of the VAT Directive, judgment of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 46).

1. The notion of special investment fund

23. The exemption in Article 135(1)(g) of the VAT Directive pursues the purpose of treating direct investment in securities and investment through a third-party-managed special investment fund equally for VAT purposes. For private investors, investment in a special investment fund is to be no less favourable for VAT purposes than direct investment. [6] In the latter case, there is no management service on which VAT is charged and which reduces investment returns. The aim is thus to ensure VAT neutrality for different forms of investment.

24. According to the wording of Article 135(1)(g) of the VAT Directive, it is for Member States to define the special investment funds which may benefit from the exemption for management services. After the European Union had begun to harmonise supervision of investment funds with the UCITS Directive, however, the Court restricted the Member States' power to define. They were now required to classify assets regulated under the old version of the UCITS Directive as special investment funds. [7] The power to define conferred on Member States by VAT law was thus superposed to some extent by the harmonisation of supervisory law. [8]

25. The occupational pension funds at issue would therefore have to be classified as 'special investment funds' within the meaning of Article 135(1)(g) of the VAT Directive if they constituted UCITS. The parties agree, however, that the occupational pension funds are not UCITS. [9]

26. Furthermore, for reasons of equality of competition, according to the Court's case-law, funds which, without being UCITS, display identical characteristics and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings must also be regarded as special investment funds. [10]

27. It is not entirely clear from previous case-law what specific characteristics these are. In the judgment in *Wheels Common Investment Fund Trustees* ('the judgment in *Wheels*') [11] and in that of *ATP PensionService* ('the judgment in *ATP*'), [12] the Court has already dealt with the classification of pension funds as special investment funds. However, both decisions are founded on the specific features of the cases at issue. They do not therefore answer the question of how the pension funds at issue should be classified in this instance.

28. Consequently, in these cases too, it must be assessed by reference to the criteria laid down in the first sentence of Article 1(2) of the UCITS Directive whether pension funds like those at issue are comparable to UCITS.

6 See, to that effect, judgment of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 34 and the case-law cited).

7 Judgments of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 46), and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 23).

8 Judgment of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 46); see also my Opinions in *Fiscale Eenheid X* (C-595/13, EU:C:2015:327, point 23); *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:125, point 32); and *Abbey National* (C-169/04, EU:C:2005:523, point 38).

9 See, with regard to other occupational pension funds, judgments of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 48), and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 25); the main reason is that the pension funds are open only to employees in the sector, occupational group or undertaking in question.

10 Judgments of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 47), and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 24); see also judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 48 et seq.).

11 Judgment of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144).

12 Judgment of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139).

(a) Raising of capital from the public

29. Under point (a) of the first sentence of Article 1(2) of the UCITS Directive, capital must be raised from the public. The fund must therefore be open to an unlimited number of investors.

30. The pension funds at issue in this case are not open to the public, but only to a limited circle of investors, namely employees in the sector, occupational group or undertaking in question. For this reason, the pension funds cannot be comparable to UCITS prima facie.

31. This is confirmed by the fact that, according to the Court's case-law, only funds which 'are in competition' with UCITS are comparable to them.[13] Such competition can essentially exist only between investment funds which appeal to the same circle of investors.[14] That is not the case with pension funds and UCITS for the reasons stated in point 30. This holds a fortiori where participation in an occupational pension fund is made compulsory by law. In principle, compulsory participation precludes competition for investors.

(b) Investment on the principle of risk-spreading

32. A further essential characteristic of a UCITS is that investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of the UCITS Directive of capital raised must operate on the principle of risk-spreading (point (a) of the first sentence of Article 1(2) of the UCITS Directive).

33. The parties agree that there is such risk diversification. It is for the referring court to verify whether this requirement is actually fulfilled.

(c) Repurchase or redemption obligation

34. Furthermore, point (b) of the first sentence of Article 1(2) of the UCITS Directive provides that units of the UCITS are, at the request of holders, to be repurchased or redeemed, directly or indirectly, out of those undertakings' assets. The tax exemption therefore requires a comparable repurchase or redemption obligation.

35. In this respect too, the pension funds at issue in the main proceedings would not appear to be comparable to a UCITS as an investment instrument since, according to the referring court, redemption is possible only exceptionally. *A fortiori* where participation is compulsory, pension customers do not appear to have a repurchase or redemption right vis-à-vis the pension fund.

(d) Specific State supervision

36. Like UCITS, under Article 12 of the UCITS Directive, the pension funds at issue in the main proceedings in the Netherlands must additionally be subject to specific State supervision.[15]

[13] Judgments of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 37); of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 48); and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 24).

[14] See my Opinion in *Fiscale Eenheid X* (C-595/13, EU:C:2015:327, point 27) and judgment of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 48).

[15] See my Opinion in *Fiscale Eenheid X* (C-595/13, EU:C:2015:327, point 27) and judgment of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 48).

37. The parties agree that this condition is fulfilled by the Netherlands pensions funds at issue. This is also consistent with Directive (EU) 2016/2341 [16] on the activities and supervision of institutions for occupational retirement provision, under which occupational retirement pension schemes must generally be subject to State supervision. [17]

(e) Unit-holders bear the investment risk

38. The last essential characteristic is the existence of an investment risk for investors. The UCITS Directive seeks to ensure effective and uniform protection for unit-holders within the European Union. [18] Such protection is required, however, only if an investment risk exists. [19] The submissions of all the parties focus on this characteristic.

39. Accordingly, in the judgment in *Wheels* the Court had declined to treat the pension fund as equivalent to a UCITS because the pension 'does not depend at all on the value of the scheme's assets and the performance of the investments made by the scheme's managers, but is defined in advance on the basis of length of service with the employer and of the amount of the salary.' [20] It was also a condition in the judgment in *ATP* that the pension customers bear an investment risk. [21]

40. In the present cases, it is a feature of the pension models, on the one hand, that the level of the pension entitlements and rights is based on the amount of the salary and the length of service with the employer. On the other hand, it may depend on investment returns whether there is indexation of entitlements and rights or, conversely, a reduction. The investment returns thus influence the amount of pensions indirectly.

41. It is questionable whether this is a comparable investment risk. In order to make this assessment, the types of pension commitment must be differentiated.

42. If the retirement pension contract provides for a guaranteed pension commitment which depends, in particular, on the length of service and the level of employment income, beneficiaries do not bear a *comparable* investment risk. As the Netherlands has also asserted, it is not sufficient that the level of the pension benefit or entitlement also depends indirectly, to a limited extent, on the investment returns for a comparable investment risk to be accepted. The possible adjustment of the level of the pension (upwards or downwards) is subject to an appropriate coverage ratio in order to guarantee, as far as possible, at least the envisaged pension in the interest of all beneficiaries. Investors in a UCITS, on the other hand, do not receive a minimum guarantee in respect of the repayment of the assets invested by them.

43. If, on the other hand, a pension commitment under the retirement pension contract depends primarily on the performance of the invested capital, beneficiaries cannot count on a guaranteed amount of pension. Rather, they participate directly in fluctuations in the value of their investments. Consequently, as with a UCITS, the investment risk rests with them.

16 Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 37).

17 See my Opinion in *Fiscale Eenheid X* (C-595/13, EU:C:2015:327, point 28), albeit with reference to the predecessor Directive 2003/41/EC.

18 See recital 3 of the UCITS Directive.

19 See also Opinion of Advocate General Cruz Villalón in *ATP PensionService* (C-464/12, EU:C:2013:840, point 64).

20 Judgment of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 27).

21 Judgment of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139, paragraphs 51 and 52).

44. On the basis of this differentiation, the referring court must examine, taking into account all the circumstances of the individual case, whether, on an overall analysis, the retirement pension contracts concluded in the main proceedings primarily contain guaranteed pension commitments or pension commitments dependent on the performance of the invested capital. Regard should be had to the main emphasis of the retirement pension contract in question and thus the relationship between guaranteed and variable pension rights.

45. A guaranteed level of pension can also be achieved in a specific case if, as in Case C-641/22, the employer has guaranteed the targeted pension accrual. Here too, however, it is necessary to make an overall analysis of all the circumstances of the individual case.

46. It is irrelevant, on the other hand, whether, as in Case C-640/22, the pension fund still has active accrual of assets. The only important factor is the terms and conditions of the underlying retirement pension contract and not the actual financial situation of the pension fund.

47. As can be seen from the requests for a preliminary ruling from the court in the Netherlands, the main emphasis of most of the models in the main proceedings would seem to be guaranteed pension commitments. In that case, prospective and current beneficiaries do not bear an investment risk comparable to a UCITS.

(f) Interim conclusion

48. The pension funds at issue in the main proceedings do not constitute UCITS. The comparability of these unit-linked pension insurance funds with a UCITS would also appear to be ruled out, subject to the assessment by the referring court. In particular, the compulsory pension funds at issue are not open to an unlimited number of investors with the result that they are also not in a situation of competition with a UCITS. Furthermore, a redemption obligation, like that for a UCITS, does not appear to exist.

49. As far as the investment risk characteristic is concerned, a differentiation should be made as to whether the pension commitments are primarily guaranteed or dependent on the performance of the invested assets. Only in the latter case do prospective and current beneficiaries bear an investment risk comparable to investors in a UCITS.

50. Member States may also extend the tax exemption to a pension fund like that at issue in the main proceedings. There is, however, no obligation to do so under EU law.

2. In the alternative: direct application of Article 135(1)(g) of the VAT Directive

51. Only in the event that the Court were to conclude that the pension funds at issue in the main proceedings can be classified as special investment funds does the further question arise whether the applicants may rely on the exemption under Article 135(1)(g) of the VAT Directive in so far as national law cannot be interpreted in conformity with EU law.

52. For that purpose, the provisions of the directive must be sufficiently precise and, so far as their subject matter is concerned, unconditional.[22] The provision may not be subject, in its implementation or effects, to the taking of any further measure by the Member States.[23]

53. In this vein, in more recent decisions the Court has rejected the direct applicability of exemptions under Article 132(1) of the VAT Directive where the Member States enjoy discretion in defining the individual characteristics.[24]

54. However, the Court has declared Article 135(1)(g) of the VAT Directive to be directly applicable notwithstanding the Member States' power to define.[25] This can be explained by the fact that the notion of 'special investment fund' is superposed in EU law. The discretion enjoyed by Member States in the context of their power to define is thus reduced 'to zero' in so far as the UCITS Directive harmonises the notion of 'special investment fund'.

55. Direct applicability is ruled out, however, in so far as it lies within the discretion of Member States whether to classify an investment fund as a special investment fund within the meaning of Article 135(1)(g) of the VAT Directive since, without such definition by the Member State, it is not clear from the directive what special investment funds beyond a UCITS are intended to benefit from exemption.

56. In summary, the applicants could therefore rely directly on Article 135(1)(g) of the VAT Directive only in so far as the pension funds at issue in the main proceedings are comparable to a UCITS (and if it is not possible to interpret national law in conformity with EU law).

B. The second question

57. By the second question, the referring court wishes to know whether the principle of fiscal neutrality requires that, for the application of Article 135(1)(g) of the VAT Directive, it must also be examined whether the pension funds at issue in the main proceedings are comparable to other funds which are regarded by the Member State as special investment funds. In essence, the issue is what limits EU law imposes on Member States in the context of the power to define conferred on them and to what extent they must tax similar services equally.

58. This question is relevant, however, only if neither the pension funds at issue nor the funds classified as special investment funds by the Member State are comparable to a UCITS. In addition, the applicants would benefit from comparability only if national law could be interpreted in conformity with EU law. The direct application of the provisions of the VAT Directive is not possible in the context of the power to define conferred on Member States, as was explained in point 55 above.

[22] Judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 26), and of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraph 13 and the case-law cited).

[23] See judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 27), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 49 and the case-law cited).

[24] See, with regard to the notion of cultural services in Article 132(1)(n) of the VAT Directive, judgment of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraphs 14, 16, 23 and 24), and, with regard to Article 132(1)(m) of the VAT Directive, judgment of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraphs 31 and 42).

[25] Judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 59), with regard to the almost identical predecessor provision in Article 13B(d)(6) of Directive 77/388/EC.

59. The Member States must exercise the power conferred on them to define the meaning of 'special investment funds' in compliance with the principle of fiscal neutrality.[26] That principle precludes similar supplies of services which are in competition with each other from being treated differently for VAT purposes.[27]

60. In the light of the principle of democracy, which is included in the values referred to in Article 2 TEU, on which the European Union is founded, however, the Court may find the principle of neutrality to have been infringed by the democratically authorised national legislature only if it has clearly exceeded its decision-making discretion. This is the case only if, from the point of view of the average consumer, the services taxed at different rates are all but identical and could therefore readily be substituted for each other.[28]

61. The question of equality arises here only because, according to the guidance provided by the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) on 19 September 2014, an 'individual defined contribution pension scheme' (third pillar of the Netherlands retirement pension system) constitutes a 'special investment fund', the management of which is exempt from tax.

62. The purpose of the individual defined contribution pension scheme in the third pillar seems to be to enable employees voluntarily to top up other pension benefits. The aim of compulsory participation in an occupational pension fund, on the other hand, is mandatory coverage of all employees [going beyond ensuring basic pension provision (first pillar)]. In the light of the different purposes pursued by (compulsory) participation in an occupational pension fund (second pillar) and the individual voluntary pension scheme (third pillar), I have doubts as to comparability. Competition between different pillars of a pension system also seems possible only to a limited extent.

63. In addition, according to the referring court, the policy of the Netherlands tax authority is based on the assumption that unit-holders in an individual defined contribution pension scheme bear an investment risk. As I have already stated, investors within the second pillar do not bear any such investment risk where guaranteed pension commitments are the main emphasis (see above, point 42). This would also appear to preclude comparability.

64. There are therefore considerable differences which suggest an absence of comparability. It is nevertheless for the referring court to make a definitive assessment on the basis of the described criteria.

65. In summary, Member States must therefore define 'special investment funds' within the meaning of Article 135(1)(g) of the VAT Directive in compliance with the principle of fiscal neutrality. It is not contrary to that principle, however, if a Member State differentiates between differently structured pillars of its retirement pension system and in particular between guaranteed pension commitments and pension commitments dependent on the performance of the invested capital.

[26] Judgments of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801, paragraph 33); of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 42); and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 18).

[27] See, inter alia, judgment of 5 October 2023, *Dyrektor Krajowej Informacji Skarbowej (VAT on hot dairy beverages)* (C-146/22, EU:C:2023:739, paragraph 46 and the case-law cited).

[28] See my Opinion in *HPA – Construções* (C-433/22, EU:C:2023:655, points 50 and 51).

VI. Conclusion

66. I therefore propose that the Court answer the questions referred for a preliminary ruling by the Rechtbank Gelderland (District Court, Gelderland, Netherlands) as follows:

1. Article 135(1)(g) of Directive 2006/112/EC on the common system of value added tax must be interpreted as meaning that an investment fund comparable to a UCITS, which is thus a 'special investment fund', is a fund which mostly fulfils the criteria set out in the first sentence of Article 1(2) of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities. This requires, in particular, that the investment fund is open to the public, that there is a redemption obligation similar to that for a UCITS and that investors bear a comparable investment risk. The latter condition depends essentially on whether the pension commitment provides primarily for guaranteed benefits or benefits dependent on the performance of the invested capital.

2. For the application of Article 135(1)(g) of Directive 2006/112 in the case of funds which are not UCITS, it must be assessed not only whether they are comparable to UCITS but also whether they are comparable to other funds that are not UCITS but are regarded by the Member State as special investment funds. The Member State may exempt the management of such special investment funds with due regard to the principle of fiscal neutrality. However, this does not preclude a comprehensible differentiation being made between the differently structured pillars of the retirement pension system in question and in particular between guaranteed pension commitments on the one hand and pension commitments dependent on the performance of the invested capital on the other hand.