Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 September 2024*

(References for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Exemptions – Article 135(1)(g) – Management of special investment funds – Definition – Pension funds – Comparability with an undertaking for collective investment in transferable securities (UCITS) – Investment risk borne by the members – Scope – Need for comparison with a pension fund regarded by the Member State concerned as a special investment fund)

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

REQUESTS for a preliminary ruling under Article 267 TFEU from the rechtbank Gelderland (District Court, Gelderland, Netherlands), made by decisions of 5 and 6 October 2022, received at the Court on 12 October 2022, in the proceedings

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 (C-642/22)

v

* Language of the case: Dutch.

Inspecteur van de Belastingdienst Maastricht (C-642/22),

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei (Rapporteur), J.-C. Bonichot, S. Rodin and L.S. Rossi, Judges,

Advocate General: J. Kokott,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 5 October 2023,

after considering the observations submitted on behalf of:

– X, Y, Stichting Pensioenfonds voor Fysiotherapeuten and Stichting BPL Pensioen, by K.R. Carton, E.M. van Kasteren and J.P.A. Vermeer, belastingadviseurs,

– Fiscale Eenheid Achmea BV and Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf (BPFL), by U.N.C. Boy and G.J. van Norden, belastingadviseurs,

– the Netherlands Government, by M.K. Bulterman, A. Hanje and J. Langer, acting as Agents,

– the Danish Government, by D. Elkan, J.F. Kronborg and C.A.-S. Maertens, acting as Agents,

– the European Commission, by J. Jokubauskaitė and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2024,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 135(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

2 The requests have been made in six sets of proceedings between (i) in Case C-639/22, X, a compulsory occupational pension fund and, in Cases C-643/22 and C-644/22, respectively, Stichting BPL Pensioen and Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf (BPFL), sector-specific pension funds, and the Inspecteur van de Belastingdienst Utrecht (Tax Inspector, Utrecht, Netherlands); (ii) in Cases C-640/22 and C-641/22, respectively, Fiscale Eenheid Achmea BV, a company which had provided services to a sector-specific pension fund, and Y, a company pension fund, and the Inspecteur van de Belastingdienst Amsterdam (Tax Inspector, Amsterdam, Netherlands); and, last, (iii) in Case C-642/22, Stichting Pensioenfonds voor Fysiotherapeuten, a compulsory occupational pension fund and the Inspecteur van de Belastingdienst Maastricht (Tax Inspector, Maastricht, Netherlands), regarding the application of the value added tax (VAT) exemption provided for in Article 135(1)(g) of the VAT directive to those pension funds.

Legal context

European Union law

The VAT directive

3 Article 2(1)(c) of the VAT Directive provides:

‘1. The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

4 Article 135(1)(g) of that directive provides:

‘1. Member States shall exempt the following transactions:

…

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

The UCITS Directive

5 Article 1 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32) (‘the UCITS Directive’) is worded as follows:

‘1. This Directive applies to undertakings for collective investment in transferable securities (UCITS) established within the territories of the Member States.

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

(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.

…’

Netherlands law

6 Article 11(1)(i)(3) of the Wet houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Wet op de omzetbelasting) (Law providing for replacement of the existing turnover tax by a turnover tax according to the system of collection of value added tax (Law on turnover tax)) of 28 June 1968 (Stb. 1968, No 329), in the version applicable to the main proceedings, 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'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

7 The applicants in the main proceedings in Cases C-639/22 and C-641/22 to C-644/22, that is, X, Y, Stichting Pensioenfonds voor Fysiotherapeuten, Stichting BPL Pensioen and Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf (BPFL), respectively, are Netherlands pension funds which purchased asset management services from an investment manager established outside the Netherlands. In Case C-640/22, the applicant in the main proceedings, Fiscale Eenheid Achmea, a company established under Netherlands law, provided asset management services to a sector-specific pension fund.

8 Those applicants challenge before the rechtbank Gelderland (District Court, Gelderland, Netherlands), the referring court in each of the cases referred to in the previous paragraph, the amount of VAT calculated by the Tax Inspectors of Utrecht, Amsterdam and Maastricht ('the tax authorities') on the purchase of those asset management services. They consider that the pension fund which purchased those services or to which those services were provided is a 'special investment fund' within the meaning of Article 135(1)(g) of the VAT Directive. Consequently, the purchase or provision of those services is exempt under Article 11(1)(i)(3) of the Law providing for replacement of the existing turnover tax by a turnover tax according to the system of collection of value added tax (Law on turnover tax).

9 It is apparent from the orders for reference that the Netherlands retirement pension system is composed of three pillars, that is, the legal basic pension, pension schemes organised by employers and individual voluntary pension schemes. The second pillar, governed by the Wet houdende regels betreffende pensioenen (Law establishing rules with regard to pensions) ('the Law on pensions'), contains company pension funds and sector-specific pension funds. Compulsory occupational pension funds for the purposes of the Wet verplichte beroepspensioenregeling (Law on the compulsory occupational pension regime) also come, according to the referring court, within that second pillar.

10 The pension funds in the disputes in the main proceedings are, in Cases C-639/22 and C-642/22, compulsory occupational pension funds, in Cases C-640/22, C-643/22 and C-644/22, sector-specific pension funds and, in Case C-641/22, a company pension fund.

11 The referring court sets out, in each of the references for a preliminary ruling, that the pension scheme implemented by the pension funds concerned is based on a 'pension benefit agreement' characterised by the payment of fixed pension benefits. This one of three types of agreements provided for under the law on pensions. That agreement differs from an 'agreement on contributions', which provides for set contributions subsequently converted into fixed or variable pension benefits, and from an 'agreement on capital', relating to a specific amount of capital subsequently converted into fixed or variable pension benefits.

12 Pension funds are subject to State monitoring regarding the policy coverage ratio, relating to the ratio between the assets held by those funds and the present value of their existing pension obligations. The referring court states that the policy coverage ratio and capital of a pension fund determine the financial situation of that fund and, to a large extent, the level of contributions and any reductions thereof, and the granting of any indexations or reductions of those indexations and of pension entitlements.

13 The amount of contributions to be paid is set by the pension fund so as to cover the increase in own assets required by the increase in pension obligations, also having regard to investment return forecasts.

14 For certain pension funds, namely those in question in Cases C-640/22, C-643/22 and C-644/22, the management board of each pension fund sets the amount of the contributions paid to those funds after consultation with employer and worker organisations. Contributions are paid by the employer and taken in part from the worker's salary. In the case of pension fund Y in Case C-641/22, the contribution is determined for individual members, although subject to a ceiling. In that case, the referring court states that the employers acted as guarantors, between 2014 and 2020, for the amount of EUR 250 million to supplement contributions if the funds were insufficient to guarantee the targeted pension accrual. In Cases C-639/22 and C-642/22, members contribute on the basis of their occupational income or company profits.

15 In all the cases in the main proceedings save for Case C-639/22, the pension entitlements and retirement benefits in the pension schemes in question are calculated on the basis of the remuneration and number of years of employment of each worker. In that connection, the referring court sets out that the amount of those pension entitlements and retirement benefits in the pension schemes in those cases may be subject to amendment. That amount may be increased, for example by reference to changes in the consumer price index (indexation). The management board of each pension whether that supplement should be granted. In Case C-644/22, the referring fund decides court sets out that any supplements granted are funded in their entirety by returns on investments made by the pension funds in question.

16 In the pension scheme in question in Case C-639/22, the referring court states that old-age pensions are set according to the number of quarterly contributions. This is a standard pension, the amount of which may be increased in relation to the previous year by the pension fund management board according to a determined formula, finances permitting.

17 In the pension scheme in question in Case C-641/22, the management board of the pension fund decides annually, finances permitting, whether and to what extent a supplement to pension entitlements and retirement benefits is to be granted. In the pension scheme in question in Case C-642/22, a supplement of 2% is granted annually on pension entitlements and retirement benefits. Depending on the pension fund's financial position, its management board may decide to grant a higher supplement, financed partly from contributions and partly from overperformance of the invested capital.

18 Conversely, a pension fund may be required to decrease the amount of those entitlements and benefits, as in Case C-641/22, as regards the accrual rate of the pension entitlements for 2020. Such increases and decreases are governed by the law on pensions. In that connection, the referring court observes that no supplement may be granted if the policy coverage ratio has fallen below a certain level. Accordingly, in Case C-644/22, the pension fund was able to grant a supplement only in 2009. In addition, as the financial position of that fund had worsened, a recovery plan was submitted to the Nederlandsche Bank (Central Bank, Netherlands), which provided for a decrease of 0.85% of the accrued pensions.

19 The referring court is uncertain whether the pension funds in the main proceedings must be regarded as 'special investment funds' qualifying for the VAT exemption provided for in Article 135(1)(g) of the VAT Directive.

20 In that context, the referring court observes, referring to the judgments of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144); of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139); and of 9 December 2015, *Fiscale Eenheid X* (C-595/13, EU:C:2015:801), that a pension fund which, like the pension funds in question in the disputes before the referring court, is not a UCITS within the meaning of the UCITS Directive may nevertheless be regarded as a 'special investment fund' for the purposes of Article 135(1)(g) of the VAT Directive when it has certain features.

21 That court is uncertain in particular regarding one of those features, namely the requirement that the members bear the investment risk. It observes that, according to the tax authorities, which refer in that regard to a judgment of the Hoge Raad (Supreme Court, Netherlands), the risk connected to investments made by the pension funds in the disputes before the referring court and borne by the members of those pension funds is not sufficiently significant.

22 The referring court considers that the pension schemes in the disputes before it are not entirely comparable to the schemes in question in the judgments of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144), and of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139), or to that in question in the judgment of the Hoge Raad (Supreme Court) which it cited in the order for reference.

23 According to that court, the level of the pension entitlements and retirement benefits under the pension schemes in the disputes before it is calculated on the basis of occupational income and number of years of employment or of a standard pension.

24 It follows, first, that the situation is distinct from the situation in the judgment of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144), because it cannot be held that those pension entitlements and retirement benefits at issue before the referring court are not connected to the value of the assets and returns on the investments made by the pension funds. Although the level of those pension entitlements and retirement benefits is

not directly depending on investment returns, the accrued amount of the pension is not guaranteed. The risk that the value of the assets might change is reflected in the policy coverage ratio and therefore determines, together with other variables, whether and to what extent supplements may be granted or whether the pension entitlements and retirement benefits must, conversely, be decreased. Thus, according to that court, investment returns and changes in asset value are expressed in the level of pension entitlements and retirement benefits.

25 Second, the pension schemes in the disputes before that court are also distinct from the pension scheme in the judgment of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139), in which the level of the pension is determined by the amount of fixed contributions and returns thereon, which corresponds more closely, according to the referring court, to a pension scheme organised on the basis of 'agreements on contributions' for the purposes of the law on pensions. This does not, however, mean, in all the schemes before the referring court, that the risk of deficits and surpluses is not borne by all the members through the decrease of accrued entitlements or the application of a reduction or, conversely, by the granting of supplements or offsetting of previous reductions.

26 The referring court seeks to determine whether the fact that investment risk is borne by all the members precludes a pension fund such as those in the disputes before it from being regarded as a special investment fund and whether it is sufficient that the members bear any risk in that regard or must bear a significant level of risk.

27 Moreover, it is apparent from the orders for reference that, in Cases C-640/22 and C-644/22, the applicants in the main proceedings, Fiscale Eenheid Achmea and Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf (BPFL), submit that the principle of fiscal neutrality means that a comparison must be made with certain pension funds performing contracts on contributions and, without being UCITS, are treated by the tax authorities as special investment funds. In that connection, the referring court observes that, according to a letter from the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands), certain pension funds performing contracts on contributions are treated by those authorities as special investment funds.

28 That court is, however, doubtful as to whether such a comparison is necessary, as the criteria set out in the judgments of 7 March 2013, *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144), and of 13 March 2014, *ATP PensionService* (C-464/12, EU:C:2014:139), making it possible to determine whether economic operators are carrying out the same transactions as UCITS, were developed in the light of the principle of fiscal neutrality. In addition, it wonders whether, for individual workers, who do not always have a choice as to the type of pension agreement, there is a substantive difference between those various types of pension agreements.

29 In those circumstances, the rechtbank Gelderland (District Court, Gelderland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling in Case C-644/22:

'(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?

(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?'

30 In Cases C-639/22, C-642/22 and C-643/22, the rechtbank Gelderland (District Court, Gelderland) decided to stay the proceedings and to refer a question to the Court of Justice for a preliminary ruling that is identical to the first question referred in Case C-644/22.

31 In C-640/22, that court states that no pension entitlement had been accrued actively since 1 January 2018 in the pension fund to which the applicant in the main proceedings provided asset management services and the pension fund in the dispute before that court was required to transfer its assets because of the low policy coverage ratio. As a result, that court is uncertain as to the relevance of that matter in the examination of the risk borne by the members regarding the investments made by that pension fund.

32 In those circumstances, the rechtbank Gelderland (District Court, Gelderland) decided to stay the proceedings and to refer the same questions as those referred to in C-644/22 to the Court of Justice for a preliminary ruling, subject to an addition made to the first question, as follows:

'… Is it relevant [in that regard]:

…

– 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?

…'

33 Last, in Case C-641/22, the referring court is uncertain whether the fact, previously set out in paragraph 14 of the present judgment, that the employers acted as guarantors for a certain period of time in order to ensure accrual of pension entitlements has an effect on the existence of a risk borne by the members regarding the investments made by that pension fund.

34 In those circumstances, the rechtbank Gelderland (District Court, Gelderland) decided to stay the proceedings and to refer a question identical to that referred in C-644/22 to the Court of Justice for a preliminary ruling, subject to an addition made to the first question, as follows:

'… Is it relevant in [that] regard:

…

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

35 By order of the President of the Court of 15 November 2022, Cases C-639/22 to C-644/22 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The first question

36 By its first question common to all the joined cases, the referring court asks, in essence, whether Article 135(1)(g) of the VAT Directive must be interpreted as meaning that the members of a pension fund performing, under a collective pension scheme, a pension agreement providing for pension entitlements and retirement benefits, the amount of which – albeit based on a standard pension or occupational income and the number of years of employment of each member – may vary under certain conditions as a result of the investments made by that pension fund, may be regarded as bearing the investment risk. That court also asks whether the following factors are relevant in that regard: (i) the size of the risk, (ii) the individual or collective nature of the risk, (iii) the number of years during which the pension entitlement of a member has accrued, (iv) the fact that the accrual of the pension entitlements was interrupted at a certain point in time as far as one of the pension funds is concerned, and (v) the fact that an employer acted as guarantor for a certain period of time for the targeted pension accrual.

37 In accordance with Article 135(1)(g) of the VAT Directive, Member States must exempt from VAT the management of special investment funds as defined by Member States.

38 In that regard, it should be borne in mind that, although the EU legislature left the definition of 'special investment fund' to the Member States, funds constituting UCITS under the UCITS Directive must be regarded as such (see, to that effect, judgment of 13 March 2014, *ATP PensionService*, C-464/12, EU:C:2014:139, paragraph 46 and the case-law cited).

39 As is clear from Article 1(2) of that directive, UCITS are undertakings the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets (judgment of 9 December 2015, *Fiscale Eenheid X*, C-595/13, EU:C:2015:801, paragraph 36 and the case-law cited).

40 In specific terms, UCITS are undertakings in which many investments are pooled and spread over a range of transferable securities which can be managed effectively in order to optimise results, and in which individual investments may be relatively modest. Such funds manage their

investments in their own name and on their own behalf, while each investor owns a share of the fund but not the fund's investments as such (judgment of 13 March 2014, *ATP PensionService*, C-464/12, EU:C:2014:139, paragraph 50 and the case-law cited).

41 It is settled case-law that funds which, without being collective investment undertakings within the meaning of the UCITS Directive, display characteristics identical to theirs 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 (judgment of 9 December 2015, *Fiscale Eenheid X*, C-595/13, EU:C:2015:801, paragraph 37 and the case-law cited).

42 It must be borne in mind that the Court has held that one of the characteristics required for an entity to be considered as displaying features comparable to a UCITS and therefore as a special investment fund which may benefit from the VAT exemption provided for under Article 135(1)(g) of the VAT Directive is that the participants are entitled to the profits or bear the risk linked to the management of the fund. In other words, it is a requirement that the members bear the investment risk (see, to that effect, judgments of 7 March 2013, *Wheels Common Investment Fund Trustees and Others*, C-424/11, EU:C:2013:144, paragraph 27; of 13 March 2014, *ATP PensionService*, C-464/12, EU:C:2014:139, paragraph 59; and of 9 December 2015, *Fiscale Eenheid X*, C-595/13, EU:C:2015:801, paragraphs 51 and 52).

43 In that connection, the Court has specified that members of a pension scheme do not bear the risk arising from the management of the investment fund in which the assets of that scheme are pooled where the pension received by the employee 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, in contrast to the return that can be hoped for by persons who purchase units in a collective investment undertaking, which depends on the performance of the investments made by the fund's managers over the period for which those persons hold the units (judgment of 7 March 2013, *Wheels Common Investment Fund Trustees and Others*, C-424/11, EU:C:2013:144, paragraph 27).

44 It follows that, for a finding that a member of a pension fund bears the required risk of the investments, it is necessary for the pension received by that member to depend on the investments made by that fund, to an extent comparable to that in which the returns of a person holding units in a collective investment undertaking depend on the investments made by that undertaking.

45 Accordingly, for a pension fund to be regarded as a special investment fund that may benefit from the exemption provided for in Article 135(1)(g) of the VAT Directive, the risk that the members of that pension fund bear as a result of the investments made by that fund must be comparable to that borne by holders of units in a collective investment undertaking on the assets that they have deposited with that undertaking.

46 Given that such a risk must be reflected in the level of pension entitlements and retirement benefits, it is necessary to establish, in order to determine whether the members of a pension fund run a risk comparable to holders of units in a collective investment undertaking, that performance of the investments made by the pension fund have a significant impact on the amount of the pension entitlements and retirement benefits.

47 Given that the returns that holders of units in a collective investment undertaking might hope for depend essentially on the performance, over the period during which they hold those units, of the investments made by that undertaking, which has an immediate effect on the value of those units, the application of the exemption provided for in Article 135(1)(g) of the VAT Directive to a pension fund presupposes that the amount of pension entitlements and retirement benefits due under the pension agreement concerned is not guaranteed, but depends primarily, positively or negatively, on the performance of the investments made by that fund.

48 In order for it to be established that an investment risk borne by the members of a pension fund is comparable to that borne by holders of units in collective investment undertakings, the amount of pension entitlements and retirement benefits cannot therefore be broadly predefined according to the duration of each member's career with the employer and the amount of his or her salary. In that connection, it is for the national court to determine, as observed in essence by the Advocate General in point 44 of her Opinion, whether the pension entitlements and retirement benefits depend primarily on the performance of the investments made by the pension fund concerned.

49 In the present case, the referring court observes that, in the pension schemes in the main sets of proceedings, the pension entitlements and retirement benefits are, in principle, calculated on the basis of a standard pension or occupational income and number of years of employment of each member and that the level thereof does not depend directly on the performance of the investments made by the pension fund, nor is it guaranteed. The policy coverage ratio would make it possible to determine whether and to what extent supplements may be granted to the members or whether, conversely, the pension entitlements and retirement benefits must be decreased. Accordingly, the referring court states that the performance of those investments are reflected in the amount of the pensions. In addition, the risk of deficits and surpluses is spread over all the members.

50 It appears clear from these considerations that the amount of pension entitlements or retirement benefits is, to a broad extent, predefined according to the duration of each member's career with the employer and his or her salary. In addition, changes to that amount depend on the policy coverage ratio, defined, inter alia, by reference to the present value of the pension obligations. Accordingly, although that amount may decrease or increase and the grant of supplements may, in certain cases, be funded entirely by the results of investments made by the pension fund, the same amount appears to depend on several factors, the primary one of which does not appear to be the performance of those investments. This is, nevertheless, for the referring court to determine, taking account of all the characteristics of the pension agreements concerned.

51 Moreover, in order to determine whether an investment risk comparable to that borne by holders of units in a collective investment undertaking is borne by members of the pension funds in the sets of main proceedings, it is not sufficient to find that members bear, individually or collectively, the risk of investments made by such a pension fund, excluding other persons or bodies. Although those investments have only a minor impact on the amount of pension entitlements and retirement benefits, the risk borne by the members is not comparable to that of holders of units in a collective investment undertaking on the assets they have deposited with that undertaking.

52 By contrast, where the risk of investments made by a pension fund has a significant impact on the amount of pension entitlements and retirement benefits due under the pension agreement, it is immaterial whether that risk is spread over all the members of the pension funds and that its impact is, as a result, reduced. That situation results from the pooling of that fund and does not prevent that risk from affecting the entitlements of all the individual members of a fund.

53 Similarly, the number of years during which the pension entitlement of a member has accrued or the fact that the period of accrual of those entitlements was interrupted at a certain point in time as far as a pension fund was concerned, as in Case C-640/22, are irrelevant. As the Advocate General observed in point 46 of her Opinion, the only relevant factors are how the pension entitlements and retirement benefits are designed in the member's pension agreement and how those entitlements and benefits depend on the performance of the investments made by that pension fund. The fact that the pension fund ceased to exist or had to transfer its assets to another body due to its financial situation does not affect the existence of an investment risk borne by the members of that fund, unless that transfer involves the risk being transferred to a third party.

54 This would be the case in the event of bankruptcy of a pension fund, which is a collective risk that must be distinguished from the possibility of changes in the amount of pension entitlements and retirement benefits. In that event, it falls to the national court to ascertain whether, for the pension fund concerned, a type of State guarantee or reinsurance system has been set up, in order to establish whether members also bear the risk stemming from bankruptcy of that fund.

55 In addition, it is possible that the fact that an employer acted as guarantor during a certain period of time for the purposes of the targeted pension accrual is liable to affect the pension entitlements and retirement benefits, in so far as, in that case, the contributions paid may result in a guaranteed pension amount that is independent of the performance of the investments made by the pension fund concerned, which could rule out the existence of the risk required for that fund to be regarded as having features comparable to that of a UCITS. Nevertheless, save for where such a guarantee is total, the national court is required to ascertain to what extent the performance of those investments affect the total amount of those pensions.

56 Having regard to the foregoing considerations, the answer to the first question is that Article 135(1)(g) of the VAT Directive must be interpreted as meaning that the members of a pension fund performing, under a collective pension scheme, a pension agreement providing for pension entitlements and retirement benefits, the amount of which – albeit based on a standard pension or occupational income and the number of years of employment of each member – may vary under certain conditions as a result of the investments made by that pension fund, may be regarded as bearing the investment risk only where that amount depends primarily on the performance of those investments. For the purposes of that assessment, the number of years during which the pension entitlement of a member has accrued or the fact that the accrual of pension entitlements was interrupted at a certain point in time as far as a pension fund was concerned are irrelevant. The fact that the risk is borne individually or collectively, in the event of, inter alia, bankruptcy, or that an employer acted as a guarantor during a certain period of time for the targeted pension accrual, are relevant factors, without being decisive per se.

The second question in Cases C-640/22 and C-644/22

57 By its second question in Cases C-640/22 and C-644/22, the referring court asks, in essence, whether Article 135(1)(g) of the VAT Directive, read in the light of the principle of fiscal neutrality, must be interpreted as meaning that, in order to determine whether a pension fund that is not a UCITS may benefit from the exemption provided for under that provision, it is necessary not only to carry out a comparison with such an undertaking but also to assess whether, in the light of the legal and financial situation of the member in relation to the pension fund, that pension fund is comparable to other funds which, without being UCITS, are regarded by the Member State concerned as being special investment funds for the purposes of that provision.

58 It is apparent from paragraphs 38 and 41 of the present judgment that, in the context of applying that exemption, Member States are required to regard funds which are UCITS within the meaning of the UCITS Directive as special investment funds, and funds which, without being collective investment undertakings within the meaning of that directive, 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.

59 Even if the exemption provided for by Article 135(1)(g) of the VAT Directive must be interpreted strictly, the principle of fiscal neutrality and the objective of facilitating investment in securities through investment undertakings require full effect to be given to that exemption (see, to that effect, judgment of 17 June 2021, *K and DBKAG*, C-58/20 and C-59/20, EU:C:2021:491, paragraph 38 and the case-law cited).

60 More specifically, the principle of fiscal neutrality precludes similar supplies of goods or services which are in competition with each other from being treated differently for VAT purposes (see, to that effect, judgment of 3 February 2022, *Finanzamt A*, C-515/20, EU:C:2022:73, paragraph 43 and the case-law cited).

61 It is apparent from the order for reference that, according to a letter from the State Secretary for Finance, certain pension funds performing contracts on contributions must be treated by the tax authorities as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive.

62 It is submitted that in that letter, the State Secretary for Finance considered that an individual defined contribution pension scheme is a special investment fund on the ground that, in essence, in such a pension scheme, the members bear the investment risk. In addition, certain individual defined contribution pension schemes may also be regarded as special investment funds where pension entitlements are accrued in a comparable way to how those entitlements are accrued in individual defined contribution pension schemes.

63 In that context, a member of a pension fund must be regarded as being the average consumer to whom the national court refers. In the present situation, it therefore falls to that court to carry out a specific examination in order to establish whether, in the light of the legal and financial situation of that member in relation to the pension fund, the pension entitlements acquired in accordance with pension agreements performed by a pension fund such as those in the main proceedings, which are, according to the request for a preliminary ruling, ‘retirement benefit agreements’, are comparable to other pension entitlements acquired in accordance with a pension agreement ‘on

contributions' performed by a pension fund classified by a Member State as a special investment fund for the purposes of Article 135(1)(g) of the VAT Directive, characterised, inter alia, by the fact that the members bear the investment risk.

64 Having regard to the foregoing considerations, the answer to the second question in Cases C-640/22 and C-644/22 is that Article 135(1)(g) of the VAT Directive, read in the light of the principle of fiscal neutrality, must be interpreted as meaning that, in order to determine whether a pension fund that is not a UCITS may benefit from the exemption provided for under that provision, it is necessary not only to carry out a comparison with such an undertaking but also to assess whether, in the light of the legal and financial situation of the member in relation to the pension fund, that pension fund is comparable to other funds which, without being UCITS, are regarded by the Member State concerned as being special investment funds for the purposes of that provision.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 135(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

   must be interpreted as meaning that the members of a pension fund performing, under a collective pension scheme, a pension agreement providing for pension entitlements and retirement benefits, the amount of which – albeit based on a standard pension or occupational income and the number of years of employment of each member – may vary under certain conditions as a result of the investments made by that pension fund, may be regarded as bearing the investment risk only where that amount depends primarily on the performance of those investments. For the purposes of that assessment, the number of years during which the pension entitlement of a member has accrued or the fact that the accrual of pension entitlements was interrupted at a certain point in time as far as a pension fund was concerned are irrelevant. The fact that the risk is borne individually or collectively, in the event of, inter alia, bankruptcy, or that an employer acted as a guarantor during a certain period of time for the targeted pension accrual, are relevant factors, without being decisive per se.

2. **Article 135(1)(g) of Directive 2006/112, read in the light of the principle of fiscal neutrality,**

   must be interpreted as meaning that, in order to determine whether a pension fund that is not an undertaking for collective investment in transferable securities may benefit from the exemption provided for under that provision, it is necessary not only to carry out a comparison with such an undertaking but also to assess whether, in the light of the legal and financial situation of the member in relation to the pension fund, that pension fund is comparable to other funds which, without being undertakings for

collective investment in transferable securities, are regarded by the Member State concerned as being special investment funds for the purposes of that provision.

[Signatures]