OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 12 December 2013 (1)

Case C?464/12

ATP PensionService A/S

v

Skatteministeriet

(Request for a preliminary ruling from the Østre Landsret (Denmark))

(Value added tax – Article 13B(d)(6) of Council Directive 77/388/EEC – Exemption of the management of special investment funds – Concept of 'special investment funds as defined by Member States' – Occupational retirement schemes – Defined contributions retirement schemes)

1. The VAT exemption for the management of special investment funds in Article 13B(d)(6) of the Sixth Directive (2) has occupied the Court repeatedly. (3) The case at hand offers the Court the opportunity to refine its jurisprudence with respect to the term 'special investment funds', namely in the context of occupational pension funds. The case also raises questions about what constitutes 'management' of special investment funds and about the tax exemption for transactions concerning deposits and current accounts, payments and transfers in Article 13B(d)(3) of the Sixth Directive.

2. The questions arise in a dispute between ATP PensionService A/S ('ATP') and the Danish Ministry of Taxation ('Skatteministeriet') over the value added tax ('VAT') treatment of ATP's services. ATP provides services to occupational pension funds.

I – **Legal framework**

A – *European Union law*

3. According to Article 2 of the Sixth Directive, the supply of services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT.

4. Article 13 of the Sixth Directive contains a number of VAT exemptions. Two of these are pertinent in the case at hand, namely Article 13B(d)(3) and (6). They read as follows:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse: …

(d) the following transactions: …

3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring; …

6. management of special investment funds as defined by Member States.'

5. Given the date of the facts of the case at hand, the Sixth Directive applies. Nevertheless it is worth mentioning that the cited provisions have been reproduced without any change that would be of relevance for the current proceedings in Articles 2(1)(c) and 135(1)(d) and (g) of Council Directive 2006/112/EC. (4)

B – *National law*

6. The Union law provisions mentioned are implemented by Paragraph 13(1)(11)(c) and (f) of the Danish Law on VAT ('momsloven'). The relevant Paragraph provides:

'The following goods and services shall be exempt from tax: …

11. The following financial activities: …

(c) Transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring; …

(f) Management of special investment funds.'

7. As the referring court points out, several of these terms have been interpreted in administrative guidelines ('juridiske vejledning'). (5)

II – **Facts and the main proceedings**

8. ATP provides services to pension funds. Its most important client, PensionDanmark, is an occupational pension fund administering retirement schemes under collective agreements and enterprise agreements.

9. Occupational retirement schemes are an essential element of the Danish pension system. That system relies on three pillars: a tax-financed public retirement scheme, an occupational retirement scheme and personal pension plans. (6)

10. Danish occupational retirement schemes, which, due to ATP's activities, are at the core of this case, are generally 'defined contributions' schemes, provided in an occupational setting. The employers pay a defined contribution to the institution providing the retirement scheme (normally a pension fund) for each of their employees, (7) who may make voluntary additional contributions. (8) Contributions to such schemes are tax deductible under Danish income tax law within certain limits. The pension that will be paid out depends on the amount of money paid into the scheme and the success of the investment made by the pension fund (after deduction of costs). It is typically paid out in a combination of three types of (taxable) payments once the beneficiary becomes eligible for payment: a life annuity, instalment payments over a certain period and payment of a lump sum. The details of an occupational retirement scheme are determined by a collective agreement between the employers' organisations and the trade unions representing individual employers and employees. (9)

11. While ATP is not involved in the investment of the contributions (this task is handled by the pension funds themselves) it does provide three types of services to the pension funds. First of all ATP provides services relating to system maintenance and development, namely the development and maintenance of the platform on which ATP's services are provided. Secondly, ATP undertakes administrative tasks, such as providing information and advice both to employers and employees in relation to the retirement schemes. Thirdly, ATP provides services as to the payment into and disbursement out of the retirement schemes.

12. In a simplified manner these latter services can be described as follows. The employer periodically pays the contributions it owes under the occupational pension scheme for all its employees collectively as an aggregate into the pension fund's bank account. ATP opens individual accounts (10) for individual pension customers on the basis of information it receives from the employer. It distributes the aggregate sum the employer pays among these accounts according to the provisions of the collective agreement or enterprise agreement. The pension customer can access the account, which is updated regularly by ATP, via internet. Once payments become due, ATP initiates the withdrawal of amounts by issuing instructions to the financial institution to pay the amount due to the pension customer.

13. Until 30 June 2002 ATP charged VAT on its services. In light of the judgment in *SDC*, (11) however, ATP changed its mind and argued that its services relating to payments into and disbursements out of the pension schemes should be exempt from VAT under Article 13B(d)(3) of the Sixth Directive. It informed the Danish tax administration ('SKAT') of this view on 26 June 2002. The SKAT ruled that ATP's services in connection with pension disbursements were indeed VAT exempt, but ruled against the application of the exemption as to most of the services related to inward payments, namely: the registration of employers liable to pay pension contributions, the opening of individual accounts, the provision of facilities for handling the payments from employers, so that all contributions can be paid into the pension fund's account using an online service or payment card, receipt and registration of reports from employers on the allocation of the total amount to individual employees, crediting contributions to individual accounts and updating the accounts, recording missing payments, reporting to pension customers on contributions paid and sending out account statements. The ruling was upheld by the highest Danish administrative tax authority, the National Tax Tribunal (Landsskatteretten) by order of 13 May 2009.

14. ATP challenged the ruling before the Hillerød Court (Retten i Hillerød), which in turn referred the case to the Eastern Regional Court (Østre Landsret) as being of general importance. ATP argues that the services which were considered to be subject to VAT are exempt as constituting 'management of special investment funds' under Paragraph 13(1)(11)(f) of the momslov, implementing Article 13B(d)(6) of the Sixth Directive and/or as a 'transaction …

concerning deposit and current accounts, payments, transfers …' under Paragraph 13(1)(11)(c) of the momslov, implementing Article 13B(d)(3) of the Sixth Directive. The Skatteministeriet contests the claim that ATP's services are VAT exempt.

III – **Questions referred for a preliminary ruling and procedure before the Court of Justice**

15. After consultations with the parties and deliberation the Østre Landsret decided, by order of 8 October 2012, to refer the following questions to the Court of Justice of the European Union pursuant to Article 267 TFEU:

'(1) Is Article 13B(d)(6) of [the Sixth Directive] to be interpreted as meaning that the term "special investment funds as defined by Member States" includes pension funds such as those referred to in the main proceedings and having the following characteristics, where the Member State recognises the institutions presented in section 2 of the present order for reference as special investment funds:

(a) the return to the employee (the pension customer) depends on the yield realised by the pension fund's investments,

(b) the employer is not required to make supplementary payments in order to secure a particular return for the pension customer,

(c) the pension fund collectively invests the funds accumulated applying a risk-spreading principle,

(d) the bulk of the payments into the pension fund is based on collective agreements between labour-market organisations representing the individual employees and employers, and not on the personal decision of the individual employee,

(e) the individual employee may decide, on a personal basis, to make additional contributions to the pension fund,

(f) self-employed traders, employers and directors may opt to pay pension contributions into the pension fund,

(g) a predetermined portion of the pension savings collectively agreed for the employees is used to purchase a life annuity,

(h) the pension customers bear the pension fund's costs,

(i) payments into the pension fund are deductible for the purposes of national income tax within certain quantitative limits,

(j) payments into a personal pension plan, including a pension fund set up with a financial institution under which the contributions can be invested in a special investment fund, are deductible for the purposes of national income tax to the same extent as under point (i),

(k) the counterpart to the entitlement to deduct contributions for tax purposes under point (i) is that disbursements are taxed, and

(l) the funds accumulated are in principle to be paid out after the person concerned reaches pensionable age?

(2) If the first question is answered in the affirmative, is Article 13B(d)(6) of the Sixth Directive

to be interpreted as meaning that the term “management” includes a service such as that in issue in the main proceedings (see section 1.2 of the order for reference)?

(3) Is a service such as that in issue in the main proceedings concerning pension payments (see section 1.2 of the order for reference) to be regarded under the terms of Article 13B(d)(3) of the Sixth Directive as a single service or as several separate services which are to be assessed independently?

(4) Is Article 13B(d)(3) of the Sixth Directive to be interpreted as meaning that the VAT exemption laid down in that provision for transactions concerning payments or transfers covers a service such as that in issue in the main proceedings concerning pension payments (see section 1.2 of the order for reference)?

(5) If the fourth question is answered in the negative, is Article 13B(d)(3) of the Sixth Directive to be interpreted as meaning that the VAT exemption laid down in that provision for transactions concerning deposit and current accounts covers a service such as that in issue in the main proceedings concerning pension payments (see section 1.2 of the order for reference)?’

16. ATP, the Kingdom of Denmark and the Commission submitted written observations.

17. At the hearing on 2 October 2013 these three parties and the United Kingdom of Great Britain and Northern Ireland made observations.

IV – **Assessment**

A – *Preliminary considerations*

18. The referring court’s questions cover three distinct issues: the meaning of ‘special investment funds as defined by Member States’ in the context of occupational retirement schemes (first question), the notion of ‘management’ of such funds (second question), and the application of Article 13B(d)(3) of the Sixth Directive to services such as those provided by ATP (third to fifth question).

19. The Court’s case-law as to all three of the issues is already rather extensive. (12) In light of this case-law I consider the Court to dispose of sufficient elements for considering the second and third issues. I will hence focus my analysis on the first issue, i.e. the meaning of ‘special investment funds as defined by Member States’, namely the question whether (and when) an occupational pension fund, such as the one that ATP provides services to, must be considered a special investment fund. That question has been raised twice recently, in *Wheels* and *PPG Holdings*, (13) but both of these cases differ significantly from the one at hand.

20. The question falls within the highly complex and controversial field of the VAT treatment of financial services (including pension services). These services have seen a significant diversification, (14) to which the current VAT directive, in particular the exemptions in the field of financial services, does not do justice. The consequence is a lack of legal certainty for operators in that area as well as diverging applications of the exemptions in question by Member States. (15)

21. The Commission has proposed both a directive to amend Directive 2006/112 regarding the treatment of insurance and financial services (16) and a regulation laying down implementing measures regarding the treatment of insurance and financial services, containing definitions of the scope of exempt services. (17) Both were the subject of extensive preparatory work, (18) in the course of which pension funds and their VAT treatment were also discussed. (19) However, no agreement has been reached on the reform. (20) Nor, according to the Commission’s statements

at the hearing, can we expect such an agreement to be forthcoming soon. Whatever the state of affairs with respect to a change in the applicable law may be, the Court has to decide based on the law in force at the time of the events in question.

22. I will start my analysis with an overview of the arguments made by the parties to the proceedings. Afterwards I will describe the interpretation the term ‘special investment funds as defined by Member States’ has received in the case-law so far. Finally, I will analyse the consequences of the case-law for occupational pension funds.

B – *Observations submitted to the Court*

23. Denmark takes the view that it is within the power of the Member States to define the term ‘special investment funds’ in Article 13B(d)(6) of the Sixth Directive and to exclude pension funds with the characteristics described by the referring court from their definition.

24. According to Denmark, Member States have to facilitate the investment in special investment funds and respect the principle of neutrality with respect to the VAT imposed on funds in competition with special investment funds. In Denmark’s view, the funds at issue in this case differ sufficiently from special investment funds to justify a different treatment: contributions are paid by the employer, their goal is to provide a pension rather than to save money, they also provide insurance such as life assurance and insurance for incapacity to work, (21) in the case of the death of the beneficiary the contributions do not (or do not wholly) fall to the beneficiary’s heirs, and the contributions are generally exempt from income tax. According to Denmark, the employer who pays the contributions does not invest, but rather pays because it is obliged to do so under the collective agreement setting up the pension scheme.

25. ATP considers pension funds with the characteristics described by the referring court to fall under Article 13B(d)(6) of the Sixth Directive and hence to be VAT exempt. ATP argues that even though Member States enjoy some degree of discretion in the definition of ‘special investment funds’, they have to respect the objectives of the exemption and the principle of fiscal neutrality. The purpose of the VAT exemption at issue is to enable individuals to invest their savings collectively, thereby spreading the risk, without being burdened by VAT. Those goals are, according to ATP, also pursued by the pension schemes at issue. The mere fact that pension schemes have the particular goal of financing a pension does not justify a different treatment.

26. ATP regards the principle of neutrality as supporting its position, as other special investment funds are in competition with pension funds. If the contributions, taken from the employee’s regular pay, did not go to the fund, the employee would have to save the money in another way. The competitive relationship is particularly obvious with respect to supplementary contributions or contributions by individuals who are not originally covered by occupational pension schemes. The fact that part of the return of a pension fund will be paid out as a life annuity (22) is, in ATP’s opinion, irrelevant, as a life annuity can simply be bought for a lump sum. Equally irrelevant are, in ATP’s view, the facts that contributions to pension funds are tax-deductible and that the pension funds usually carry an element of insurance. Furthermore, ATP argues that the conclusion of occupational pension funds by collective agreement is irrelevant, as the employees take the relevant decisions, represented by trade unions.

27. At the hearing, ATP pointed out that the pension funds at issue in the case differ significantly from those that were the subject of *Wheels* and *PPG Holdings*. Those cases concerned defined benefit schemes, in which the employer fulfilled a legal obligation by paying the pension. Only the employees could participate in the regime. In contrast, the case at hand concerns a defined contribution scheme, in which the beneficiaries and investors carry the risk. The employer merely has to pay the contribution. A larger public, namely everyone linked to the

labour market, can participate in the pension schemes.

28. The United Kingdom argued at the hearing that defined contribution pension funds such as the one described by the referring court are not sufficiently comparable to special investment funds to be in competition with them and hence cannot benefit from the VAT exemption at issue for five reasons: occupational pension funds cannot be sold at will, do not grant any right to the funds invested before the beneficiary reaches pension age and are lost in case of death, are agreed on by collective agreement and paid by the employer rather than constituting investments by the employee, are available to employees only rather than the public at large and finally do not fall under the regime of Council Directive 85/611/EEC ('UCITS Directive'). (23)

29. The Commission argues that the pension funds at issue fall under the notion of 'special investment funds'. It distinguishes between defined contribution and defined benefit schemes, arguing that with respect to the former schemes employees benefit from their investment and are hence in a similar situation to small investors with respect to special investment funds. (24)

C – *Case-law on 'special investment funds as defined by Member States'*

30. The case-law on Article 13 of the Sixth Directive contains both relevant general statements as to the interpretation of exemptions and important considerations relating to the interpretation of the term 'special investment funds as defined by Member States'. I will cover these two issues in turn and then present my own considerations on the approach of the Court when analysing Article 13B(d)(6) of the Sixth Directive.

1. General considerations as to the interpretation of VAT exemptions

31. When interpreting the exemptions contained in Article 13 of the Sixth Directive the Court has consistently held that as a rule the terms of these exemptions have their own autonomous meaning in Union law, as their 'purpose is to avoid divergences in the application of the VAT system from one Member State to another'. (25) This, however, is not the case with respect to terms the definition of which Union law explicitly entrusts to Member States. (26) In such cases it is for the Member States to define the concept in question in their domestic law. (27) When defining such concepts, however, they may not 'prejudice the objectives pursued by the Sixth Directive or the general principles underlying it, in particular the principle of fiscal neutrality'. (28)

32. Furthermore, the Court has consistently held that the exemptions contained in Article 13 of the Sixth Directive must be interpreted strictly, as in principle VAT is to be levied on all services supplied for consideration by a taxable person. (29)

2. The term 'special investment funds as defined by Member States'

33. As the wording of the term suggests, Union law leaves the definition of 'special investment funds' to Member States. I will discuss the meaning of this discretion of Member States first, and then summarise the Court's case-law as to three limits of the discretion: the wording of the provision and the UCITS Directive, the purpose of the exemption, and the principle of fiscal neutrality.

a) Discretion of Member States

34. As I already mentioned, the principle that the terms of exemptions under Article 13 of the Sixth Directive must be interpreted autonomously finds its limits where the definition is explicitly left to Member States. The Court has held that this is the case with respect to the term 'special investment funds'. (30) However, States can hardly be free to define anything under the sun as

‘special investment funds’. Such unfettered discretion would come with the risk of abuse, would confound the different exemptions and would run counter to the principle that the exemptions are generally read narrowly. There hence must be some Union meaning of the term ‘special investment funds’ despite the exemption’s wording leaving the definition to Member States.

35. The tension in Union law both leaving the definition of a term to Member States and nevertheless having to impose limits on that definition (31) is apparent in the following statement of the Court: ‘the task of defining the meaning of the words “special investment funds” does not in any way permit the Member States to select certain funds located on their territory and grant them exemption and exclude other funds from the exemptions. … [T]he terms “special investment funds” must be the starting point for the discretion conferred on the Member States’.(32) What the Court meant to say is that logically, Union law has to fix both an inner and an outer frame of the concept ‘special investment funds’ within which Member States are free to choose their definition of the term. The discretion of Member States to determine the content of the concept is thus limited. The Court derives these limits from the wording (and later legislative developments) of the provision, its purpose and general principles underlying the directive such as the principle of neutrality. (33)

36. In practice, the application of these limits has reduced the definitional power of Member States significantly. This development could be criticised, but legal security, which is of the essence when it comes to the VAT treatment of financial products, requires respect for the continuity of the case-law of the Court.

b) The wording of the provision and the UCITS Directive

37. The wording of Article 13B(d)(6) of the Sixth Directive gives comparatively little guidance as to the content of the term ‘special investment funds’, particularly when bearing in mind the various terms used in different languages. Thus, where the English version of the Sixth Directive speaks of ‘special investment funds’, the French one refers to ‘fonds communs de placement’, the Spanish one to ‘fondos communes de inversión’, (34) the German one to ‘Sondervermögen’, and the Dutch one to ‘gemeenschappelijke beleggingsfondsen’.

38. However, later developments have fleshed out this term. In 1985 the UCITS Directive entered into force to coordinate national laws governing collective investment undertakings. The precise relationship between that directive and Article 13B(d)(6) of the Sixth Directive is not immediately apparent. As the Court stated, the Spanish, French, Italian and Portuguese versions of the directive’s term for undertakings for collective investment in transferable securities (‘UCITS’) constituted under the law of contract use the same expression as that which appears in the exemption, but that is not the case for other languages such as English, German and Danish. (35)

39. The Court and its Advocate Generals have, accordingly, struggled do define the relationship between the UCITS Directive and Article 13B(d)(6). (36) However, in *Wheels* the Court clearly held that ‘[f]unds which constitute undertakings for collective investment in transferable securities within the meaning of the UCITS Directive are special investment funds’.(37) They hence constitute a minimum content of the term ‘special investment funds’.

c) The purpose of the exemption

40. As Advocate General Kokott pointed out in her Opinion in *Abbey National*, the purpose of the exemption is to ‘facilitate investment in common funds for small investors’. (38) Such funds are supposed to pool the money of several investors, (39) to enable them to spread the risk over a range of securities. The VAT exemption allows these investors to engage in such investments without incurring the additional cost of VAT. (40) The Court has embraced this purpose. (41)

41. Consequently, the Court has held that the exemption covers special investment funds ‘whatever their legal form’. (42) Whether such funds are constituted under contract or trust law or under statute is irrelevant for their pursuit of the described purpose. The Court pointed out that a different interpretation would run counter to the principle of fiscal neutrality, which prevents the different treatment of economic operators carrying out the same transactions. (43)

42. Similarly, the Court held that the mode of operation used by the fund is irrelevant: whether a fund is ‘open-ended’ (i.e. a variable capital fund that is obliged to buy back its units from investors wishing to sell) or ‘closed-ended’ (i.e. fixed-capital, whose shares can only be sold on a secondary market) does not play a role for the fund’s classification with respect to the VAT exemption under Article 13B(d)(6) of the Sixth Directive. Again, this holding can also be based on the principle of fiscal neutrality. (44)

d) The principle of fiscal neutrality

43. The principle of fiscal neutrality, according to the Court, ‘precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT’. Goods or services that are in competition with each other due to their similarity cannot be treated differently with respect to VAT. (45)

44. The criterion of a competitive relationship is a difficult one. Advocate General Sharpston commented on its dangers in *Deutsche Bank*, remarking that there always is some overlap between activities and if all activities ‘partly in competition with each other had to receive the same VAT treatment, the final result would be’ the elimination of all differences in VAT treatment. (46)

45. The danger perceived by Advocate General Sharpston can be eliminated by applying a correct methodology of comparison. First of all a comparator needs to be established that falls under the concept ‘special investment fund’. The fund at issue will only be compared to that comparator. According to what I have stated above, funds which are collective investment undertakings within the meaning of the UCITS Directive fall under the concept of ‘special investment fund’ and hence can serve as a comparator. (47)

46. Whether the fund analysed must also be included in the concept of ‘special investment fund’ or not is a question of whether that fund and the comparator are sufficiently comparable for them to be in competition with each other. (48) The criteria of the funds that are to be compared to establish sufficient likeness for there to be competition are not chosen randomly. Neither is the analysis an entirely economic one. Rather, it has to be based on the objective of the exemption. Relevant criteria are thus, for example, whether the fund is a method of spreading risk, whether the investors benefit from the gains in the investment etc.

3. Considerations on the approach of the Court

47. According to the case-law of the Court, the discretion of Member States to determine the term ‘special investment funds’ is thus limited by the objective of the exemption, the UCITS Directive and the principle of neutrality. A closer look reveals that, arguably, the Court has applied these (overlapping (49)) limits in such a manner that they compose two alternative tests.

48. At times the Court refers to the objectives of the exemption, deriving what amounts to a definition of the term ‘special investment funds’, using the principle of neutrality to confirm the outcome. (50) On other occasions the Court regarded UCITS as the core of ‘special investment funds’ and then applied the principle of neutrality. (51)

49. I propose to use (and further refine) the second of these approaches. A fund hence has to be considered as a ‘special pension fund’ if it either falls under the UCITS Directive or is sufficiently comparable to UCITS for them to be in competition with each other. Relevant characteristics for the comparison are those relevant to the objectives of the exemption analysed, which is to allow several investors to pool their funds and thus spread the risk over a range of securities.

D – *Occupational pension funds as special investment funds*

50. After these considerations I will now apply the described principles to the case at hand. The question that is posed by the current case is to what extent occupational pension funds have to be considered special investment funds. Union law contains some rules on such funds, but does not harmonise them.(52) According to what I have stated above I will have to analyse whether the funds at issue are UCITS and, if not, to what extent the principle of fiscal neutrality demands their inclusion in the exemption.

1. UCITS Directive

51. Occupational pension funds such as those in question in this case do not fall under the UCITS Directive. (53) As Denmark has pointed out, the units of the funds at issue in this case cannot, at the request of holders, be re-purchased or redeemed as is the case for UCITS according to Article 1(2) of the UCITS Directive.

2. Principle of fiscal neutrality

52. In a second step, the principle of fiscal neutrality has to be applied. It asks whether the funds at issue are sufficiently comparable to UCITS for them to be in competition with them. (54) In *Wheels* the Court had to consider that question for other types of occupational pension funds. It held those funds not to fall under Article 13B(d)(6) of the Sixth Directive. Those funds pooled the assets of a retirement pension scheme and were not open to the public, but merely granted employment-related benefits. Significantly, they were of the ‘defined-benefit’ type, i.e. the members of the scheme did not bear the risk arising from the management of the fund, as the amount of their pension was fixed and thus did not depend on the success of the investment. According to the Court, the fund was also not a special investment fund from the employer’s point of view, as for it the contributions were a means by which it complied with its legal obligations. Advocate General Sharpston followed this reasoning in *PPG Holdings*, identifying three relevant criteria: whether the scheme pools the assets of a retirement pension scheme, whether members of the pension scheme bear the risk arising from the management of the fund, and whether the employer makes the contributions to comply with its legal obligations towards its employees.(55)

53. Without challenging the outcome of those cases I propose to refine the analysis for the case at hand. Under Union law certain criteria are relevant and others irrelevant for comparing

funds with UCITS to determine whether they are sufficiently comparable to be in competition with them. It is incumbent upon the national courts to analyse the relevant facts, apply those criteria and decide whether the pension fund at issue in a case must be considered a ‘special investment fund’.

a) Point of view of comparison

54. Before I can list irrelevant and relevant criteria I have to point out that pension schemes can be analysed as asset-pooling instruments of employers or of employees. Which of these two paradigms applies depends on whether the employees or the employers benefit from the investment. According to the description of the referring court, the employees benefit from the fund in the case at hand.

b) Irrelevant criteria

55. As the analysis of the comparable character of the funds at issue with UCITS has to be undertaken with the objective of the exemption in mind, a number of elements that have been discussed in this case are irrelevant to the comparison.

56. This is, contrary to the allegations of Denmark, true with respect to the purpose of the investment. Whether the investor saves for pensions or for other purposes has no relevant impact on the competitive relationship. Hence the fact that the funds at issue are pension funds does not prevent them from constituting ‘special investment funds’. In contrast to *Wheels*, I would consequently dismiss the relevance of the employer’s legal obligation with respect to paying defined pension benefits as an irrelevant ‘purpose’ of the investment.

57. The fact that occupational pension funds are not agreed on individually but collectively is irrelevant. First of all, the employees’ representatives negotiate the characteristics of the funds with the employers’ representatives. Even though a collective agreement might mean that there is very little economic competition between the funds and UCITS outside of voluntary supplementary payments by the employees, this is not relevant to the objective of the exemption. In this respect the Court has already decided that the exemption covers funds whatever their legal form. To that extent the possibility of making supplementary payments or the voluntary adherence of some persons to occupational funds is equally irrelevant.

58. The same consideration applies to the question whether the contributions to a fund are income tax deductible or not. A favourable income tax treatment for contributions to some funds over others might have a considerable impact on the economic competitive relationship, but it has no significance with respect to the objectives of the exemption and hence must be disregarded.

59. Similarly, the mode of payments out of the retirement fund (life annuity or lump sum) is not significant for the fund’s characterization, as transfers between the various options are possible by a simple financial transaction.

60. Where occupational pension funds are bundled with an insurance element and the two elements cannot be separated, as is the case here, the national Courts have to determine which element is prevalent.

c) Relevant criteria

61. As I have stated above, the criteria relevant for the comparison have to be deduced from the purpose of the exemption, namely to allow the pooling of funds of several investors, and to spread the risk over a range of securities.

62. According to this premise, only a limited number of elements are essential for comparing occupational pension funds to UCITS for the purposes of fiscal neutrality under the exemption analysed. First of all, several beneficiaries have to pool their funds to spread the risk over a range of securities. The fund can only be considered a pooling of the beneficiaries' funds if the beneficiaries enjoy an unconditional legal right with respect to their investment. They may not be able to realise the right at will (i.e. sell their entitlement) and they may receive the benefit of their investment only upon retirement. However, where the investment is lost in case of death and does not fall to the heirs of the beneficiary, one can hardly speak of a pooling of the beneficiaries' funds.

63. Finally, the beneficiaries have to bear both the cost of the fund and the risks of the investment, even though the contributions can be paid by their employer as part of their payment package. This will generally be the case with respect to defined-contribution, but not with respect to defined-benefit schemes. As I have already stated, the application of these criteria is incumbent on the national courts.

64. I therefore conclude that Article 13B(d)(6) of the Sixth Council Directive has to be interpreted as meaning that the term 'special investment funds as defined by Member States' has to include occupational pension funds where such funds pool the assets of several beneficiaries, and allow the spreading of the risk over a range of securities. This is only the case where the beneficiaries bear the risk of the investment. The fact that the contributions are made by their employers for their benefit under a collective agreement between organisations representing employees and employers and that payments out of the fund are only made upon retirement is irrelevant, as long as the beneficiary has a secure legal position with respect to her or his assets. Whether a fund fulfils these requirements is for the national courts to decide.

V – **Conclusion**

65. In the light of the foregoing, I suggest that the Court should answer the first question raised by the Østre Landsret as follows:

Article 13B(d)(6) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment has to be interpreted as meaning that the term 'special investment funds as defined by Member States' has to include occupational pension funds where such funds pool the assets of several beneficiaries, and allow the spreading of the risk over a range of securities. This is only the case where the beneficiaries bear the risk of the investment. The fact that the contributions are made by their employers for their benefit under a collective agreement between organisations representing employees and employers and that payments out of the fund are only made upon retirement is irrelevant, as long as the beneficiary has a secure legal position with respect to her or his assets. Whether a fund fulfils these requirements is for the national courts to decide.

1 – Original language: English.

2 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment ('Sixth Directive') as amended, OJ 1977 L 145, p. 1.

3 – Case C?169/04 *Abbey National* [2006] ECR I?4027; Case C?363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (‘*JP Morgan*’) [2007] ECR I?5517; C?44/11 *Deutsche Bank* [2012] ECR; Case C?275/11 *GfBk* [2013] ECR; Case C?424/11 *Wheels Common Investment Fund Trustees and Others* (‘*Wheels*’) [2013] ECR; Opinion of Advocate General Sharpston in Case C-26/12 *PPG Holdings*, pending.

4 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended.

5 – The VAT exemption for transactions concerning deposit or current accounts is interpreted in D.A.5.11.6. Special investment funds are described in D.A.5.11.9.2. Their management is the subject of D.A.5.11.9.3.

6 – For an overview of common pension schemes see OECD, *Pensions at a Glance*, 2005; updated in OECD, *Pensions at a Glance*, 2011.

7 – Persons not covered by virtue of their employment situation, such as self-employed traders, employers and directors, may opt to pay into an occupational pension scheme if such a scheme has been agreed on for the employees of the undertaking in question.

8 – In practice these constitute the significantly smaller part of the funds, as stated by ATP at the hearing.

9 – Personal pension schemes follow a largely similar pattern, but it is the beneficiaries themselves who contract to have such a scheme and pay for it.

10 – These accounts are pension accounts rather than separate bank accounts.

11 – Case C?2/95 [1997] ECR I?3017.

12 – As to the first two issues see the case-law cited in footnote three. As to the third issue see *SDC*; Case C?305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I?6729; order of 14 May 2008 in Joined Cases C?231/07 and C?232/07 *Tiercé Ladbroke*; Case C?242/08 *Swiss Re Germany Holding* [2009] ECR I?10099; Case C?175/09 *Axa UK* [2010] ECR I?10701; Case C?350/10 *Nordea Pankki Suomi* [2011] ECR I?7359; Opinion of Advocate General Kokott in Case C?461/12 *Granton Advertising,* pending. I discuss the second issue in my Opinion in Case C?275/11 *GfBk*, pending.

13 – Opinion of Advocate General Sharpston.

14 – The Commission is of the view that the number of insurance and financial products available on the market exceeds 5000. Directorate General Taxation and Customs Union, Harmonisation of Turnover Taxes, 5 March 2008, TAXUD/2414/08, p. 3.

15 – The difference in the VAT treatment of financial services is readily apparent in a report prepared by PricewaterhouseCoopers for the European Commission: *Study to Increase the Understanding of the Economic Effects of the VAT Exemption for Financial and Insurance Services* , 2 November 2006. An overview over the implementation of the exemptions in Member States’ national laws can be found in the Annex to IBFD, *VAT Survey Financial Services*, 2006. See also Comment by Wessels, J., *Highlights & Insights on European Taxation*, 2012 No 4, p. 62.

16 – COM(2007) 747 final/2 of 20 February 2008.

17 – COM(2007) 746 final/2 of 20 February 2008.

18 – See Directorate General Taxation and Customs Union, supra, footnote 14.

19 – See Note from the Presidency, *Proposals for a Council Directive and Regulation as regards the VAT treatment of insurance and financial services*, Doc. 13577/10 FISC 92 of 16 September 2010, p. 20. The document has been referred to by ATP to support its position that pension funds are deemed to be covered by the term special investment fund.

20 – From the published documents it is apparent that disagreement also continues in the question of the treatment of pension funds. Item Note from the General Secretariat, *Proposals for a Council Directive and Regulation as regards the VAT treatment of insurance and financial services*, Doc. 18650/11 FISC 170 of 14 December 2011, p. 5. The need for finalising the reform is stressed by Dahm, J., and Hamacher, R., *Vermögensverwaltung und Umsatzsteuer*, UR 2012, 817.

21 – At the hearing Denmark stated that it treats funds such as the one at issue as insurance companies.

22 – The Skatteministeriet regarded this as an important difference of pension funds when compared to special investment funds.

23 – Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3) as amended. The UCITS Directive was replaced by 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) on 1 July 2011.

24 – The Commission regards the characteristics (a), (b), (c) and (h) of the first question as particularly relevant for the comparison with special investment funds.

25 – *JP Morgan*, paragraph 19; *Wheels*, paragraph 16; *Abbey National*, paragraph 38; Case C?498/03 *Kingscrest Associates and Montecello* [2005] ECR I?4427, paragraph 22; Case C?428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I?1527, paragraph 2; Case C?358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraph 51.

26 – *JP Morgan*, paragraph 20; *Abbey National*, paragraph 39, *Wheels*, paragraph 16; Case C?468/93 *Gemeente Emmen* [1996] ECR I?1721, paragraph 25.

27 – *JP Morgan*, paragraph 21; Joined Cases C?443/04 and C?444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I?3617, paragraph 29.

28 – *JP Morgan*, paragraph 22; See also *Gemeente Emmen*, paragraph 25; Case C?246/04 *Turn- und Sportunion Waldburg* [2006] ECR I?589, paragraph 31.

29 – *Abbey National*, paragraph 60; Joined Cases C?394/04 and C?395/04 *Ygeia* [2005] ECR I?10373, paragraph 15; Case C?45/01 *Dornier* [2003] ECR I?12911, paragraph 42; Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13.

30 – *Abbey National*, paragraph 41.

31 – Rossi, P., *L'Avvocato generale della Corte UE – Chiarita la portata dell'esenzione Iva per le operazioni di gestione dei fondi comuni di investimento*

, il fisco n. 38/2005, 14422.

32 – *JP Morgan*, paragraph 41.

33 – *JP Morgan*, paragraphs 45 and 46; *Wheels*, paragraph 18; Opinion of Advocate General Kokott in *JP Morgan*, points 15 and 17.

34 – The Italian and Portuguese versions similarly refer to ‘fondi comuni d’investimento’ and ‘fundos comuns de investimento’.

35 – *JP Morgan*, paragraph 33; *Abbey National*, paragraph 55

36 – *Abbey National*, paragraphs 55, 61, 64 to 65; Opinion in *Abbey National*, points 38, 41 to 43, 50, 73 to 83; *JP Morgan*, paragraphs 31 to 34; Opinion in *JP Morgan*, points 32 and 33; *Deutsche Bank*, paragraph 32; Opinion in *Deutsche Bank*, point 74.

37 – *Wheels*, paragraph 23.

38 – Opinion in *Abbey National*, point 68.

39 – The reference to *small* investors, present in *Abbey National*, was dropped in the later judgment in *JP Morgan*, paragraph 45, as Advocate General Sharpston notes in her Opinion in *Deutsche Bank*, footnote 21.

40 – Opinion in *Abbey National*, points 27 to 29. The Court refers to this latter consideration again as ‘fiscal neutrality’. *Abbey National*, paragraph 62; *Wheels*, paragraph 19.

41 – *Abbey National*, paragraph 62; *JP Morgan*, paragraph 45; *Deutsche Bank*, paragraph 33. See *Wheels*, paragraph 23.

42 – *Abbey National*, paragraph 53; *JP Morgan*, paragraph 26

43 – Ibid., para. 56.

44 – *JP Morgan*, paragraphs 28 to 30, 35.

45 – *Wheels*, paragraphs 20 and 21; *JP Morgan*, paragraph 46; Case C?106/05 *L.u.P.* [2006] ECR I?5123, paragraph 32; Joined Cases C?453/02 and C?462/02 *Linneweber and Akritidis* [2005] ECR I?1131, paragraph 24; Case C?382/02 *Cimber Air* [2004] ECR I?8379, paragraph 24; Case C?109/02 *Commission* v *Germany* [2003] ECR I?12691, paragraph 20.

46 – Opinion in *Deutsche Bank*, point 60

47 – *Wheels*, paragraph 24.

48 – See *JP Morgan*, paragraphs 50 and 51

49 – Jaster, E., and Murchner, I., *Die umsatzsteuerliche Behandlung von Vermögensverwaltungsleistungen (Teil 2)*, UStB 2013, 54 observe that the criteria developed in *JP Morgan* and those of the UCITS Directive are similar.

50 – This is my reading of *Abbey National* and *JP Morgan*.

51 – The clearest application of this approach can be found in *Wheels*. Arguably it was pioneered in *Deutsche Bank*.

52 – On 23 September 2003, Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provisions (OJ 2003 L 235, p. 10) entered into force.

53 – The same was true in *Wheels*, paragraph 25. Note that Directive 2003/41 does not apply to UCITS according to its Article 2(2)(b).

54 – *Wheels*, paragraphs 24 and 26.

55 – Opinion in *PPG Holdings*, points 16 and 17.