



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
The Director

Brussels, 12 June 2017
TAXUD/C1 – EFS/vl (2017) 3300616

Director of International Tax and
Consumer Tax
Ministry of Finance of Netherlands
Korte Voorhout 7
2511 CW Den Haag

Subject: Application of Article 135(1)(g) of the VAT Directive – VAT treatment of management services provided in respect of pension funds

Dear

Thank you for the transmission, on 29 May 2017, of a message asking for the Commission's opinion on the interpretation of Article 135(1)(g) of the [VAT Directive](#)¹, which contains an **exemption for the management of special investment funds**. More specifically, your question concerns the application of this provision to services consisting in the management of pension funds.

According to explanations given, the Netherlands currently in determining the VAT treatment of such management services distinguishes between pension funds with **Defined Contribution** ("DC") and pension funds with **Defined Benefit** ("DB"). So, while management services provided in respect of DC pension funds are exempt from VAT, those provided in respect of DB pension funds are taxed, as they are not seen as covered by the exemption. This distinction, you state, is based on the case-law² the Court of Justice of the European Union (CJEU); and has also been validated by the Dutch Supreme Court in a case where it was concluded that a DB pension plan could not be regarded as a special investment fund for the purposes of Article 135(1)(g) of the VAT Directive (management of DB pension funds therefore not being VAT exempt).

Given that this issue will be further examined in the Netherlands at the initiative of the Dutch Parliament, you have requested: (i) us to confirm that this issue will be discussed in the next [VAT Committee](#) meeting; (ii) the opinion of the Commission services on this

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

² You refer to the judgment of 7 March 2013, *Wheels Common Investment Fund Trustees and Others*, C-424/11, ECLI:EU:C:2013:144; and the judgment of 13 March 2014, *ATP PensionService*, C-464/12, ECLI:EU:C:2014:139.

issue; and (iii) information concerning the VAT treatment of management services provided in respect of pension funds in other Member States, and whether there are any infringement procedures on this issue.

Please, find below some comments on the issues raised.

- i. Indeed, we agree with you that the VAT Committee is the appropriate forum where to discuss issues such as the one raised, linked to the uniform application of the provisions of the VAT Directive and which concern all Member States. Therefore, we will include this item in the agenda of the next VAT Committee meeting at your request, subject to receiving your preliminary analysis³. As usual, we will prepare a Working paper with the opinion of the Commission services taking into account your analysis, which will be used as a basis for the discussion with the rest of Member States.
- ii. Given that such Working paper with the opinion of the Commission services will only be ready in time for the next VAT Committee meeting, which is scheduled for the end of this year, we are happy in the meantime to provide you with some preliminary and general comments on the substance of the question raised.
 - Broadly speaking, one of the main differences between DC and DB pension funds⁴ is who bears the **risk of the investment**. If the pension fund is of DC, the level of the contributions made to the fund is pre-defined but the retirement benefit to be received by the employee will mainly depend on how well the investment performs (i.e. the pay-out is not guaranteed). In contrast, DB pension funds are those where the retirement benefit, rather than the contribution, is pre-fixed (i.e. the pay-out will remain the same, regardless of how the investment performs). This in turn has an impact on who assumes the risk of the investment: the employees to whom the retirement benefit is going to be paid (DC pension fund), or the employer who is paying for that benefit (DB pension fund).
 - It is only management of **special investment funds** that is exempt under Article 135(1)(g) of the VAT Directive. The meaning of "special investment funds" is however not defined in the VAT Directive. Although the CJEU has never examined this concept directly, it has acknowledged that a specific type of funds – Undertakings for Collective Investment in Transferable Securities ("UCITS")⁵ – qualify as special investment funds. By means of this proxy, the CJEU has assessed whether DC and DB pension funds are "identical" or

³ See information paper [taxud.d.1\(2010\)119801](#) – EN Working of the VAT Committee – how to introduce items.

⁴ The distinction between DC and DB pension funds is typically made in respect of collective retirement schemes put in place by employers (and which include an employer contribution) in order to provide retirement benefits to their employees (pension scheme members and beneficiaries), also known as occupational pension funds or Institutions for Occupational Retirement Provision ("IORPs"). Such occupational pensions are the "second pillar" of pension systems, the "first pillar" being state-based social security pensions, and the "third pillar" being non-compulsory private pension savings by individuals. For more information on IORPS, see [here](#). Some useful guidance on the definitions of DC and DB pension funds can be found in Annex A (Glossary) of the Impact Assessment accompanying the Proposal for a Recast IORP Directive ([SWD\(2014\) 103 final](#)); and in OECD (2005), *Private Pensions: OECD Classification and Glossary*; OECD Publishing, Paris, p. 14.

⁵ For more information, see [here](#).

"sufficiently comparable" to UCITS and, therefore, whether they can be treated as special investment funds.

In this regard, as you rightly point out, the CJEU has concluded in *ATP PensionService*⁶ that **DC pension funds** are sufficiently comparable to UCITS (i.e. they are sufficiently comparable to special investment funds) and, therefore, management services provided in respect of those pension funds **can be exempted** pursuant to Article 135(1)(g) of the VAT Directive. In contrast, the CJEU found in *Wheels Common*⁷ that **DB pension funds** are not sufficiently comparable to UCITS (i.e. they are not sufficiently comparable to special investment funds) and, therefore, management services provided in respect of such pension funds **cannot benefit from the exemption**.

The CJEU justified the difference in outcome mainly on the grounds that the investment risk was borne by different persons: "*In Wheels* [DB pension funds], *the members of the scheme did not bear the risk arising from the management of the investment fund in which the scheme's assets were pooled, because the pension was defined in advance on the basis of length of service with the employer and the amount of the salary (...). By contrast, the schemes at issue* [DC pension funds] (...) *are funded by the persons to whom the retirement benefit is to be paid and those persons bear the investment risk*"⁸. The CJEU had already in *Claverhouse*⁹ pointed to investment risk being one of the factors to be taken into account when assessing whether a fund has the characteristics of being a special investment fund.

- Distinguishing between DC and DB pension funds for the purposes of applying the exemption laid down in Article 135(1)(g) of the VAT Directive therefore seems to stem directly from the case-law of the CJEU on this issue.
- iii. We lack an overview of how the provisions of the VAT Directive – including the exemption pursuant to Article 135(1)(g) – are systematically applied in other Member States, although we hope that some clarity can be achieved when discussing this issue at the next VAT Committee meeting. In this respect, however, please also note that the Commission services have not been made aware of any particular problems as regards the application of Article 135(1)(g) in respect of pension funds.

⁶ Judgment of 13 March 2014, *ATP PensionService*, C-464/12, ECLI:EU:C:2014:139.

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

⁸ *ATP PensionService*, paragraph 52. See also paragraphs 50 and 51 of that judgment, for an outline of the main characteristics of a special investment fund.

⁹ Judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, C-363/05, ECLI:EU:C:2007:391, paragraph 50.

I hope that these explanations are useful.

Yours sincerely,

Copy: EU, Permanent Representation of the Kingdom of the Netherlands to the