Case C-758/22

Request for a preliminary ruling

Date lodged:

15 December 2022

Referring court:

Bundesverwaltungsgericht (Federal Administrative Court, Germany)

Date of the order for reference:

27 September 2022

Applicants and appellants in the appeal on a point of law:

Bayerische Ärzteversorgung

Bayerische Architektenversorgung

Bayerische Apothekerversorgung

Bayerische Rechtsanwalts- und Steuerberaterversorgung

Bayerische Ingenieurversorgung-Bau mit Psychotherapeutenversorgung

Defendant and respondent in the appeal on a point of law:

Deutsche Bundesbank

Federal Administrative Court

DECISION

[…]

[…]

In the administrative-law case of

1. Bayerische Ärzteversorgung,

public-law institution,

[…] Munich,

2. Bayerische Architektenversorgung,

3. Bayerische Apothekerversorgung,

4. Bayerische Rechtsanwalts- und Steuerberaterversorgung,

5. Bayerische Ingenieurversorgung-Bau mit Psychotherapeutenversorgung,

public-law institutions, […] 81925 Munich,

parties 1 to 5 being:

represented by the Bayerische Versorgungskammer,

[…] Munich,

applicants and appellants,

[…]

v

Deutsche Bundesbank;

[…] Frankfurt am Main,

defendant and respondent,

the 8th *Senat* (Division) of the Federal Administrative Court

after considering the hearing of 21 September 2022

[…]

ruled as follows on 27 September 2022:

The proceedings are stayed.

The Court of Justice of the European Union is requested to give a preliminary ruling under Article 267 TFEU on the following questions concerning the interpretation of Regulation (EU) 2018/231 of the European Central Bank of 26 January 2018 on statistical reporting requirements for pension funds – ECB/2018/2 – (OJ L 45, 17.2.2018, p. 3) read in conjunction with Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and

regional accounts in the European Union (OJ L 174, 26.6.2013, p. 1; 'ESA'):

1. (a) Does point (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA require that all consumers of the products offered by the producer must have the freedom to purchase or not purchase those products and to make that choice on the basis of the prices charged?

If the foregoing question is answered in the negative:

(b) In cases where the vast majority of those consumers, without having such freedom of choice, receive from the producer products amounting to more than half of its output by virtue of compulsory membership with that producer and are required to pay compulsory contributions in an amount set by the producer, are the requirements of the provision satisfied by the fact that a minority had the option of joining the producer as voluntary members and exercised that option in order to obtain the products in exchange for payment of the same contributions as the compulsory members?

2. Will market output at economically significant prices, as defined under paragraphs 3.17 to 3.19 of Annex A to the ESA, always be present if the '50% criterion' defined in the third and fourth sentences of the third subparagraph of paragraph 3.19 of Annex A to the ESA is fulfilled by virtue of the fact that at least 50% of the costs are covered by sales over a sustained multi-year period, or is that criterion to be interpreted not as a sufficient condition (one that is sufficient by itself) but rather as a necessary condition that applies in addition to the two preconditions laid down in points (a) and (b) of the second sentence of the first subparagraph of paragraph 3.19 of Annex A to the ESA?

3. For the purposes of determining whether institutional units are market producers as defined in paragraph 3.24 of Annex A to the ESA, must reference be made not only to paragraphs 3.17, 3.19 and 3.26 of Annex A but also to the additional requirements laid down in the second subparagraph of paragraph 1.37 of Annex A to the ESA?

4. (a) In order for an institutional unit to be classified in subsector S.129, does paragraph 2.107 of Annex A to the ESA necessarily require that all of its benefits must be provided to all participants on the basis of an insurance contract?

If that is the case:

(b) Is the requirement for the benefits to be provided on a contractual basis already fulfilled in this respect if, notwithstanding the fact that the compulsory membership, the compulsory contributions and the compulsory benefits of the institutional unit are governed by the public body pursuant to

its statutes, compulsory members can also establish claims to additional benefits through the payment of voluntary additional contributions?

5. Is point (f) of the third sentence of Article 1(1) of Regulation (EU) No 2018/231 to be interpreted as excluding from the concept of a 'pension fund', as defined in the first sentence of that provision, only those institutional units that satisfy both of the criteria set out in paragraph 2.117 of Annex A to the ESA, or does that exception also cover other institutional units which are to be regarded as social security pension schemes under paragraph 17.43 of Annex A to the ESA, even if they do not meet all of the requirements set out in paragraph 2.117 of Annex A to the ESA?

6. (a) Does the concept of 'general government' in paragraph 2.117(b) and paragraph 17.43 of Annex A to the ESA refer only to the respective primary unit, or does it also include legally independent pension institutions that have been established on a statutory basis, are organised on the basis of compulsory membership and financed by contributions, and which have the right to self-governance and separate accounting?

In the latter case:

(b) Does the settlement or approval of the contributions and benefits, as referred to in paragraph 2.117(b) of Annex A to the ESA, mean a settlement or approval of the amount, or does it suffice if a law prescribes the minimum risks to be covered and the minimum level of cover, and also regulates the principles and limits for collection of contributions, while leaving it for the pension institution to assess the amount of the contributions and benefits within this framework?

(c) Does the concept of a 'government unit', as referred to in paragraph 20.39 of Annex A to the ESA, include only institutional units that fulfil all the requirements set out in paragraphs 20.10 and 20.12 of Annex A to the ESA?

G r o u n d s:

I

1 The parties disagree as to whether or not the applicants are subject to reporting requirements under Regulation (EU) 2018/231 of the European Central Bank of 26 January 2018 on statistical reporting requirements for pension funds – ECB/2018/2 – (OJ 2018 L 45, p. 3, and corrigendum [of the German version] OJ 2019 L 132, p. 47).

2 The applicants were established in the Free State of Bavaria pursuant to the Bavarian Gesetz über das öffentliche Versorgungswesen (Law on Public Support and Pensions, 'VersoG') in the version published on 16 June 2008 (BayGVBl. (Bavarian Gazette of Laws and Ordinances) p. 371), last amended by

Article 32a(18) of the Gesetz vom 10. Mai 2022 (Law of 10 May 2022) (BayGVBl. p. 182), as public-law institutions with legal personality. They grant pension benefits to their members in the event of incapacity for work, old-age and death in accordance with the provisions of the above Law and their statutes. In this respect, they must fulfil the conditions for their members to be exempted from the obligation to be insured under the statutory pension insurance scheme (third sentence of Article 28 VersoG). They may only conduct their activities on a not-for-profit basis and may use their funds and assets for the sole purpose of fulfilling their mandate to provide pensions (Article 9(1) and (3) VersoG). They must finance their administrative expenses, including the salaries of their employees and the benefits payable to their beneficiaries, from their own funds (first sentence of Article 9(2) VersoG).

3 The vast majority of the members of each of the applicants are legally required to be members since they practise their profession in the Free State of Bavaria (Article 30(1) read in conjunction with Article 33 et seq. VersoG). An exemption from compulsory membership is permitted under Article 30(2) VersoG only in exceptional cases, such as temporary or limited professional activity or membership of another pension fund. Under Article 30(3) VersoG, former compulsory members may remain as voluntary members in accordance with the provisions of the statutes, in order to acquire pension entitlements in exchange for the same contributions as those paid by compulsory members. Within the framework of the statutory provisions (Article 10(2) and (3) VersoG), the applicants regulate the collection of the contributions or apportionments used to finance performance of their functions, as well as the prerequisites for pension claims, their type and amount, and the conditions under which they lapse, by means of their statutes. The statutes may authorise the members to make voluntary additional payments to increase their pension entitlement, provided that the sum of the additional payments and the compulsory contribution does not exceed the statutory ceiling for contributions (Article 31(4) VersoG). It is common ground that each applicant pays out more than 50% of its benefits as compulsory benefits for its compulsory members.

4 By letters of 7 September 2018 and 25 March 2019, the defendant informed applicants 1 to 4 respectively that, in accordance with Articles 1 and 2 of Regulation (EU) 2018/231, they were, as pension funds, subject to the statistical reporting requirements and would have to provide the defendant with more detailed data on their financial circumstances on a quarterly basis, starting from the reference date of 30 September 2019. By means of almost identical letters from the defendant dated 12 November 2018 and 17 July 2019, the fifth applicant was instructed to submit more limited data on an annual basis. By their actions, the applicants seek, in each respective case, the annulment of the communications concerning them and, in the alternative, a declaration that they are not subject to reporting requirements. […] [Observations on interim measures]

5 By judgment of 4 November 2021, the Verwaltungsgericht (Administrative Court, Germany) dismissed the actions, stating that the applicants were pension funds as

defined in Article 1(1) of Regulation (EU) 2018/231, and subject to reporting requirements pursuant to Article 2(1) of that regulation. The Administrative Court held that they were market producers within the financial corporations sector and belonged to subsector S.129 of the ESA. Their principal activity and function comprised the provision of pension benefits. For that purpose, they charged economically significant prices. According to the Administrative Court, the same applies to the compulsory benefits because, pursuant to the first sentence of Article 9(2) VersoG, these must be assessed in economic terms. In the absence of state aid, the applicants would be required to regulate contributions and benefits in such a way that their ability to provide the benefits would remain assured. According to the Administrative Court, it was in any event clear from paragraph 3.19 of Annex A to the ESA that the compulsory benefits are (also) to be classified as market output, since the applicants cover at least 50% of their costs from sales of their products over a sustained multi-year period. Paragraph 1.37 of Annex A to the ESA does not preclude this since, according to the Administrative Court, that provision applies only to public sector entities. The applicants could not be classified as public sector entities because they are not subject to government control. Hence, an allocation to subsector 1314 (social security funds) – which would mean the reporting requirements would not apply by virtue of point (f) of the third sentence of Article 1(1) of Regulation (EU) 2018/231 – was also precluded. Paragraph 20.39 of Annex A to the ESA confirms this classification. According to that paragraph, a defined-contribution funded scheme, established by a government unit, cannot be regarded as a social security scheme if, as is the case for the applicants, there is no government guarantee on the level of pensions due and that level depends on asset performance; it would necessarily be uncertain in that respect.

6 In their ‘leapfrog’ appeals on points of law (*Sprungrevisionen*), the applicants submit that they are not market producers. According to their submissions, their compulsory benefits, which – undisputedly – constitute the major part of their production – are not sold at economically significant prices. In this respect, the applicants claim that the compulsory members do not have the freedom, as is required under point (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA, to choose whether or not to acquire the pension benefits on the basis of the required contributions. The applicants argue that the 50% rule laid down in the third subparagraph of paragraph 3.19 of Annex A to the ESA is not relevant; it serves only to determine the output. In any event, the applicants claim that they fall within the social security funds subsector just like the statutory pension insurance scheme.

7 The defendant is defending the judgment under appeal.

II

8 The proceedings are to be stayed and a preliminary ruling is to be obtained from the Court of Justice of the European Union on the basis of the third paragraph of Article 267 TFEU. The interpretation of Article 1(1) of Regulation (EU) 2018/231

and those provisions of Annex A to the ESA referred to in the operative part of this request for a preliminary ruling is not so obvious as to leave no scope for reasonable doubt, so that it could therefore be concluded that the interpretation would be equally obvious to the courts of the other Member States of the European Union (on this criterion, see CJEU, Grand Chamber judgment of 6 October 2021, *Consorzio*, C-561/19, EU:C:2021:799, paragraph 40).

9 The questions referred are relevant to the decision on the appeal on points of law. The leapfrog appeal on points of law is admissible. […][Comments on the admissibility of the action and the leapfrog appeal on points of law]

10 The merits of the appeals on points of law depend on whether or not the applicants are subject to the statistical reporting requirements for pension funds provided for under Article 2(1), read in conjunction with the first sentence of Article 1(1) of Regulation (EU) 2018/231. According to Article 2(1) of that regulation, the actual reporting population is to consist of the pension funds resident in the euro area Member States. The first sentence of Article 1(1) of the regulation defines the term ‘pension fund’ by reference to subsector S.129 of the ESA and provides that it must be a financial corporation or quasi-corporation that is principally engaged in financial intermediation as the consequence of the pooling of social risks and needs of the insured persons (social insurance). According to the second sentence of that provision, pension funds, as social security schemes, provide income in retirement and may provide benefits for death and disability. However, according to point (f) of the third sentence of that provision, the definition of the term does not include social security funds as defined in paragraph 2.117 of Annex A to the ESA.

11 The applicants are legal persons established in Germany. They are principally engaged in providing social insurance through financial intermediation, as described in the first and second sentences of Article 1(1) of Regulation (EU) 2018/231, by providing contribution-based old-age, survivors’ and disability pensions to their members. It remains to be determined whether they are to be classified as financial corporations falling within subsector S.129 of the ESA, or are exempted from the reporting requirements as constituents of the social security funds subsector.

12 1. Financial corporations in sector S.12 of the ESA 2010 include institutional units which are independent legal entities and market producers, and whose principal activity is the production of financial services. The applicants are legal persons governed by public law and thus satisfy the first condition. According to paragraph 3.24 of Annex A to the ESA, they are market producers if most of their output is market output as defined in paragraph 3.17 et seq. of Annex A to the ESA. In this respect, only the output of products sold at economically significant prices can be considered (paragraph 3.18 (a)). According to the first subparagraph of paragraph 3.19 of Annex A to the ESA, prices are economically significant if they have a substantial effect on the amounts of products that producers are

willing to supply and on the amounts of products that purchasers wish to acquire. Such prices arise when both of the following conditions apply:

(a) the producer has an incentive to adjust supply either with the goal of making a profit or, at a minimum, covering capital and other costs; and

(b) consumers have the freedom to purchase or not purchase and make the choice on the basis of the prices charged.

13 The *Senat* considers that both conditions must be satisfied cumulatively. This follows from the use of the plural in the German language version and is confirmed by the French (‘*la réunion des deux conditions*’) and English (‘both’) versions. The first condition could be regarded as satisfied in view of the applicants’ obligation to cover their administrative costs, including salaries, out of their own funds (see paragraph 2 regarding the first sentence of Article 9(2) VersoG). The second condition can be met only if the terms ‘purchase’ and ‘prices’ also include a pension entitlement purchased pursuant to statutes and contributions collected by government bodies, and if, in addition, it is not necessary that every consumer – or in any event every consumer that purchases the benefits provided by the producer – should have the freedom to choose whether to purchase those benefits and to make the choice on the basis of the prices charged.

14 A broad interpretation of the terms ‘purchase’ and ‘prices’ is supported by the fact that, for the purposes of distinguishing between the public and private sectors, the ESA does not focus on whether the legal form of the institutional unit has its basis in public or private law, or on the form of the membership or entitlement relationships, but rather on whether the unit is subject to government control (see paragraph 1.35 of Annex A to the ESA; CJEU, judgment of 11 September 2019, *FIG and FISE*, C-612/17 and C-613/17, EU:C:2019:705, paragraph 34 et seq., and paragraphs 73 and 78, and judgment of 28 April 2022, *Secrétariat général de l’enseignement catholique*, C-277/21, EU:C:2O22:318, paragraph 25 et seq.). However, even under a broad interpretation that includes entitlements based on public law and contributions collected on the same basis, it remains problematic that not all consumers have the freedom of choice required under condition (b). A person who is neither a compulsory member of one of the applicants nor meets the strict conditions for voluntary membership is precluded from acquiring the applicants’ pension benefits. In the case of consumers for whom membership is required or initiated by law, the required freedom of choice is lacking, at least with respect to the compulsory benefits for the compulsory members. Unless they meet the conditions for an exceptional exemption from compulsory membership, they can neither avoid having to purchase the pension entitlement nor escape the obligation to pay contributions. They are free only to pay additional contributions in order to acquire additional benefits. This gives rise to the question, formulated under point 1. a) of the operative part of this request for a preliminary ruling, as to whether point (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA requires that all consumers of the products offered by the producer must

have the freedom to choose whether to purchase those products and to make that choice on the basis of the prices charged.

15 The wording of condition (b) ('consumers') might suggest that the required freedom of choice and price-based decision must be available to all consumers with respect to the producer's entire offering. If, in the interests of a systematic interpretation, reference is to be made to the standard demarcation between market and non-market that is used for sector classification (paragraph 1.37 of Annex A to the ESA 2010) (in this respect, see the third question referred for a preliminary ruling), then the condition requiring sale to any person prepared to pay the price – as set out in point number (1) of the second subparagraph – may also support such an interpretation. The same applies to the further condition set out in point number (3) of that subparagraph which requires that effective markets exist where sellers and buyers have access to, and information on, the market. However, the subsequent sentence clarifies that an effective market can operate even if these conditions are not met perfectly. The *Senat* is unable to draw an unequivocal conclusion from the ESA and the previous case-law on this subject regarding the nature and intensity of the access restrictions or purchase obligations that would be necessary in order to rule out market-driven activity and economically significant prices. The two decisions of the Court cited above in paragraph 14 and its judgment of 3 October 2019, *Fonds du Logement de la Région Bruxelles-Capitale*, C-632/18, EU:C:2019:833, paragraph 36 et seq., address the conditions governing the allocation of different entities to the general government sector, but do not comment on the aforementioned question or the precondition for market output which requires that consumers must have the freedom to choose whether or not to purchase.

16 2. If question 1.(a) is answered in the negative, it is then necessary to determine whether the condition in point (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA is already satisfied by virtue of the fact that few consumers join the applicants as voluntary members and are, in this respect, free to choose whether to purchase the pension entitlements associated with membership in exchange for the same contributions as those paid by compulsory members, even if such consumers constitute a minority of members and the majority of the applicants' output is accounted for by compulsory benefits paid to compulsory members (question 1.(b)). According to the defendant, a decision to join voluntarily is an expression of a free, price-based purchase decision which also justifies classifying the compulsory contributions of the same amount as economically significant prices. The *Senat* doubts the soundness of this conclusion in view of the fact that the contributions paid by the voluntary members are not determined by an interplay of supply and demand under market conditions, as appears to be required by paragraph 3.19 of Annex A to the ESA. For the majority of the compulsory members who do not have the possibility of claiming an exemption, the applicants provide their benefits as monopoly suppliers. In view of the fact that only former compulsory members can be made eligible for voluntary membership pursuant to Article 30(3) VersoG, all other consumers are precluded from making a free decision to purchase benefits from

the applicants. Hence, even the lowest conceivable requirements for market access on the consumer side are not satisfied. Moreover, the amount of the compulsory contributions does not depend on the contributions paid by the voluntary members. On the contrary, it is in fact the compulsory contributions, set by a public body, that determine the amount of the contributions to be paid by the voluntary members in exchange for the same benefits.

17 3. In the judgment under appeal, the decision was thus based on the independent consideration that the contributions were, in any event, to be classified as economically significant prices in accordance with the 50% criterion set out in the third and fourth sentences of the third subparagraph of paragraph 3.19 of Annex A to the ESA. The cited provisions are worded as follows:

> For the output of … institutional units [*other than the unincorporated enterprises owned by households referred to in the second sentence*], the ability to undertake a market activity at economically significant prices will be checked notably through a quantitative criterion (the 50% criterion), using the ratio of sales to production costs. To be a market producer, the unit shall cover at least 50% of its costs by its sales over a sustained multi-year period.

18 In the judgment under appeal, the court held that the requirement for at least 50% of the costs to be covered by sales was a sufficient condition (that is to say, sufficient by itself) for a finding that prices were economically significant. This assumption also appears to have been made in the reasoning set out in the Opinion of Advocate General Hogan in *FIG and FISE*, C-612/17 and C-613/17, EU:C:2019:149, point 31. This reasoning assumes that the relevant organisation is to be regarded as a non-market producer only if it has not attained the minimum 50% cost coverage. According to this interpretation, the applicants would have to be classified as market producers simply by virtue of the fact that at least half of their costs are covered by collecting contributions – as found in the judgment of the lower court – even if the conditions laid down in points (a) and (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA, as discussed in paragraph 12 et seq. above, are not met.

19 However, the 50% criterion laid down in the third and fourth sentences of the third subparagraph of that provision could also be regarded as a necessary condition , albeit one that is not sufficient as such (that is to say, not sufficient by itself), of market output. In such case, it would supplement the conditions set out under points (a) and (b) of the first subparagraph, but would not serve to compensate for the fact that those conditions had not been met. Such a conclusion is supported by the fact that the 50% criterion set out in the third subparagraph of paragraph 3.19 of Annex A to the ESA is applied only in order to assess the possibility of market output and is not laid down as a defining characteristic of market output, as is the case for the conditions laid down in the first subparagraph. This is confirmed by the French and English language versions (‘*La capacité de réaliser une activité marchande*’; ‘The ability to undertake a market activity’).

According to these language versions, the criterion of at least 50% cost coverage determines (only) the ability to undertake market activity, but not whether market activity is being undertaken. This is also true in the case of the systematically comparable provision set out in the third subparagraph of paragraph 20.29 of Annex A to the ESA, which also serves to differentiate between market and non-market activity. Adopting the interpretation that the 50% criterion, as set out in the third sentence of the third subparagraph of paragraph 3.19 of Annex A to the ESA, operates as a necessary but not sufficient condition (that is to say, one that is not sufficient by itself) would mean that it functions as an exclusion criterion. Thus, even if the two defining characteristics set out in the first subparagraph are present, there will not be market output at economically significant prices if the sales cover less than 50% of the costs over a sustained multi-year period. It seems logical for such a broadly loss-making output, which cannot be financed under market conditions even over the medium term, to cease being classified as market output. Conversely, the mere fact of achieving at least 50% cost coverage could not by itself justify a presumption of market output if the conditions laid down in points (a) or (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA are not met.

20 The correct interpretation that should be given to the third and fourth sentences of the third subparagraph of paragraph 3.19 of Annex A to the ESA is not clear from the Court's current body of case-law. In its judgment of 11 September 2019, *FIG and FISE*, C-612/17 and C-613/17, the Court treated the federations that brought the action at that time as non-profit institutions, and hence as non-market producers (see paragraphs 2.129 and 2.130 of Annex A to the ESA), without referring to the comparable 50% criterion set out in paragraph 20.29 of Annex A to the ESA, and cited in paragraph 9 of the judgment as a 'market/non-market test', which applies to government controlled units. It is possible that the question of cost coverage was not relevant to the decision at the material time in view of the fact that classifying the federations as corporations had already been ruled out on the basis that they were not focused on generating a profit or at least covering costs (see the rules set out in paragraphs 20.19 to 20.28, as referred to in the second subparagraph of paragraph 20.29 of Annex A to the ESA, in particular the second sentence of paragraph 20.21 and paragraph 20.23 ESA). It thus stands to reason that – even when applying the parallel rule set out in paragraph 3.19 of Annex A to the ESA – market output should be assumed only if both of the conditions specified in points (a) and (b) of the first subparagraph of that provision are fulfilled, irrespective of whether or not there is cost coverage.

21 4. The question of whether paragraph 1.37 of Annex A to the ESA may be taken into account in the interests of a systematic interpretation aimed at dispelling remaining uncertainty regarding the interpretation of the first and third subparagraphs of paragraph 3.19 of Annex A to the ESA is the subject of the third question referred to the Court. If classification as a market producer under paragraph 3.24 of Annex A to the ESA presupposes that, in addition to the conditions specified in paragraph 3.19, the conditions for market activity as set out in paragraph 1.37 must also be met, then the applicants should be classified as

non-market producers. Contrary to point (1) of this provision, they do not seek to maximise their long-term profits, nor do they sell their benefits freely on the market to whoever is prepared to pay the asking price. Moreover, they are prohibited from doing either of the above under the relevant national law. As stated in paragraph 2 above, the applicants must allocate all of their revenues to the performance of their function, that is to say, for the primary purpose of providing pension benefits and covering the associated costs. Moreover, they are not permitted to provide their pension benefits to every consumer who is prepared to pay the contributions but only to their statutory compulsory members and to the very limited group of their voluntary members.

22 The *Senat* is doubtful as to whether – as the defendant maintains – paragraph 1.37 of Annex A to the ESA applies only to public-sector entities. According to the first subparagraph of that provision, its purpose is to differentiate between market and non-market as well as ('and') to differentiate between the private and the public sector. However, applying point (1) of the second subparagraph of that provision would appear to be problematic since the requirements specified therein are more extensive than the requirements set out in paragraph 3.19 of Annex A to the ESA, which, according to paragraph 3.24 of Annex A to the ESA, are the relevant requirements in the instant case. It is possible that paragraph 3.19 of Annex A to the ESA is intended to concretise the criteria specified in paragraph 1.37 for differentiating between market producers and non-market producers. Paragraph 1.37 of Annex A to the ESA relates to the broad sector classification grid set out in Table 1.1; with respect to both publicly and privately controlled units, this distinguishes in each case between market and non-market activities. The criteria laid down for that purpose – whereby the sellers' objective is to maximise their profits and the buyers' objective is to achieve price-utility optimisation – are stricter than the two conditions for an assumption of market output formulated in points (a) and (b) of the first subparagraph of paragraph 3.19 of Annex A to the ESA, namely that the offer calculation must at least aim to achieve cost coverage and that the consumer must be free to make a price-based decision as to whether or not to proceed with the purchase. Accordingly, paragraph 1.37 of Annex A to the ESA could be applicable only in so far as the general criteria laid down in that provision do not contradict the more specific criteria laid down in paragraph 3.19 of Annex A to the ESA, but merely paraphrase conditions also stipulated therein – for example, a minimum of free market access or a competitive situation as a prerequisite for market-based price formation. In this respect also, the *Senat* requests the Court to provide clarification.

23 5. The fourth question concerns the second sentence of paragraph 2.107 of Annex A to the ESA, which refers to the benefits included in the insurance contracts of pension fund schemes. This potentially suggests that units which provide their benefits solely on the basis of public-law regulations – as applies in the case of the applicants – are not regarded as pension fund schemes. On the other hand, the definition provided in paragraph 2.105 of Annex A to the ESA does not impose any requirements as to the legal basis of the benefits and, furthermore,

paragraph 2.107 of Annex A to the ESA does not set out a (further) definition, but instead provides examples. The reference to contracts might thus indicate only an arrangement that is typical of the benefits relationship, but not conceptually necessary. Paragraph 2.109 of Annex A to the ESA expressly states that pension fund schemes may also be organised by general government, without commenting on the question of contractual arrangements. Moreover, paragraph 20.39 of Annex A to the ESA also specifies other characteristics for the purposes of classifying borderline cases. However, this could be because an arrangement covered by paragraph 2.107 of Annex A to the ESA is assumed. The *Senat* is unable to infer any unequivocal clarification from the purpose of the provisions and recitals in the relevant regulations that would enable it to dispel the doubt surrounding the interpretation. If no contractual arrangement is necessary, the *Senat* considers it questionable whether a public-law scheme, comprised overwhelmingly of compulsory members, will be sufficient, in so far as all members can increase the level of the benefits by making voluntary contributions, even if only a minority can voluntarily establish and terminate the benefit relationship by joining or leaving.

24 Questions 1 to 4 on the individual prerequisites for market output and classification in subsector S.129 are not superfluous because, by way of example, it could potentially be established unequivocally that the applicants fall within the scope of the exemption for social security funds provided for under point (f) of the third sentence of Article 1(1) of Regulation (EU) 2018/231. Whether or not this is the case depends on the answers to the interpretation questions numbered 5 and 6, which also cannot be answered without the requested preliminary ruling.

25 6. Point (f) of the third sentence of Article 1(1) of Regulation (EU) 2018/231 refers to paragraph 2.117 of Annex A to the ESA for the purposes of identifying the social security funds subsector. According to the latter provision, this subsector includes central, state and local institutional units whose principal activity is to provide social benefits and which fulfil each of the following two criteria:

(a) by law or by regulation certain groups of the population are obliged to participate in the scheme or to pay contributions; and

(b) general government is responsible for the management of the institution in respect of the settlement or approval of the contributions and benefits independently from its role as supervisory body or employer.

26 Paragraph 2.110(a) of Annex A to the ESA clarifies that institutional units which fulfil each of these two criteria do not belong to the pension funds subsector (S.129) but rather to the social security funds subsector.

27 However, not all of the defining characteristics mentioned in paragraph 2.117 of Annex A to the ESA have been included in the definition of ‘social security pension schemes’ set out in paragraph 17.43 of Annex A to the ESA. This

therefore gives rise to the fifth question referred for a preliminary ruling. If the first provision is to be understood as a definition of the social security funds subsector, and the second provision is to be understood as a more specific provision allowing for differentiation within that subsector, then paragraph 17.43 of Annex A to the ESA presupposes that all of the definitional characteristics specified in paragraph 2.117 of Annex A to the ESA are fulfilled and supplements them with additional characteristics for the purposes of distinguishing pension funds within the social security funds subsector. In such case, the applicants' classification as social security funds may be precluded if they do not satisfy condition (b) under paragraph 2.117 of Annex A to the ESA (in this respect, see point 7 under paragraph 28 below). According to the contrary view, the definition set out in paragraph 17.43 of Annex A to the ESA is independent and conclusive. Furthermore, this contrary view understands the concept of general government as referred to in that paragraph to encompass, in addition, legal persons established under public law that are independent vis-à-vis the primary unit. In such case, the applicants would have to be classified as social security pension schemes because the law requires their compulsory members to participate in their pension schemes and because they provide their benefits as institutional units, with separate legal personality, of a *Land* (federal state) – the Free State of Bavaria.

28 7. For its part, the question (6.(a)) as to whether the concept of 'general government' referred to in paragraph 2.117(b) and paragraph 17.43 of Annex A to the ESA also includes such institutional units, or refers only to the respective primary unit, cannot be answered unequivocally one way or the other. In any event, given that paragraph 2.117(b) of Annex A to the ESA refers to management that extends beyond a supervisory role, the term 'general government' used in that paragraph could only be referring to the primary unit responsible for supervising the institutional units endowed with the right of self-administration (autonomy). If the terms are being used consistently, then the term 'general government' as used in paragraph 17.43 of Annex A to the ESA would also have to be understood in this narrow sense. However, in the above-mentioned provision the term could also include other government units, or even administrative bodies responsible for providing the statutory pension insurance that are independent of the primary unit, allow for their members to be exempted from the statutory pension insurance scheme and are intended to ensure, for certain occupational groups, a self-administered old-age pension that is aligned to their contribution and benefit levels, but which are not subject to government control. The demarcation rule set out in paragraph 20.39 of Annex A to the ESA, which assumes that the benefits might also be 'managed' by a 'separate institutional unit', could lend credence to this proposition. On the other hand, paragraph 20.12 of Annex A to the ESA expects that social security schemes must cover all or a large part of the community as a whole; in general, this requirement is unlikely to be fulfilled in the case of regional occupational pension schemes targeted at specific professions.

29 Depending on the interpretation accorded to the term 'general government' in both of these provisions, the additional question (6.(b)) arises, with respect to paragraph 2.117(b) of Annex A to the ESA, as to whether settlement and approval

of contributions and benefits by the general government requires that the primary unit determines quantifiable amounts for both in each case. The concept of settlement or approval suggests the need for final regulation. However, according to the contrary view advanced by the applicants, it would be sufficient for the primary unit to establish the legal framework, as described in greater detail in the question referred for a preliminary ruling, within which the autonomous unit is authorised to regulate the amount of the contributions and the type and scope of the benefits.

30 Lastly, for the purposes of applying the demarcation rule set out in paragraph 20.39 of Annex A to the ESA, which was adopted for borderline cases, the question arises as to whether the concept of a 'government unit' encompasses only institutional units that meet all the requirements laid down in paragraphs 20.10 and 20.12 of Annex A to the ESA. According to the binding factual findings of the court adjudicating on the substance (Paragraph 137(2) of the Verwaltungsgerichtsordnung (Code of Administrative Court Procedure), the criterion requiring substantial transfers from the main budget (paragraph 20.10) cannot be regarded as satisfied. Accordingly, the question as to whether the applicants are subject to government control could only be material if paragraph 20.12, but not paragraph 20.10, is relevant. If, on the basis of the correct interpretation to be accorded to the ESA provisions in each respective case, they are neither market producers nor part of the social security funds subsector, they should be classified as private non-profit institutions and, as such, they could not be subject to reporting requirements – irrespective of whether they are subject to government control.

[…] [Signatures]