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Weber, D.; Koeprijanov, D.

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Article

Some Thoughts on 'the Management' of 'Special Investment Funds' Following the Entering into Force of the AIFM Directive

Dennis Weber* **& Dimitri Koeprijanov****

The VAT exemption for management of special investment funds has been a topic of discussion for a long time. In the Fiscale Eenheid X NV judgment (9 December 2015, C-595/13), the Court of Justice of the European Union again gave its view on the interpretation of this exemption. The judgment raises many questions and the fact that the dispute relates to a period in which the AIFM Directive had not yet been introduced makes these questions even more complicated. In this contribution, the authors share their thoughts on the consequences of the judgment, the introduction of the AIFM Directive and the current scope of the exemption for management of special investment funds. In particular attention will be paid to the interpretation of the terms 'special investment fund' and 'management'

1 INTRODUCTION

Article 135(1)(g) of the VAT Directive includes a (mandatory) VAT exemption for 'the management of special investment funds'. In this article, we discuss whether the scope which is afforded to the Member States in the interpretation of the term 'special investment funds' and the term 'management' has been restricted since the entering into force of the Alternative Investment Fund Managers Directive (AIFM Directive).[1] This issue was also recently raised in a Working Paper of the VAT Committee.[2]

The interpretation of the term 'special investment funds'

Article 135(1)(g) of the VAT Directive contains a (mandatory) exemption for:

> the management of special investment funds as defined by Member States;.

The starting point of the case law of the Court of Justice of the European Union (CJEU) is that the exemptions of Article 135 of the VAT Directive are autonomous terms of Union law which are 'in principle, [to] be given a common definition in order to avoid divergences in the application of the VAT system from one Member State to another, so that the Member States cannot alter their content'. The exception to this is 'that [this] is not the case where the legislature has conferred on the Member States the task of defining certain terms of an exemption'.[3]

This exception can be found in Article 135(1)(g) of the VAT Directive given that this provision confers on the Member States the authorization to define the term 'special investment funds'.[4] We note that authorization to determine the definition of investment funds on the basis of national law is an exception. Due to lack of harmonization of the law and definition of investment funds at EU level (the Sixth VAT Directive was adopted in 1977, long before the UCITS Directive was adopted (1985[5])) a reference in national regulations to such funds was the only option. See also AG Kokott who observed in her Opinion in *Abbey National* (punt 41)[6]:

> It is true that when the Sixth Directive was adopted, at which time the law on common funds had not yet been approximated by Directive 85/611, it made sense exceptionally to refer to national law for the definition of common

* Amsterdam Centre for Tax Law; University of Amsterdam; of counsel Loyens & Loeff. Email: dennis.weber@loyensloeff.com.
** Loyens & Loeff, advisor Indirect Tax. Email: dimitri.koeprijanov@loyensloeff.com

1 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ EU, 1 July 2011, L 174/1. *See* on this Directive also: I. D. M. Dingemans, F. M. van der Zeijden & M. R. Verburgh, Rechtseenheid op losse schroeven: de AIFMD in de fiscaliteit, WFR 2016/205.

2 *See* VAT Committee, Working Paper no. 936, taxud.c.1(2017) 6168695, Scope of the exemption for the management of special investments funds, Brussels, 9 Nov. 2017.

3 *See* in that sense, the judgments in *Abbey National*, C-169/04, EU:C:2006:289, paras 38 and 39; *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, C-363/05, EU:C:2007:391, paras 19 and 20; *Wheels Common Investment Fund Trustees* e.a., C-424/11, EU:C:2013:144, para. 16, and *ATP PensionService*, C-464/12, EU:C:2014:139, para. 40.

4 *See* i.e. judgments in *Wheels Common Investment Fund Trustees* e.a., C-424/11, EU:C:2013:144, para. 16, and *ATP Pension Service*, C-464/12, EU:C:2014:139, para. 40.

5 Council Directive 85/611/EEC of 20 Dec. 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 375, at 3.

6 CJ 4 May 2006, Case C-169/04, *Abbey National*.

> funds. By so doing, it was ensured that the exemption takes effect only in clearly defined cases, namely the management of common funds which have State authorisation as such in a Member State.

The authorization to define the term 'special investment funds', however, is not unlimited. This authorization is limited by:

- The wording of the Directive[7]
- The object of the VAT Directive[8]
- The principal of fiscal neutrality[9]

With regard to the exemptions of activities in connection with the management of special investment funds, the CJEU observed that these in particular had as objective 'to facilitate investment in securities by means of investment undertakings by excluding the cost of VAT and, in that way, ensuring that the common system of VAT is neutral as regards the choice between direct investment in securities and investment through collective investment undertakings'.[10]

It is clear from the *Fiscale Eenheid X NV* judgment[11] that in the defining of the term 'special investment funds', the Member States have apparently limited this term in their national law to investments which were regulated at national level. The CJEU observed (paragraph 42):

> As the Advocate General noted in point 21 of her Opinion, the Member States originally determined that investment funds were funds regulated at national level and subject, therefore, to licensing and oversight rules, namely authorisation by the public authorities and control, with the aim particularly of protecting investors. Referring to the national law of the Member States for the definition of 'special investment funds' has thus enabled the exemption under Article 13B(d)(6) of the Sixth Directive to be reserved to investments that are subject to specific State supervision.[12]

From this consideration, it also appears that with 'investments that are subject to specific State supervision' the CJEU refers to investment funds which are regulated and are thus 'subject to specific licensing and oversight rules, particularly for the object of protecting investors'. In the past, the regulation with regard to admission and supervision of investment funds was not harmonized within the EU and was thus linked to national law for the national admission and supervision.

With the entering into force of the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive, however, a step has been taken with EU regulations regarding admission and supervision of investment funds. The CJEU has attached an important consequence to this, due to which it has: 'limited the discretion of Member States to define special investment funds' (see *Fiscale Eenheid X NV* judgment, paragraph 45).

To add to this:

> The Member States' power to define was thus overlaid by the coordination, at EU level, of laws relating to the supervision of investments. The concept of 'special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive is therefore determined both by EU law and by national law. (*Fiscale Eenheid X NV* judgment, para. 46).

Management of investment funds which fall under the UCITS Directive and within this framework are subject to special government supervision, therefore, fall under the exemption, as do institutions which do not fall under this Directive, but demonstrate the same characteristics as those institutions or are at least are comparable as such with institutions which fall under the UCITS Directive. These, however, must be institutions which are subject to (EU or nationally regulated) special government supervision.

Hereby, the CJEU has seen to it that the term 'special investment funds' is given a Community definition to the extent possible. Institutions which fall under the UCITS Directive have a Community definition in full; for institutions which do not fall under that Directive, the exemption may not preclude similar institutions which compete with institutions which do fall under the UCITS Directive. The reason is that such investment capital is subject to the same competition conditions and concern the same circle of investors.[13] The CJEU is seeing to it that fiscal neutrality is safeguarded: (managers of) investment funds which compete with each other are entitled to the same VAT exemption.

2 Entering into force of the AIFM directive

As from 22 July 2013, the AIFM Directive[14] should have been transposed into the national law of the Member States. This Directive has the objective of 'establishing common requirements governing the authorisation and

[7] We see that, e.g. in the *Fiscale Eenheid X, C-595/13*, the CJEU considered (para. 32): 'A Member State cannot in particular, without negating the very terms 'special investment funds', select from among special investment funds those which are eligible for the exemption and those which are not. That provision thus grants it only the power to define, in its domestic law, the funds which meet the definition of 'special investment funds'.'

[8] *See* CJ 9 Dec. 2014, Case C-595/13, *Fiscale Eenheid X NV*, para. 33.

[9] *See* CJ 9 Dec. 2014, Case C-595/13, *Fiscale Eenheid X NV*, para. 33.

[10] *See* CJ 9 Dec. 2014, Case C-595/13, *Fiscale Eenheid X NV*, para. 34.

[11] Case C-595/13, *Fiscale Eenheid X NV*, para. 42.

[12] *See* for critical comments on this judgment: G. J. van Norden & W. Tigchelaar, Focus on btw-vrijstselling Beheer (Vastgoed), WPNR 2016(7096), at 163; and Zadelhoff in his note to the judgment published in BNB 2016/45.

[13] *See* Case C-595/13, *Fiscale Eenheid X NV*, para. 48 (and AG Kokott in para. 27 of her Opinion to that Case); *See* in this framework on fiscal neutrality in more detail, AG Kokott in paras 33 through 49 of her Opinion in Case C-363/05, *JP Morgen Fleming Claverhouse Investment Trust*.

[14] Directive 2011/61/EU of the European Parliament and the Council of 8 June 2011 with regard to managers of investment institutions and to amendment of the Directives 2003/41/EC and 2009/65/EC and of the Regulation (EC) no. 1060/2009 and (EU) no. 1095/2010, PB EU, 1 July 2011, L 174/1.

supervision of AIFMs in order to provide a coherent approach to the related risks and their impact on investors and markets in the Union' (see the second consideration in the Recital). In the fourth consideration of the Recital, it is considered:

> This Directive aims to provide for an internal market for AIFMs and a harmonised and stringent regulatory and supervisory framework for the activities within the Union of all AIFMs, including those which have their registered office in a Member State (EU AIFMs) and those which have their registered office in a third country (non-EU AIFMs).

With the implementation of the AIFM Directive, the aim is thus to create a harmonized legal framework for (managers of) all investment funds which are not regulated under the UCITS Directive[15]; the so-called 'alternative' investment funds or AIFs.

In addition to an ordinary licence regime, the AIFM Directive provides for a 'lighter regime' for certain smaller AIF managers. Consideration 17 of the Recital sets forth the following:

> This Directive further provides for a lighter regime for AIFMs where the cumulative AIFs under management fall below a threshold of EUR 100 million and for AIFMs that manage only unleveraged AIFs that do not grant investors redemption rights during a period of 5 years where the cumulative AIFs under management fall below a threshold of EUR 500 million. Although the activities of the AIFMs concerned are unlikely to have individually significant consequences for financial stability, it is possible that aggregation causes their activities to give rise to systemic risks. Consequently, those AIFMs should not be subject to full authorisation but to registration in their home Member States and should, inter alia, provide their competent authorities with relevant information regarding the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs they manage. However, in order to be able to benefit from the rights granted under this Directive, those smaller AIFMs should be allowed to be treated as AIFMs subject to the opt-in procedure provided for by this Directive. That exemption should not limit the ability of Member States to impose stricter requirements on those AIFMs that have not opted in.

3 Consequence of AIFM directive for definition of the term special investment funds

3.1 Investment Funds Which Fall Under the UCITS Directive or the AIFM Directive

The AIFM Directive heralds a further step in the harmonization of the admission and supervision law regarding collective bringing together of investment capital. Such as the CJEU considered in the *Fiscale Eenheid X NV* judgment, with the AIFM Directive (paragraph 61) 'at EU level, a further step [is set] in the harmonisation of specific State supervision of investments'. Through this further harmonization, the discretion of the Member States in the interpretation of the term special investment funds has been further restricted. It is clear from the *Fiscale Eenheid X NV* judgment that a limit has been set by the UCITS Directive to the discretion which the Member States have in the interpretation of a special investment fund. After the AIFM Directive, further limits have been set to the discretion to consider investment capital which falls under this Directive as special investment funds. When one of those Directives (UCITS Directive or the AIFM Directive) is applicable to a certain investment capital, the Member State, namely, no longer has any discretion whatsoever to define the term 'special investment funds'. For those funds, the term 'special investment funds' has been given a Community definition. See in this framework, AG Kokott in paragraph 23 of her Opinion in the case *Fiscale Eenheid X NV*:

> Once specific State supervision of investment funds began to be regulated at EU level with the UCITS Directive, the Court of Justice limited the discretion of Member States to define special investment funds within the meaning of Article 13B(d)(6) of the Sixth Directive: Member States must classify funds that are regulated under the UCITS Directive as 'special investment funds'.

In paragraph 48 of her Opinion in *JP Morgen Fleming Claverhouse Investment Trust,*[16] AG Kokott had also defended that the Member States:

> In the case of funds covered by Directive 85/611, the Member States no longer retain any discretion in that respect; in their case an adequate level of investor protection must be assumed. Other forms of investment fund, on the other hand, may be excluded from the exemption if they do not ensure a level of investor protection comparable to that ensured by funds whose management is exempt.

As is shown from Working Paper no. 936 of the VAT Committee,[17] the Commission services and Member State Denmark have a different opinion as regards funds with managers who fall under the AIFM Directive (AIF).[18] According to the Commission services and Denmark, the requirement that such funds fall under 'specific State supervision' is satisfied (namely, they satisfy the requirements which are laid down in the AIFM Directive), but that does not mean that such

[15] Apart from a few exceptions, such as, e.g. pension funds; *See* Art. 2, para. 3 of the AIFM Directive.

[16] CJ 28 juni 2007, Case C-363/05, *JP Morgen Fleming Claverhouse Investment Trust.*

[17] *See* VAT Committee, Working Paper no. 936, taxud.c.1(2017) 6168695, Scope of the exemption for the management of special investments funds, Brussels, 9 Nov. 2017.

[18] *See* VAT Committee, Working Paper no. 936, taxud.c.1(2017) 6168695, Scope of the exemption for the management of special investments funds, Brussels, 9 Nov. 2017.

funds do *always* satisfy all the requirements to be regarded as comparable to funds which fall under the UCITS Directive. The requirements which, according to the Commission services and Denmark, an AIF must satisfy to be comparable with an UCITS is that there must be: (i) collective investments, (ii) risk diversification, (iii) investment risk borne by the investors and, a requirement which is not set by Denmark but is by the Commission: (iv) the funds must be subject to the same conditions of competition and appeal to the same circle of investors as UCITS (competition test).

Based on this, according to Denmark, it cannot be defended that *all* AIFs are special investment funds within the meaning of the VAT Directive because they cannot always, just as all UCITS investment funds, be considered to fulfil all the requirements. In the opinion of Denmark it must on a case-by-case basis assessed if a particular AIF is comparable to an UCITS.[19] Hereby, the Commission services even takes the position that it is in particular doubtful whether the fourth requirement, the competition test, is satisfied because AIFs and UCITS in general are not found to be in competition.[20]

We do not agree with the position of the Commission services and Denmark. Our main objection is that in the reasoning of the Commission and Denmark, an AIF should be compared with the criteria which apply to *UCITS* (namely, criteria i to iii) and, in addition, are tested (criterion iv) as to whether an AIF is in competition with UCITS. This, however, is not the correct comparison. First, we question why an AIF should satisfy the requirements (criteria i to iii) which apply to UCITS. The AIFM Directive sets out its *own* definition of an AIF (in Article 4(1)(a) AIFM Directive) and thus it must be tested against those requirements.[21] AIFS which satisfy this definition thus fall under the AIFM Directive and, with due observance of the fiscal neutrality principle, must be given the same treatment as direct investors. The Commission sets as (an extra) requirement that an AIF must be in competition with a UCITS (condition iv). The question, however, is why. AIFs and UCITS, in principle, target different investors (AIFs professional investors; UCITS retail investors) and have different investment strategies,[22] the competition requirement from the case law of the CJEU has as purpose of treating investment funds which *do not* fall under the AIFM Directive or the UCITS Directive equally to funds which *do* fall under those Directives (see clearly in that regard, paragraph 24 of the *Wheels* case[23]). In the subject case, we discuss funds which *do* fall under the AIFM Directive. These are in competition with *each other* (rather than with UCITS) and therefore, on that basis, must be given equal treatment.

3.2 Investment Funds Which Do Not Fall Under the UCITS Directive or the AIFM Directive

The Member States retain only their authorization to define the term special investment funds in the case an investment fund does not fall under the UCITS Directive or under the AIFM Directive, but this authorization is also restricted and Member States may only exclude investment funds from the VAT exemption insofar as this is in accordance with the principle of fiscal neutrality (which means, in this framework, that investment funds which are in competition with each other must be entitled to the same VAT exemption). It follows from the *Fiscale Eenheid X NV* judgment that in such a situation, the exemption must be restricted to investments which are under 'specific State supervision' because only suchlike funds are subject to the same competition conditions and address the same circle of investors (see explicitly paragraphs 42 and 47 through 49 of the *Fiscale Eenheid X NV* judgment).

4 Funds which fall under the AIFM directive qualify for the exemption for special investment funds: Difference between registration obligation and full licence obligation?

As is set out in paragraph 3.1 above, since the entering into force of the AIFM Directive, the Member States have no authorization to define the term special investment funds which fall under the scope of application of the AIFM Directive in their national law, this term now has a Community definition. This means that, in our opinion, in case investment capital falls under the AIFM Directive (an AIF), the investment capital is a special investment funds under Article 135(1)(g) of the VAT Directive.

Another question is if, under the application of the VAT exemption, a distinction mist be drawn between

[19] Based on the requirements specified in points i to iii; *See* VAT Committee, Working Paper no. 936, taxud.c.1(2017)6168695, Scope of the exemption for the management of special investments funds, Brussels, 9 Nov. 2017, Annex 2.

[20] *See* VAT Committee, Working Paper no. 936, taxud.c.1(2017) 6168695, Scope of the exemption for the management of special investments funds, Brussels, 9 Nov. 2017, at 28–30.

[21] Art. 4(1)(a) of the AIFM Directive luidt: AIFs' means collective investment undertakings, including investment compartments thereof, which:

(1) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
(2) do not require authorization pursuant to Art. 5 of Directive 2009/65/EC;

[22] *See also* recital 47 of the AIFM Directive: UCITS and AIFs are different both in the investment strategies they follow and in the type of investors for which they are intended.

[23] *See Wheels Common Investment Fund Trustees* e.a., C-424/11, EU: C:2013:144, para. 24.

managers who fall under the lighter regime (registration obligation) of the AIFM Directive (Article 3 of the Directive) and the AIF managers which fall under the more burdensome regime (full licence obligation).

We see no reason to draw a distinction here. The AIFM Directive has made a lighter regime possible, to relieve AIF managers which manage smaller amounts of capital. This does not alter the fact that those AIF managers are to be admitted to the market and are subject to supervision which is determined by the AIFM Directive at Community level. These are, therefore, managers of investment funds which are recognized as such by the EU. The AIFM Directive provides for a more burdensome regime and a lighter regime for managers of larger/smaller amounts of capital, but that does not detract from the fact that the capital falls under specific State supervision, according to the CJEU itself in the *Fiscale Eenheid X NV* judgment (paragraph 61), in which the Court considered that the AIFM Directive is, 'at EU level a further step in the harmonisation of specific State supervision of investments'.

In addition to that, in the case an AIF manager falls under the lighter regime, the Member States have the possibility to impose stricter requirements on those managers (see Article 3, paragraph 3 AIFM Directive). There is, therefore, for (small) AIF managers at Community level, a lighter admission and supervision regime, but the Member States may impose stricter requirements. The Directive therefore provides for a minimum Community EU right of admission and supervision. The fact that a Member State has not exercised the possibility to impose stricter requirements on AIF managers which fall under the lighter regime (or who have only made limited use thereof), cannot constitute reason to exclude those AIF managers from the VAT exemption. Those AIF managers, after all, already fall under the minimum EU regulatory and supervisory framework. In addition, the AIFM Directive itself indicates that AIF managers who fall under the lighter regime and those who fall under the heavier regime are, in fact, equal. The Directive namely, provides for an opt-in procedure which offers AIF managers who fall under the lighter regime the possibility to be granted the same rights as the AIF managers who fall under the full licence obligation (Article 3, paragraph 4 AIFM Directive).

Such as has been observed above, the authorization to define the term 'special investment funds' is always restricted by:

- The wording of the Directive;
- The objective of the VAT Directive;
- The principle of fiscal neutrality;

The wording of the Directive: 'special investment funds', does not constitute reason to draw a distinction between AIF managers who fall under the lighter regime and those who fall under the more burdensome regime. The object of the VAT exemption for the management 'special investment funds' is in particular 'to facilitate investment in securities by means of investment undertakings by excluding the cost of VAT and, in that way, ensuring that the common system of VAT is neutral as regards the choice between direct investment in securities and investment through collective investment undertakings'.[24] It fails to be seen why AIF managers who fall under the lighter regime on the basis of this object of the VAT exemption must be excluded. AIF managers who fall under the lighter regime often have the same characteristics as the funds which fall under the heavier regime and at the very least are comparable to such extent that they are in competition. An AIF manager which falls under the more burdensome regime can, for example, manage exactly the same investments as an AIF manager who falls under the lighter regime, but falls under the more burdensome regime merely because, for example, the threshold (not more than EUR 100 or EUR 500 million of assets) is exceeded. Furthermore, the fact that the opt-in rule offers to each AIF manager the possibility to fall under the full licence obligation indicates that Union law assumes that those AIF managers are in fact comparable and are in competition with each other. It would also be in contravention of the object of the VAT exemption if the VAT exemption did not apply to small AIF managers, but at the moment their assets grow they are granted the advantage of the VAT exemption (because then, they fall under the more burdensome regime). Here, large and small AIF managers are not treated equally. The State aid prohibition of Article 107 TFEU prohibits enterprises from being granted an advantage which deviates from the general system (where this would be so in the case of an exemption in the subject case) insofar as hereby a differentiation is made between market participants which with regard to the aim of the regime, are in a comparable factual and legal situation.[25] Given that large and small AIF managers in the subject case are comparable with regard to the object of the VAT exemption, this would appear to be prohibited State aid. Primary EU law, therefore, thus also enforces an interpretation of the VAT exemption such as is reflected here above.

5 Scope of the term management

5.1 Introduction

Still yet another question is what is the scope of the term 'management' in the context of the exemption for management of special investment funds.

Interpretation of the term management was first discussed in the judgment in *Abbey National II*.[26] The CJEU had to examine the question whether the administrative

[24] *See* Case C-595/13, *Fiscale Eenheid X NV*, para. 34.
[25] *See* CJ 8 Sept. 2011, *Paint Graphos*, joined cases C-78/08-C-80/08, case law EU:C:2011:550, paras 50 and 54.
[26] CJ, 4 May 2006, C-169/04.

management of a special investment fund, outsourced to a third party by the fund manager fell under the term management within the meaning of the exemption. The CJEU considered that this was a Community term which covered all actions which were specific to the business of a special investment fund. Given that according to Appendix II to the UCITS Directive, 'administration' is part of the activities of a special investment fund, those activities had to be considered as falling within the scope of the term management.

The CJEU continued to pursue this line in the case law which followed. Each time when the exemption for special investment funds was at issue, the CJEU reminded us that the UCITS Directive had to be taken as starting point and the funds regulated by that Directive.[27]

In the *Gfbk*-case,[28] the CJEU clarified that activities which are not specified in Appendix II to the UCITS Directive, but which – taken as a whole, are specific and essential for the activities of a special investment fund can also fall under the term management. According to the CJEU, this was inter alia the case when the activities referred to had intrinsic connection with the activities of specific investment funds.[29] The starting point, however, remains the UCITS Directive and the activities of the funds regulated thereby.

In paragraph 78 of the *Fiscale Eenheid X* case, the CJEU ruled that the actual management of the immovable property held by the fund was, 'not specific to the management of a special investment fund in that it goes beyond the various activities connected with the collective investment of capital raised'.

The CJEU is clear: the actual management of real estate is not specific to the operation of a special investment fund and therefore, does not fall under the term management. The underlying reasoning of the CJEU is simple and is also given in paragraph 78: 'In so far as the actual management of immovable property is intended to preserve and build up the assets invested, its objective is not specific to the activity of a special investment fund but is inherent in any type of investment.'

Actual management of the real estate itself is not specific to the management of a real estate fund because this would equally be the case for individual investment in real estate, according to the CJEU. This would seem to settle the matter – or is there still scope for nuance? This too gives rise to the question whether the entering into force of the AIFM Directive could play a role.

Both the CJEU and the AG are silent here and they also make no further reference to this, other than to the question of whether a real estate fund could qualify as a special investment fund.[30] Nevertheless, it would seem worthwhile to dwell further on this, not in the least because, to date, in the interpretation of the term management, the CJEU has always taken the harmonized legislative framework for investment funds as starting point. We deal with this further in the following paragraph.

5.2 Introduction of AIFM Directive; Broadening of the Term Management?

5.2.1 Activities of an AIF Broader Than an UCITS?

Because the CJEU has indicated in the *Fiscale Eenheid X-case*, that activities with regard to assets are not specific to the activities of an UCITS, we are of the opinion that to answer the question whether the term management has been changed by the entering into force of the AIFM Directive, it is important to consider whether the activities of an AIF are broader than the activities of an UCITS. More in particular whether the activities of an AIF are of such a different nature that activities with regard to assets could be considered specific to this. In this framework, it is interesting to examine the definition of an AIF. After all, in de judgments *GfbK* and *Fiscale Eenheid X,* the CJEU based itself on the definition of UCITS such as is provided in the UCITS Directive.

From Article 1, paragraph 2 of the UCITS Directive (which the CJEU itself cites) UCITSs are funds 'with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of capital raised from the public and which operate on the principle of risk-spreading'.

If we examine the definition of an AIF such as is included in the AIFM Directive,[31] it further states that AIFs '[are] collective investment undertakings, including investment compartments thereof, [those] which:

> raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors' which also do not qualify as an UCITS.

The definition of an AIF would not seem to deviate significantly from the definition of an UCITS, at least not in the sense that it would clearly appear from the definition of an AIF, that also belonging to the activities of an AIF – as opposed to an UCITS – are activities which have the object of maintaining the invested capital and to have it increase in value. It is possible that room for such interpretation could still be found for this in the words 'investment policy', but this is not apparent at the very least.

The above leads us to the conclusion that the definition of an AIF – to say the least – does not necessarily

[27] CJ, 19 July 2012, C-44/11.
[28] CJ, 7 Mar. 2013, C-275/11.
[29] In *GfbK*, it concerned investment advisory services which were provided by a third party to a common investment fund.
[30] CJ, 9 Dec. 2015, C-595/13, para. 61.
[31] Art. 4, para. 1, sub a of the AIFM Directive.

offer the scope to have activities with regard to assets fall under the scope of the term management.

5.2.2 *AIFM Directive and Activities with Regard to Assets of AIF's*

As was also observed by the AG in her Opinion in the *Fiscale Eenheid X* case, it is stated in Appendix I of the AIFM Directive that managers of funds regulated by the AIFM Directive (AIFs) can – in the framework of the management of an AIF – be engaged in activities with regard to the assets held by an AIF.[32] In the non-exhaustive list of this work, the term 'management of real estate' is explicitly specified.

What does this mean for the decision of the CJEU in the judgment *Fiscale Eenheid X*? More in particular, would the opinion of the CJEU have been different if the dispute concerned a period in which the AIFM had already been introduced? We are of the opinion that that is not the case and find support for this in the systematics of the AIFM Directive and the composition of Annex I to that Directive.

To start with the composition of the Annex. This states, in brief, that a manager of an AIF *is obliged* to perform at least the following functions:

(1) portfolio management
(2) risk management

In addition, a manager *may* perform services in the area of:

(1) fund administration
(2) marketing
(3) activities with regard to the assets of an AIF.

This composition differs from Article 6 of the UCITS Directive read in conjunction with Annex II to, in which it is indicated that the collective portfolio management '*shall* include' investment management, administration and marketing.

The background of the deviating composition of Annex I to the AIFM Directive lies in the systematics of the AIFM Directive; AIF managers are not allowed to (save for a number of exceptions) perform activities other than those specified in Annex I of the AIFM Directive.[33]

Because the AIFM Directive, in principle, encompasses all non-UCITS funds (save for a number of exceptions), a system has been elected in which the manager of an AIF is obliged to perform a number of tasks which are deemed essential to the management of every AIF (the 'must do' tasks). With regard to a number of tasks, it is recognized that it is not necessary to oblige managers of AIFs to perform them (fund administration and marketing). Finally, there are tasks for which it is not necessary, but for which it would also not be logical, to oblige all AIF managers to perform them. This concerns the work with regard to assets. Thereby consider in particular, funds which are dependent on the maintaining or increasing of the value of the assets for their returns (such as private capital funds or real estate funds).

The consideration of the interests set out above has led to the composition of Annex I of the AIFM Directive being what it is. Consideration 21 of the Recital of the AIFM Directive sets out the following:

> Management of AIFs should mean providing at least investment management services. The single AIFM to be appointed pursuant to this Directive should never be authorised to provide portfolio management without also providing risk management or vice versa. Subject to the conditions set out in this Directive, an authorised AIFM should not, however, be prevented from also engaging in the activities of administration and marketing of an AIF or from engaging in activities related to the assets of the AIF.

The inclusion of activities related to the assets in Annex I of the AIFM Directive, therefore, envisions preventing that managers are forbidden to perform those services, which would be highly impractical for certain types of AIFs. In our opinion, however, this does not mean to say that those services are specific to the activities of AIFs in general. The fact that an AIF is permitted to perform activities related to assets of the AIF does not, in our view, have the aim of broadening the term management in Article 135, paragraph 1, letter g of the VAT Directive.

We are of the view that the CJEU must restrict the scope of the term management to activities and services which are specific to the activities of *all* common investment funds (be it an UCITS or an AIF), such as the responsibility of fund administration and the providing of investment advice. Only then will justice be done to the objective of Article 135, paragraph,1 letter g of the VAT Directive which provides that the a choice between direct investment and investment via common investment funds in a fiscal-neutral way.

6 Conclusion

Our conclusion is that due to the entering into force of the AIFM Directive, the term 'special investment funds' in Article 135, paragraph 1, g of the VAT Directive has further restricted the power of the Member States to determine the definition of the term special investment funds. It is clear from the *Fiscale Eenheid X NV* case that a limit has been imposed on the discretion which is availed to the Member States by the definition of a special investment fund. After the AIFM Directive, further restrictions have been imposed on the discretion to consider certain investment capital which falls under this Directive as a special investment fund. When one of

[32] Opinion AG, 20 May 2015, C-595/13, para. 55.
[33] Art. 6 of the AIFM Directive.

those Directives (UTICS or the AIFM Directive) is applicable to certain investment capital, the Member State no longer has any discretion at all to define the term 'special investment funds'. This means, amongst others, that private equity funds which fall under the AIFM Directive must be considered special investment funds and that no distinction may be drawn between AIF managers who fall under the lighter regime (registration obligation) of the AIFM Directive (Article 3 of the Directive) and AIF managers who fall under the more burdensome regime (full licence obligation).

The Member States retain their authorization to define the term special investment funds in the case an investment fund does not fall under the UCITS Directive or under the AIFM Directive, but this authorization is also thus restricted, and Member States can only exclude investment funds from the VAT exemption insofar as this is in accordance with the principle of fiscal neutrality (which means that investment funds which are in competition with each other must be entitled to the same VAT exemption). It follows from the *Fiscale Eenheid X NV* judgment that in such a situation, the exemption must also be restricted to investments which are under 'specific State supervision'.

With regard to the term 'management' of Article 135, paragraph 1, g of the VAT Directive, our conclusion is that with the entering into force of the AIFM Directive, for managers of AIFs this term does not encompass activities related to assets of special investment funds.

We are of the view that the CJEU must restrict the scope of the term management to activities and services which are specific to the activities of *all* common investment funds (be it an UCITS or an AIF), such as the responsibility of fund administration and the providing of investment advice. Only then will justice be done to the objective of Article 135, paragraph,1 letter g of the VAT Directive which will deal with a choice between direct investment and investment via common investment funds in a tax-neutral way.

Work which is specific to the activities for certain types of funds (such as real estate funds or private equity funds) would thereby fall outside of the scope of the term management (for example, real estate operation or support and consultancy services with regard to portfolio companies).