

5. QUESTIONS CONCERNING THE APPLICATION OF EU VAT PROVISIONS

- 5.5 Origin: Commission, the Netherlands and Denmark**
Reference: Article 135(1)(g)
Subject: Scope of the exemption for the management of special investment funds
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Activity of management

1. The VAT Committee **almost unanimously** confirms that in accordance with settled case-law of the Court of Justice of the European Union (CJEU), services consisting in the provision of investment advice by a taxable person (“advisory company”) to a taxable person managing a special investment fund (“management company”) shall be exempt on the basis of Article 135(1)(g) of the VAT Directive, provided that such advisory services form a distinct whole and are specific to and essential for, the management of such special investment funds. Subject to a case-by-case assessment to substantiate that this condition is met, the VAT Committee further confirms **almost unanimously** that advisory services which consist in giving recommendations to purchase and sell assets shall qualify for the exemption, in line with settled case-law of the CJEU.

Qualification as a special investment fund

2. The VAT Committee **almost unanimously** agrees that not all investment funds may qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive.
3. The VAT Committee **almost unanimously** confirms that in accordance with settled case-law of the CJEU, funds which constitute Undertakings for Collective Investment in Transferable Securities (“UCITS”) within the meaning of Directive 2009/65/EC as amended¹ (“UCITS Directive”) qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive and that in consequence, management services provided in respect of any UCITS shall be exempted in accordance with that provision. ¹

¹ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

4. The VAT Committee **almost unanimously** confirms that in accordance with settled case-law of the CJEU, even if a fund does not qualify as a UCITS within the meaning of the UCITS Directive, any such fund may still qualify as a special investment fund for the purposes of Article 135(1)(g) of the VAT Directive if it displays characteristics identical to those of an UCITS and thus carries out the same transactions or, at least displays features that are sufficiently comparable for it to be in competition with such undertakings.

In this regard, the VAT Committee **by a large majority agrees**, based on case-law of the CJEU that for any such fund to be considered to be displaying features that are sufficiently comparable to a UCITS, all of the following conditions shall be met:

- a) the fund must be a collective investment;
- b) the fund must operate on the principle of risk-spreading;
- c) the return on the investment must depend on the performance of the investments, and the holders must bear the risk connected with the fund;
- d) the fund must be subject to State supervision;
- e) the fund must be subject to the same conditions of competition and appeal to the same circle of investors as UCITS.

Alternative Investment Funds

5. As regards Alternative Investment Funds (“AIFs”), which is a broad category including funds such as hedge funds, private equity funds, European Venture Capital funds (“EuVECAs”), European Social Entrepreneurship Funds (“EuSEFs”), European Long-Term Investment Funds (“ELTIFs”), and any other fund not qualifying as an UCITS within the meaning of the UCITS Directive, the VAT Committee by a large majority agrees that an AIF shall qualify as a special investment fund only if it meets all the conditions set out in point 4. Whether AIFs qualify as special investment funds must be determined on a case-by-case basis. In particular, the VAT Committee is of the large majority view that where an AIF can be seen as not targeting the same circle of investors as UCITS because of the characteristics of its investment portfolio or because of the conditions under which the investors are allowed to participate in that fund, such an AIF shall not qualify as a special investment fund

Pension funds

6. The VAT Committee almost unanimously confirms that in accordance with settled case-law of the CJEU pension funds which fall within the scope of the UCITS Directive qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive, as set out in point 3.
7. The VAT Committee also **almost unanimously** confirms in accordance with settled case-law of the CJEU that where a pension fund does not fall within the scope of the UCITS Directive, the pension fund may still qualify as a special investment fund for the purposes of Article 135(1)(g) of the VAT Directive, as set out in point 4.

The VAT Committee **almost unanimously** agrees that regardless of how it is classified for regulatory purposes such a pension fund shall qualify as a special investment fund only if it meets all the conditions set out in point 4. Whether pension funds qualify as special investment funds must be determined on a case-by-case basis.

In particular, the VAT Committee **almost unanimously** confirms that, in accordance with settled case-law of the CJEU, only pension funds where the investors themselves bear the risk connected with the pension fund (as opposed to that risk being borne by someone other than the investor) may be seen as sufficiently comparable to UCITS and, therefore, qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive.

The VAT Committee **almost unanimously** confirms that in accordance with settled case-law of the CJEU, defined-contribution pension funds (“DC pension funds”), where the contribution to be made to the pension fund is defined, but the retirement benefit to be received depends on the performance of the investment (the risk thus being borne by the investor), shall be seen as sufficiently comparable to UCITS and, therefore, qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive.

Furthermore, the VAT Committee **almost unanimously** confirms that in accordance with settled case-law of the CJEU, defined-benefit pension funds (“DB pension funds”), where the retirement benefit to be received by the investor is defined regardless of the contributions to be made to the fund (the risk thus not being borne by the investor), may not be seen as sufficiently comparable to UCITS and, therefore, they shall not qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive.

The VAT Committee is of the almost unanimous view that for hybrid pension funds containing elements of both DC and DB pension funds to be seen as sufficiently comparable to UCITS and, therefore, qualify as special investment funds for the purposes of Article 135(1)(g) of the VAT Directive, it must be required that the investors bear themselves a substantial part of the risk connected with the pension fund.