Editor Hein Vermeulen

The Tax Treatment of CIVs and REITs

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Why this book?

The Tax Treatment of CIVs and REITs comprises the proceedings of a conference held by the Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam on 2 November 2012. The book provides a unique and current overview of the tax issues that play a role in the cross-border operation of collective investment vehicles (CIVs) and real estate investment trusts (REITs). Typically, these investment funds function well in a domestic context, where the investors, the fund and the investments are all located in one state. In an international context, however, interesting issues arise, such as questions on the proper allocation of taxing rights, beneficial ownership and non-discrimination. These and other issues are addressed in this book.

The book starts with the 2008 and 2010 updates to the OECD Model Tax Convention, adopting the OECD CIV and OECD REIT reports with a view on policymakers and practice. In addition, it places the treatment of CIVs and REITs in an EU tax law perspective. Finally, future developments are also discussed, including the impact of the Undertakings for Collective Investment in Transferable Securities (UCITS) Directives IV and V and the Alternative Investment Fund Managers Directive (AIFMD), from both a direct tax and an indirect tax perspective.

Collective investment is of increasing importance in a society with a proportional rise in the ageing population, as a means for the public to save for later. The Tax Treatment of CIVs and REITs provides a valuable overview of the international tax issues that the CIV and REIT vehicles encounter in an international context.

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General Report: The Tax Treatment of CIVs and REITs

Hein Vermeulen*

1.1. Introduction

On 2 November 2012, the Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam organized a conference on the international tax treatment of collective investment vehicles (CIVs) and real estate investment trusts (REITs) – a subject that was the topic of the IFA Congresses in 1962, 1971 and 1997.[1] The conference was chaired by the author and was held at the heart of Dutch academic society, the Royal Academy of Arts and Sciences in Amsterdam.

The topic of the conference – the tax treatment of CIVs and REITs, briefly CIVs – attracted just over 100 participants. It can be derived from this that many people took an interest in the field of CIVs. There was a nice blend of participants, inter alia, from the Dutch Ministry of Finance, the Dutch, Norwegian and Finnish tax authorities, the Dutch courts, academics and practitioners in the financial services industry and tax. Some participants travelled from other countries, including Italy, Luxembourg, the United Kingdom and Finland, to attend the conference.

Of course, this great attention was due to the line-up of speakers and moderators who were present to give a presentation and share their thoughts with the audience. They are all esteemed specialists in the field of the taxation of CIVs. Together with the author, the speakers and moderators, in alphabetical order, were Raymond Adema, Patricia Brown, Sjoerd Douma,

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1. IFA Cahiers 1962, Vol. 47b, *Fiscal problems arising in connection with investment trusts of international character*; IFA Cahiers 1971, Vol. 56a, *The fiscal treatment of international investment trusts and mutual funds, having regard to the major regulatory and foreign exchange features in the various countries*; IFA Cahiers 1997, Vol. 82b, *The taxation of investment funds* (IBFD 1997), Online Books IBFD.

Gijs Fibbe, Arnaud de Graaf, Gert-Jan van Norden, Luis Nouel, Erwin Nijkeuter, Stefano Simontacchi, Tomi Viitala, Martin Vink, Peter Wattel, Dennis Weber, Stef van Weeghel and Ronald Wijs.

The conference was divided over four panels. The first panel, moderated by Prof. Peter Wattel, dealt with the OECD CIV report, which was incorporated in 2010 in the Commentary to the OECD Model Tax Convention. Prof. Stef van Weeghel moderated the second panel that dealt with another OECD report: the OECD REIT report, which was already incorporated in the Commentary to the OECD Model in 2008. After a lunch break, the third panel, moderated by Prof. Dennis Weber, dealt with EU law aspects in the field of CIVs and REITs. Finally, the last panel, moderated by the author, discussed future developments pertaining to CIVs and REITs.

As the conference was aimed at addressing the international and EU tax law aspects of CIVs and REITs, it was in a way a sequel to a conference that was organized by the ACTL on 8 April 2012, also at the Dutch Royal Academy of Arts and Sciences, the topic of which was the future of the Dutch fiscal investment institution.[2] This is one of the oldest tax regimes in the world for collective investment. The occasion then was the publication of a treatise on the regime of the Dutch fiscal investment institution.[3] The discussions at that conference took place in a Dutch, domestic context; therefore, some interesting questions with an international character remained unanswered. These questions were referred to the conference discussed here, the tax treatment of CIVs and REITs, which has an international character.

1.2. Opening

After welcoming the speakers, moderators and participants, the chairman set out the objective of the conference, which was to spend an entire day on the international tax law and EU law aspects of CIVs and REITs. To set the stage, the outset of CIVs in general was presented.

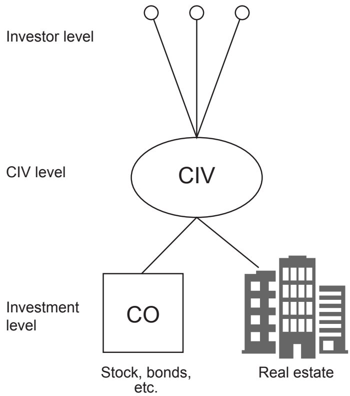
2. *See* http://actl.uva.nl/news-events/previous-events/previous-events/previous-events/content/folder-2/congressen/2012/04/conferentie-toekomst-van-de-fiscale-beleggingsinstelling-18-april-2012.html.

3. H. Vermeulen, *Het regime voor de fiscale beleggingsinstelling* (Deventer, Kluwer Law 2012).

1.3. CIVs in general

Investment through a CIV, i.e. collective investment, is an alternative for individual investment. Such collective investment through a CIV may be depicted as follows:

Figure 1.1. Collective investment through a CIV



In the above diagram, the three aforementioned main elements of CIVs are displayed. The first element is the investor level, which is depicted at the top of the diagram. These are the investors that pool their funds together to invest jointly or collectively. It is assumed here that the investors are private individuals. The second element is the CIV, depicted in the middle of the diagram. This is the vehicle that is used to pool the funds of the investors. The third element consists of the investments, such as stocks, bonds, other securities or real estate. This is the investment level, which is displayed at the bottom. These are the objects in which the CIV invests.

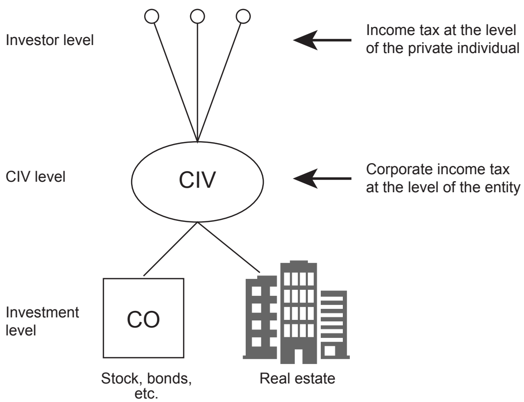
The author notes that the above diagram is simplified. Typical elements that also should be part of the picture are the fund manager and the custodian. The fund manager is the person that initiates the fund and selects the investments. The custodian is the person that holds the legal title of the investments. In a situation where the CIV has legal personality, is self-managed and does not operate a separate custodian (meaning that the manager of the CIV is not a separate legal person), the picture, however, comes close to reality.

1.4. CIVs in a domestic context

Generally speaking, the author believes that CIVs function well in a domestic context. This is a context where the three main elements of a CIV are all situated in one state. As said before, these elements are the:
(a) investors;
(b) CIV; and
(c) investments

CIVs function well in a domestic context because states implement special regimes for collective investment. The reason that CIVs usually function properly in a domestic context is thus not due to normal application of the general tax system of a state. Typically, the application of the normal rules will lead to economic double taxation, at least in states that have a classical system. Absent special rules, not only is corporate tax levied at the level of the CIV but also income tax is levied as well as at the level of the investor, assuming of course that the investor base consists of private individuals. The reason for this economic double taxation is that CIVs are considered to be entities for domestic corporate tax purposes. The CIV is thus typically treated as a corporate taxpayer, which will have to pay corporate tax on its profits. In addition, the investor in the CIV will be taxed on its income from the CIV. This may be depicted as follows:

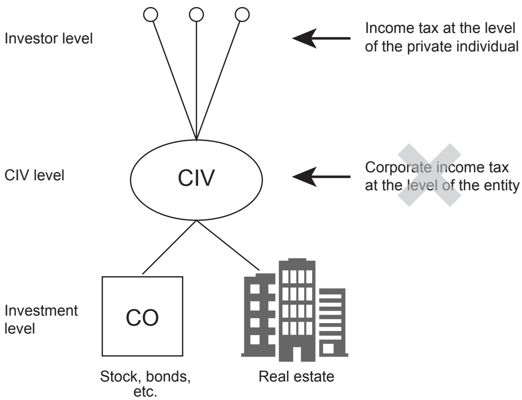
Figure 1.2. Economic double taxation



As a result, under the normal application of the general tax system of a certain state, collective investment will lead to an additional layer of tax as opposed to individual investment, i.e. corporate tax at the CIV level, next to the (income) taxation that already takes place at the investor level. Had that investor not invested through a CIV but had he invested directly, then he would only be confronted with one layer of taxation, i.e. the taxation at the investor level. Assuming that the investors are private individuals, that single layer of taxation will consist of personal income tax. The double taxation that arises due to the collective investment should be characterized as economic double taxation and not juridical double taxation, since different subjects, i.e. the CIV and the investor, are taxed for the same income.

In general, there are two ways to circumvent this economic double taxation. The common technique used is to eliminate taxation at the level of the CIV, leaving the taxation at the investor level intact. This technique aimed at eliminating entity-level taxation may be depicted as follows:

Figure 1.3. Single taxation at investor level



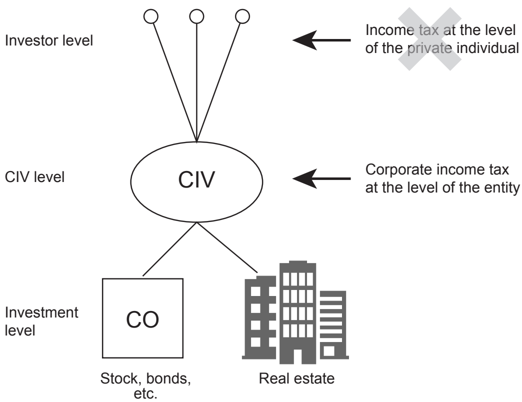
Here, taxation is eliminated at the level of the CIV. One layer of tax remains at the level of the investors. Thus, the same result is achieved as is the case with individual investment. Different techniques are used to achieve this form of single taxation at the investor level.[4] Firstly, the CIV could be exempt for corporate tax purposes. An example that may be mentioned here is the Luxembourg SICAV.[5] Secondly, the CIV could be ignored for corporate tax purposes, i.e. be characterized as fiscally transparent, such as a common partnership. Thirdly, the CIV could be entitled to deduct dividend

4. Cf. L.J. Ed & P.J.M. Bongaarts, *General Report*, in *The taxation of investment funds* p. 38, IFA Cahiers 1997, Vol. 82b (IBFD 1997), Online Books IBFD.
5. A. Steichen, *National Report France*, in *Corporate Tax Subjects: EATLP 2013* p. 2; available at: www.eatlp.org.

distributions from its taxable basis. The US regulated investment company (US RIC)[6] and US real estate investment trust (US REIT)[7] are allowed to do so. If such a US RIC or US REIT would distribute all its profits, there would effectively not be a tax base for corporate tax purposes. Fourthly, the CIV could be subjected to a zero per cent corporate tax rate. The CIV would then also effectively not pay corporate tax. In essence, these techniques should fully eliminate the layer of corporate tax at the level of the CIV. If, however, for instance, a reduced rate is granted to a CIV instead of a zero per cent corporate tax rate, which is the case in Spain for example,[8] then the economic double taxation is only removed partially.

An alternative to technique of eliminating taxation at the level of the CIV is to take away taxation at the investor level. This technique leaves the taxation at the level of the CIV intact. The technique could be called a "reverse" technique, leading to a single taxation at the level of the CIV. This reverse technique may be depicted as follows:

Figure 1.4. Single taxation at CIV level



Here, taxation is eliminated at the investor level.[9] One layer of tax remains at the level of the CIV. Although Swiss tax law adopts this concept in certain

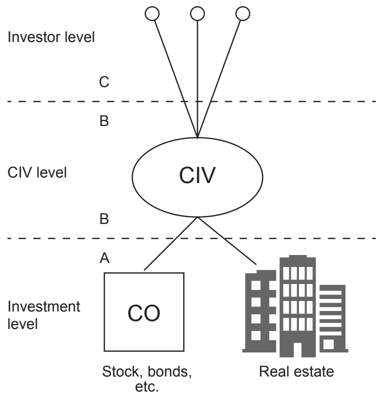
6. Sections 851 and 4982 of the US Internal Revenue Code.
7. Sections 856 and 4981 of the US Internal Revenue Code.
8. M. Lorán Meler, A. Burgos Sainz & I. Alonso de la Puerta, *Spain - Investment Funds & Private Equity* secs. 4.1.1.1. and 4.1.1.2.1., Topical Analyses IBFD.
9. For instance, this could be achieved by granting the investor a full credit for corporate tax levied at the level of the CIV.

circumstances,[10] the author believes that this reverse technique is not commonly used.

1.5. CIVs in a cross-border context

The special domestic rules designed to eliminate one level of taxation in a domestic context discussed in section 1.4. give rise to specific questions in an international context. How should the rules be applied if the investors, CIV and investment are situated in different states? Such a cross-border operation may be depicted as follows:

Figure 1.5. CIVs in a cross-border context



Here, the investors are residents of State C. The CIV is established in State B. The investments finally are situated in State A. The application of the normal rules of international tax law typically does not do justice to the functioning of CIVs. The reason is that in an international tax law context, it is unclear whether the CIV is treated as a person, resident and beneficial owner in the double tax treaties concluded between States A and B and whether the CIV is treated as a person and resident between States B and C.

If the CIV would not be entitled to treaty benefits under the treaty concluded between State A and State B, again, (double) taxation would occur

10. P-M. Glauser, *National Report Switzerland*, in *Corporate Tax Subjects: EATLP 2013* pp. 8 and 9; available at: www.eatlp.org.

compared to a situation where the investors situated in State C would have been able to claim treaty benefits under the treaty concluded between State A and State C, had these investors invested directly in the investments of the CIV.[11]

1.6. The first panel: OECD CIV report

The first panel of the Conference, moderated by Prof. Wattel, addressed the issue described in section 1.5. by discussing the OECD CIV report, which was adopted in the 2010 update of the OECD Model.

The first panellist, Prof. Patricia Brown, gave some insight on the work of the OECD Working Party 1 that led to the CIV report. Although a solution could be found in the OECD Partnership Report itself, Brown explained that Working Party 1 concluded that CIVs operating in a cross-border context need a different approach. She noted that in the Partnership Report itself it is noted that there may be difficulties in applying the Partnership Report "in the case of a partnership that would have a large number of partners who would be residents of different States".[12] Therefore, the Working Party continued working on another solution for CIVs. It was also decided to dedicate a separate report to REITs. Brown then tested the requirements for treaty benefits in the field of CIVs – person, residence, beneficial ownership and, in some instances, specific clauses on limitation of benefits – by discussing four examples involving CIVs. These four examples include the Luxemburg FCP, the German *Sondervermögen*, the Italian SICAV and the Massachusetts Business Trusts (MBTs). Brown explained the scope of work of the OECD that led to the CIV report and which was included in the new commentary to the OECD Model in July 2010.

Dr Gijs Fibbe, the second panellist, explained the solutions offered in the CIV report for granting treaty benefits to CIVs or their investors. These are the "in its own right" approach[13] and the "look-through" approach.[14] By using an example, Fibbe provided insight to these approaches. In this, he

11. The author notes that it is assumed here that the tax treaties concluded between State A and State B and between State A and State C are identical.
12. OECD Ctr. for Tax Policy and Admin., *The Application of the OECD Model Tax Convention to Partnerships – Report: adopted on 20 January 1999* para. 75 (OECD 1999), International Organizations' Documentation IBFD (hereinafter the Partnership Report).
13. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 1* para. 6.17 (22 July 2010), Models IBFD.
14. Para. 6.28 *OECD Model: Commentary on Article 1* (2010).

also explained the concept of the equivalent beneficiary.[15] He concluded that both approaches, the in its own right approach and the look-through approach, extend tax neutrality to cross-border situations.

The third panellist, Prof. Arnaud de Graaf, then discussed the tax treaty policy of the Netherlands regarding CIVs. He briefly set out the three types of regimes for CIVs to be distinguished in the Netherlands: the Dutch FBI;[16] the Dutch VBI[17] and the Dutch closed fund for mutual account (*fonds voor gemene rekening*, FMA or FGR).[18] De Graaf explained their characteristics and their tax status under Dutch tax law. He then applied the general requirements for treaty benefits in the field of CIVs – person, residence and beneficial ownership – to these CIVs. He concluded that all three are considered persons but that the residence test, due to the liable to tax requirement, is not easy to answer given a recent Dutch Supreme Court ruling regarding a Dutch association that was not liable to tax. De Graaf said that the aim of the Dutch government therefore is to address the Dutch CIVs in treaties it negotiates. He mentioned that the Dutch policy view is that the FBI is considered to be a resident but that the VBI may not be regarded as such since it is not under the obligation to distribute its profits and does not withhold Dutch dividend withholding tax if it makes a distribution of profits. However, De Graaf noted, that the Dutch policy view now is to have every subject for Dutch corporate income tax purposes qualify as a resident under new treaties. With respect to the FMA or FGR he noted that it is the policy to deny that vehicle the status of person, residence and beneficial owner. Instead, the aim is to have this vehicle claiming treaty benefits under the look-through approach explained by Fibbe. The Netherlands succeeded in negotiating various treaty provisions and memoranda of understanding in which this approach was adopted, including Belgium, Canada, Denmark, Germany, the United Kingdom and the United States.

1.7. The second panel: OECD REIT report

The second panel of the Conference, moderated by Prof. Van Weeghel, addressed other issues that arise in cross-border operations of REITS by discussing the OECD REIT report, which was adopted in the 2008 update of the OECD Model.

15. Para. 6.21 *OECD Model: Commentary on Article 1* (2010).
16. NL: Corporate Income Tax Act, art. 28a, National Legislation IBFD.
17. NL: Corporate Income Tax Act, art. 6a, National Legislation IBFD.
18. NL: Corporate Income Tax Act, art. 2(2), National Legislation IBFD.

The first panellist, Dr Stefano Simontacchi, painted the outset by explaining the consequences of the normal application of the OECD Model in the field of directly held real estate investments and indirectly held real estate investments. This included an overview of the relevant articles of the OECD Model: articles 6, 10, 13 and 21. He first analysed a direct real estate investment and then an indirect real estate investment through a real estate company[19] to complete his analysis with an indirect real estate investment through a REIT. He concluded that article 13(4) of the OECD Model gives rise to debate and suggested an alternative wording. He also suggested an alternative wording for article 13(2) of the OECD Model.

Luis Nouel, the second panellist, discussed the OECD REIT report, which considers the taxing rights of contracting states in the field of REITs. He briefly explained the issue of treaty entitlement of REITS and then focussed on distributions of profits and capital gains by addressing whether article 10 of the OECD Model limits the taxing right of the state where a REIT is established when distributing a profit. This is addressed in the OECD REIT report, which suggests that such taxing right must indeed be granted to the REIT state. It also suggests that large investors should not be able to obtain a lower treaty rate but should instead suffer the nominal rate of the REIT state. Only then is the idea secured that the source state has an unlimited taxing right over its source-state real estate. As regards capital gains, Nouel explained that the OECD REIT report upholds article 13(4) of the OECD Model to large investors but that it denies application of that rule to small investors. For the latter, the catch-all clause of article 13(5) should apply, the reason being that small investors regard a small investment in a REIT as a normal portfolio investment.

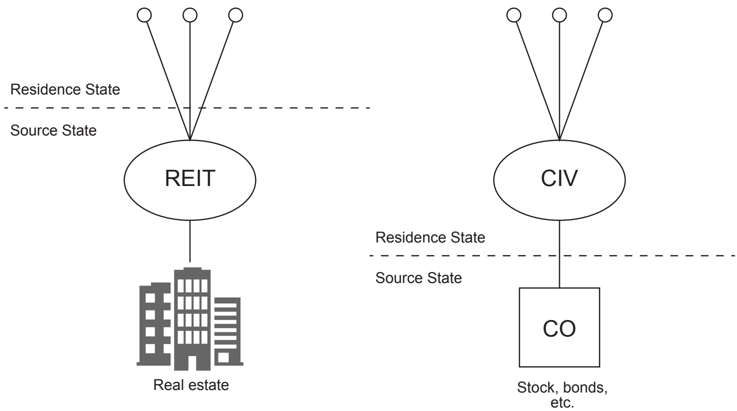
The third panellist, Ronald Wijs, discussed two cross-border tax hurdles that REITs are confronted with. The first is a downstream issue and arises when a REIT makes a cross-border investment. Typically, Wijs explained, the source state wants to tax the property income and is not inclined to grant its local REIT regime to foreign resident REITs. In the view of Wijs, this constitutes an obstruction to cross-border real estate investments. He explained that the source state of course fears a loss of tax if foreign REITs are given benefits of local REIT. The question thus is how to retain a fair share over source-state real estate income. The second issue is an upstream issue and arises when a REIT distributes profits to a foreign shareholder. The risk here is that the REIT state is confronted with refund claims based on a

19. Cf. *OECD Model Tax Convention on Income and on Capital* art. 13(4) (22 July 2010), Models IBFD.

non-discrimination argument for withholding tax made by foreign investors if domestic investors are entitled to an exemption, refund or credit of the withholding tax.

Wijs explained that the EPRA (European Public Real Estate Association) suggested a solution for these issues. EPRA's key proposal comes down to a mutual recognition of REITs, which is either accompanied with some kind of formulary apportionment in case of taxation by the REIT state or credit mechanism in case of taxation by the source state. EPRA's proposal suggests that the specific investment- and non-investment-related conditions should become part of the EU Commission's Communication.

Figure 1.6. REIT report vs CIV report



1.8. The third panel: EU law aspects

After the lunch break there was a shift from international tax law to EU law. The third panel, moderated by Prof. Weber, dealt with EU law aspects in the field of CIVs and REITs. The panel was fuelled by a judgment in this field that was delivered just 1 week before the Conference took place (*Commission v. Belgium* (Case C-387/11)).[20]

The first panellist, Dr Tomi Viitala, looked at the comparability of different CIVs and REITs from the viewpoint of EU law. He explained that

20. BE: ECJ, 25 Oct. 2012, Case C-387/11, *European Commission v. Kingdom of Belgium*, ECJ Case Law IBFD.

comparability is key to having access to either the freedom of capital or of establishment. In the view of Viitala, governments often take a very strict interpretation of "comparability" whereas the existing case law of the European Court of Justice (ECJ) leaves wide room for national interpretation. He discussed a variety of comparability tests, ranging from legal form, regulation and purpose/activity test to tax treatment. Viitala then discussed relevant ECJ case law in this respect. These include *Aberdeen* (Case C-303/07),[21] *Santander* (Case C-338/11)[22] and *Commission v. Belgium*.[23] He also provided some insight to Finnish case law and tax practice on comparability. Viitala concluded that a non-resident CIV covered by the UCITS directive should be comparable to a resident UCITS irrespective of the legal form and differences in regulation. For non-UCITS it would be a bridge too far, in the opinion of Viitala, to conclude that any foreign CIV would be comparable to a domestic CIV.

Dr Erwin Nijkeuter, the second panellist, evaluated the dividend withholding tax developments by discussing two pending Dutch court cases. In the first case, a French bank claimed a refund of Dutch dividend withholding tax on Dutch portfolio investments.[24] The French bank reported a loss and could not credit the Dutch dividend withholding tax against its French corporate tax liability. According to the Amsterdam court, the French bank was not comparable to a Dutch resident bank. In the second case, a Finnish investment fund claimed a refund of Dutch dividend withholding tax on Dutch portfolio investments on the basis that a Dutch investment fund effectively does not pay Dutch dividend withholding tax.[25] Although the lower court of Breda dismissed the claim, the Den Bosch court ordered that the Finnish investment fund is eligible for a refund of Dutch dividend withholding tax. Both cases are currently pending at the Dutch Supreme Court.

The third panellist, Dr Sjoerd Douma, then discussed whether a regime for a CIV could constitute State aid.[26] After setting out the requirements for State

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21. FI: ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy v. Uudenmaan verovirasto and Helsingin kaupunki*, ECJ Case Law IBFD.
22. FR: ECJ, 10 May 2012, Case C-338/11, *Santander Asset Management SGIIC SA and Others v. Direction des résidents à l'étranger et des services généraux*, ECJ Case Law IBFD.
23. *Commission v. Belgium* (C-387/11).
24. NL: Court of Amsterdam, 24 May 2012, LJN BW6483.
25. NL: Court of Den Bosch, 9 Mar. 2012, no. 11/00451, LJN: BV9630.
26. EU: *Treaty on the Functioning of the European Union* (TFEU), as amended through 2007) art. 107(1), EU Law IBFD. *See also* H. Vermeulen, *Fiscal State Aid and Real Estate Collective Investment Vehicles (CIVs)*, EC Tax Review, pp. 154-158 (2011/3).

aid in general, he explained the *Paint Graphos* case (Case C-78/08)[27] and the *Fineco* case (T-445/05).[28] In the latter case, the Court of First Instance held that the special Italian regime at hand for so-called midcap funds was not compliant. However, the Commission laid down some clear principles in its decision regarding the Finnish REIT regime.[29] Briefly, a deviation of the general tax system is allowed if its aim is to "to put an investment in a REIT at a par with a direct investment in real estate by an individual investor".

1.9. The fourth panel: Future developments

The fourth and final panel, moderated by the author, focussed on the future by discussing future developments pertaining to CIVs and REITs.

The first panellist, Dr Raymond Adema, painted the future from the perspective of UCITS. In the view of Adema, regulations regarding taxation have not kept up with other developments. This hinders the efficient functioning of the market in UCITS. He argued that action should be taken. In this respect, Adema is a supporter of coordination of tax policy. However, harmonization has failed, so that mutual recognition should be the choice of the way forward.

Martin Vink, the second panellist, who was charged with the subject of future taxes and regulations, showed that the asset management industry is overwhelmed with legislative efforts. He placed this in the context of the current financial and economic crisis. To name a few, Vink listed some of the regulatory efforts that are on the table, including Solvency II, local and EU financial transaction taxes, the Volcker rule, the Dodd Frank Act, MiFid, MiFIR, the EU Market Infrastructure Directive, Basel III, CRD, the Alternative Investment Fund Managers Directive, the International Code of Conduct, the EU Savings Directive II, TRACE, FATCA, etc. He explained that in the current environment all parts of the asset management industry are impacted by these efforts. In addition to the regulatory efforts, Vink showed that the industry is also confronted with many new tax proposals,

27. IT: ECJ, 8 Sep. 2011, Case C-78/08, *Amministrazione delle Finanze, Agenzia delle Entrate v. Paint Graphos Scarl; Adige Carni Scrl, in liquidation v. Ministero dell' Economia e delle Finanze, Agenzia delle Entrate; Ministero delle Finanze v. Michele Franchetto*, ECJ Case Law IBFD.

28. Court of First Instance of the European Communities, 4 Mar. 2009, T-445/05, *Associazione italiana del risparmio gestito and Fineco Asset Management SpAFineco v. Commission of the European Communities*.

29. EC, 12 May 2010, State Aid No. N131/2009, COM(2010) 2974.

mostly aiming at filling budget gaps. He went on by giving an update on the EU proposal for a financial transaction tax (FTT) and the need for enhanced cooperation, since the proposal did not receive unanimity of the EU Member States. In the meantime, Vink showed that we see a patchwork of such taxes, as some Member States introduced local regimes. He then explained that the FTT will have a major impact on investment return and even on the European Union as other markets may prove to be more competitive. Vink also addressed the consequences for the industry of the Alternative Investment Fund Managers Directive and UCITS IV and, to finish, provided an overview of the current state of play of the discrimination of investment funds within the European Union. He concluded that he expects a boost in the development of the cross-border investment funds industry within the Union if tax barriers across Europe are eliminated.

The third panellist, Prof. Van Norden, shared his thoughts on future developments from the angle of VAT. Firstly, he explained the current legal framework of VAT, which is laid down in article 135(1)(g) of the EC VAT Directive. This provision stipulates that EU Member States shall exempt the management of special investment funds as defined by Member States. In making reference to ECJ case law, Van Norden demonstrated the purpose of this exemption, which is to facilitate investment in securities by means of CIVs by excluding the cost of VAT. According to Van Norden, it is intended to ensure that VAT is fiscally neutral as regards the choice between direct investment in securities and investment through CIVs. He further discussed a recent ECJ case with respect to the difference between investment advice and fund management[30] and two cases involving pension funds.[31] In the latter cases the ECJ held that pension funds with a defined benefits pension plan cannot be considered as special investment funds for VAT purposes. Van Norden then discussed the impact of the changing regulatory environment, the Alternative Investment Fund Managers Directive and UCITS V from a VAT perspective. He concluded that VAT legislation should be linked to the regulatory environment.

30. DE: ECJ, 7 Mar. 2013, Case C-275/11, *GfBk Gesellschaft für Börsenkommunikation mbH v. Finanzamt Bayreuth*, ECJ Case Law IBFD.
31. UK: ECJ, 7 Mar. 2013, Case C-424/11, *Wheels Common Investment Fund Trustees Ltd, National Association of Pension Funds Ltd, Ford Pension Fund Trustees Ltd, Ford Salaried Pension Fund Trustees Ltd, Ford Pension Scheme for Senior Staff Trustee Ltd v. Commissioners for Her Majesty's Revenue and Customs*, ECJ Case Law IBFD and NL: ECJ, 18 July 2013, Case C-26/12, *Fiscale eenheid PPG Holdings BV c.s. v. Inspecteur van de Belastingdienst/Noord/kantoor Groningen*, ECJ Case Law IBFD.

1.10. Poster programme

Martijn Nouwen, whose research focuses on Harmful Tax Competition in the European Union and the EU Code of Conduct for Business Taxation, was present at the Conference with a poster. In view of the Conference, he placed the current discussion of aggressive tax planning and harmful tax competition in the sphere of CIVs and REITs as the Code Group agreed at the end of 2011 to begin examining special tax regimes targeted at investment funds.[32]

1.11. Concluding remark

The author hopes that the reader of this book will find an overview of the issues that arise in the world of CIVs and REITs which operate in an international context.

32. Code of Conduct Group Progress Report of 13 December 2011, doc. 17081/1/11 REV 1, at 8.

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