Tax Implications of the Amended UCITS and the AIFM Directives: A General Overview from a Dutch Perspective

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1. Introduction
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2. UCITS and AIFM Directive
2.1. Background
The EU Directive1 regulating certain “retail” fund entities – designated as Undertaking(s) for Collective Investments in Transferable Securities (UCITS) – has been subject to several revisions since its original adoption in 1985. On the basis of a regulated standard, the UCITS Directive aims to enhance EU cross-border collective investments in open-ended funds in transferable securities, offering opportunities to both investors and asset managers. After the last two decades the UCITS regulatory requirements have successfully penetrated the funds market well beyond EU borders – especially in Asia, the Middle East and Latin America – to grow into a worldwide (retail) fund industry standard. Under the UCITS III revision in 2001, a simplified prospectus was introduced to further facilitate cross-border marketing, and the UCITS investment powers were expanded to also allow investments in a wider range of financial instruments, including derivatives. At this stage, the last step in this development has been the adoption of the UCITS IV Directive (2009/65/EC) in 2009, which the EU Member States were required to implement in their national legislation by 1 July 2011.2

Similar to the UCITS Directive, the Alternative Investment Fund Managers Directive3 (AIFM Directive) introduces a standard for the management of funds, including a managers licence system, and provides for specific fund structure, policy and reporting requirements. The AIFM Directive was developed to regulate fund managers of “alternative funds” in the European Union. In fact, the AIFM Directive regulates the management of all types of investment funds within the EU market that are not regulated as a UCITS. Consequently, any fund that would not be able to qualify as a UCITS automatically falls within the scope of the AIFM Directive. The AIFM Directive was adopted in 2011 and will take effect as from July 2013.

2.2. UCITS IV
The UCITS IV amendments aim to strengthen the robustness of the UCITS regime by facilitating rationalization and more efficient operation of the UCITS IV fund structures on a cross-border scale. Basically, the UCITS IV regime provides for the following amendments.

UCITS notification. UCITS IV facilitates cross-border marketing and distribution of a UCITS in other “host” Member States on the basis of a new “regulator-to-regulator” notification system. Under the former UCITS III procedure, the possession of a “UCITS passport” would still require a UCITS to go through a – generally cumbersome – notification process with the local regulator of each separate Member State where the UCITS would want to distribute its units. Under UCITS IV, this procedure has changed. Upon request of the UCITS, its local “home state” regulator will inform the “host” Member State regulator of the intention of the UCITS to distribute units in another relevant Member State and take on relevant notification procedures, which should result in substantial savings in costs and time for a UCITS.

Key investor information document. UCITS IV will replace the UCITS III “simplified prospectus” (which has been perceived by the market as overly technical and complex)
with a short and concise document for investors to understand the features, investment policy and objectives of a relevant UCITS. This document, the so-called “Key Investor Information Document” (KIID), can be expanded if additional information would be required, depending on relevant circumstances.

UCITS merger. UCITS IV provides for a general framework for local and cross-border mergers between UCITS, facilitating the restructuring and rationalization of the UCITS structures.

UCITS master-feeder structures. In line with fund market developments to create asset-pooling vehicles, UCITS IV provides for an amendment to the UCITS III fund investment diversification requirements, allowing the establishment of so-called “master-feeder” structures for UCITS, requiring a UCITS that would operate as “feeder” to invest at least 85% (or more) of its assets in the relevant UCITS “master” fund.

UCITS management company passport. Under UCITS IV, the management company of a UCITS is allowed to offer its services to UCITS established in other EU Member States, outside its own home state, on the basis of a further developed “full” UCITS management company passport (MCP). This may result in UCITS being managed by a management company in another EU Member State. As in such case the UCITS entity and the management company would be supervised by different local regulators, further competency rules are introduced to allocate supervisory responsibilities between local regulators. The opening up of cross-border UCITS management activities should result in further efficiency and cost savings where, in principle, EU-wide UCITS fund management is now allowed to be operated from only one Member State.

Cooperation between regulators. The growing EU cross-border potential for UCITS under UCITS IV as set out above, will be embedded in further detailed supervisory and investigatory powers for local regulators, also enabling a higher level of cooperation between the local regulators of relevant Member States. Local regulators can enforce relevant UCITS supervisory requirements under an expanded set of administrative sanctions and penalties.

2.3. Tax aspects of UCITS IV amendments

In respect of the above-mentioned amendments, especially the implementation of a UCITS merger, the establishment of UCITS master-feeder structures and the use of the UCITS management company passport may trigger specific tax issues, as will be further explained below.

2.3.1. UCITS management company passport

The UCITS management company passport facilitates a UCITS management company to operate from another EU Member State than the UCITS state of establishment. The establishment and operation of such cross-border UCITS management services could result in potential tax issues, as discussed below.

2.3.1.1. Tax issues at the level of the management company

General considerations. In practice, a UCITS fund management company would normally operate as taxable corporate entity for corporate tax purposes. If a fund manager were to consider concentrating and setting up its UCITS fund management activities in another jurisdiction, it would need to assess the tax regime of such jurisdiction, including the tax implications of a relevant (financing) structure (especially the tax deductibility of interest payments, and (withholding) taxation of dividend and interest payments), but also any substance requirements under local tax regulations.

VAT. The VAT system within the European Union is governed by specific VAT Directives and consequently, in principle, the same EU regime applies to all the EU Member States. However, different interpretations of the EU directive provisions by Member State local VAT authorities in practice result in deviating VAT treatments. EU Directive (2006/112/EC) contains a VAT exemption for management services provided to funds entities for collective investments, i.e. including UCITS.4 The specific scope of this “collective investment” exemption is, however, subject to debate. For instance where the management company under the UCITS Directive could provide not only investment management as such, but also daily management, administrative services and additional (secondary) services (e.g. marketing), different views exist on whether the VAT collective investment exemption could indeed be fully applied in a relevant jurisdiction. In addition, in some cases the VAT structuring might even become more complicated where Member States would take different views on the VAT status of the UCITS itself, namely with regard to whether the UCITS fund entity would itself qualify as an entity subject to VAT.5

Restructuring steps. The tax aspects of the transfer and restructuring steps itself should also be taken into consideration, and careful analysis of the tax classification of the envisaged legal structuring is required. In many EU jurisdictions, the relocation of a management company to another EU Member State would, in principle, trigger taxation of relevant capital gains (e.g. goodwill),6 which in practice might be avoided only if the taxable assets were to be left in a permanent establishment in the original jurisdiction.7 Recently, however, the EU Court of Justice (ECJ)...

5. See in this regard BE: ECJ, 21 Oct. 2004, Case C-8/03, Banque Bruxelles Lambert S.A. v. the Belgian State, Minister of Finance, Department of administration of value added tax, registration and public property, ECI Case Law IBFD, on which basis it can be reasoned that open-ended funds (such as UCITS) should qualify as taxable for VAT purposes; for closed-end funds, this seems less clear, however. If treated as a VAT taxable entity the fund would, in principle, be able to deduct or reclaim input VAT, which might be relevant if (part of the) the services rendered to a fund (e.g. from a management company) would be subject to VAT. The VAT classification of a fund in a jurisdiction might also depend on its legal form. However, in the Netherlands a fund entity generally qualifies as a taxable entity for VAT purposes.
6. In some jurisdiction specific stamp duty exposure could also arise.
7. From a general legal perspective, the transfer of an entity might typically be effected with the transfer of its official address of registration; from a tax perspective, however, in addition to the official address registration.
ruled that immediate capital gains taxation upon transfer of a company to another Member State is not allowed
under the EU Treaty freedoms, if such gains would not have been taxed if such transfer were to have taken
place only within the borders of the EU Member State. On this basis, immediate taxation of capital gains at the
level of the management company upon relocation of the management company from one EU Member State to
another Member State may be avoided.

If the establishment of a single management company in one EU Member State were to be effected through a
merger between two management companies from different EU Member States, this should not result in additional
taxation under the application of the EU Merger Directive (2005/19/EC).

2.3.1.2. Tax issues at UCITS fund level
2.3.1.2.1. Tax residency: adverse tax consequences

Normally, a UCITS fund entity would typically be set up and operated as tax-neutral vehicle, enjoying an attrac-
tive tax treatment which, on the basis of certain local requirements, would be granted to (UCITS) investment
vehicles. Under local tax and legal regulations, such may be achieved by local tax regulations through granting a
(taxable) fund entity a full (corporate) tax exemption or providing for a tax regime that would effectively result
in no taxation due. Alternatively, local tax regulations could (also) classify a UCITS as a transparent (i.e. look-
through) entity for (corporate) tax purposes. In practice, such treatment might especially be available to contractual
fund structures (i.e. fund entities that would, in principle, have legal personality), on which basis the income and
gains of the fund would for tax purposes be directly allocated to the investors in the fund. Under common law,
unit trusts are also used for the establishment of a UCITS,

which under certain conditions also may qualify as tax-
transparent entities.

If the UCITS management company were to be trans-
ferred to an EU Member State other than the EU Member
State of establishment of the UCITS itself, a specific issue
may arise in respect of the tax residency of the UCITS.
Under the generally accepted doctrine, many EU Member
States would (also) determine the residency of an entity
for tax purposes on the basis of the place of its effective
management, and consequently a transfer of the company
managing the UCITS entity may result in a change of tax
residency of the UCITS. This may result in all sorts of complications, which may also depend on the relevant
legal form of the relevant UCITS fund entity.

If the UCITS were to have been constituted as a (tax-
exempt) corporate entity, the UCITS could, as a conse-
quence of the transfer of the management company, in
principle be confronted with additional taxation in the
Member State from which the management company is
operating (e.g. corporate taxation or stamp duties). This
might especially be relevant where a specific tax-neutral
regime in the other Member State would somehow not be
available, or available only under additional requirements
which the relevant UCITS is unable to fulfil. Similarly, if
the UCITS were to have been constituted as a tax-trans-
parent contractual fund, it may be that upon transfer of
the management company to the other EU Member State,
the UCITS will not be considered tax transparent in the
other EU Member State. Consequently, that UCITS would
then qualify as tax-resident in the other jurisdiction, and
could incur taxation if no (other) tax exemption regime
were to be available for the UCITS.

In a particular UCITS structure, the tax residency of a
UCITS may also be relevant to ensure the availability of
relevant tax treaty benefits under an applicable income
tax treaty, such as mitigation of withholding taxes on pay-
ments received from an underlying investment jurisdic-
tion. The application of an income tax treaty, however,
typically requires residency for tax purposes in one of the
treaty partner jurisdictions. Consequently, a change of tax
residency could have the effect that no tax treaty would
be available for the UCITS, or that only another tax treaty
would be available which might not provide for the same
favourable tax treatment as under the relevant treaty pro-
visions (e.g. only a limited reduction, rather than elimina-
tion, of withholding taxes on relevant payments).

A change of the place of effective management of the
UCITS fund entity to another EU Member State may also
have VAT consequences where under the local VAT
regulations of the other Member State, a different VAT treatment would be applicable (for example no VAT exemption, or higher a VAT rate, or even a different VAT classification as “taxable” entity as such), which may result in inefficiencies and additional (tax) costs.

2.3.1.2.2. Possible solutions

In respect of a UCITS that is constituted as a corporate entity, issues surrounding its tax residency may in practice be avoided or mitigated if the UCITS entity were to be provided with an independent management board, which would also properly operate as such (i.e. also in line with the relevant substance requirements to ensure its place of effective management, for instance an independent decision process taking place in the jurisdiction of establishment of the UCITS entity). If, however, the UCITS fund entity is constituted as a contractual fund (i.e. with no corporate structure in place to manage the UCITS as an independent entity), no simple solution springs to mind.

Given the heavy predicament that contractual UCITS may be especially confronted with in light of the above, some EU Member States have taken the initiative to provide for a legislative amendment to establish that the “place of effective management doctrine” does not apply to a UCITS. Such amendment has also been introduced in Dutch tax law, and consequently, if the management company of a non-Dutch UCITS were to be transferred to the Netherlands, such would not constitute tax residency of the UCITS itself in the Netherlands. According to this Dutch tax provision, the UCITS fund entity will be considered to have its tax residency in the EU Member State that regulates the fund entity for purposes of the UCITS Directive.

2.3.1.3. Tax issues at the level of the investors

The transfer of the management company to another EU Member State and a subsequent change of tax residency of the UCITS fund entity may in some jurisdictions also directly affect the tax position of the investors in the fund, where for example distributions on the UCITS fund units might become subject to withholding taxes (i.e. under the tax regulations of the (new) jurisdiction of the management company and/or jurisdiction of establishment of the UCITS). After such transfer, also a (future) sale or liquidation of the relevant UCITS may trigger (additional) taxation at the level of the investors. This would therefore also be part of the general tax structure analysis of a relocation of management services.

2.3.2. UCITS merger

Under UCITS IV, three kinds of merger are to be facilitated, namely merger by absorption (transfer by a dissolving UCITS of its assets and liabilities in an existing UCITS), merger by creation (transfer by a dissolving UCITS of its assets and liabilities in a newly established UCITS) and a scheme of amalgamation (typically under common law, in which the merging UCITS would dissolve upon discharge of liabilities). If the UCITS fund entity were to be constituted as a contractual fund (i.e. without legal personality and a designated depositary holding the legal title of the fund assets), a fund merger might require the legal merger of the relevant fund depositaries.

In principle a merger between UCITS fund entities could give rise to taxable gains at the level of the merging UCITS in respect of the transfer of fund assets into the receiving UCITS fund entity, although given the fact that normally UCITS fund entities would be operated in a tax-neutral structure, such merger would generally not give rise to additional taxation. Otherwise the merging UCITS would need to rely on rollover relief, if available – also in view of a possible cross-border merger (see also further below). In this regard, the availability of local tax relief might also depend on the legal form of the UCITS entity. Furthermore, a UCITS would not be allowed to invoke protection under the EU Merger Directive (2005/19/EC) where a UCITS as investment vehicle would typically not be engaged in a “business enterprise”, as required in order to have access to this Directive.

As a result of the merger, in exchange for the units in the merging UCITS, the investor would receive units in the continuing UCITS. In some jurisdiction this may qualify as a disposal by the investor of units in the merging UCITS, and therefore could give rise to taxation. In such case, the investor would need to rely on a specific rollover relief. However, such relief might not be available in every EU jurisdiction and, if available, such relief might not apply in cross-border situations (where such arguably might not always be in line with equal treatment under application of the EU Treaty freedoms). Generally, to qualify for an available relief, specific requirements are specified under local tax regulations which would, for example, require that a relevant investor be able to substantiate that a relevant merger transaction has been entered into for sound business purposes (i.e. not only, or predominantly, for tax structuring purposes).

Furthermore, the merger transaction may also qualify as a taxable event in the underlying jurisdiction of investment and, for example, trigger local capital gains taxation, or at level of the receiving UCITS fund entity or investor level, transfer tax and stamp duty charges.

The envisaged merger could also have VAT implications, although it might be possible to invoke specific VAT exemptions. Again, in cross-border situations, inefficiencies might arise in respect of the interpretation differences between the local VAT authorities of the involved EU Member States in respect of the application and scope of an available VAT exemption under the VAT Directive.

In short, while UCITS mergers on a domestic level could generally be implemented on a tax-neutral basis (or only with limited tax leakage), cross-border mergers tend to become very complicated and will in many cases not be covered by relevant tax relief. As such, the result may be adverse tax consequences, especially at the investor level.

14. With reference to article 5 of the UCITS Directive 2009/65/EC, on the “authorization of UCITS.”
As an exception, however, the Netherlands will generally provide rollover relief for merging UCITS, including relief for investors in cross-border situations.

### 2.3.3. UCITS master-feeder structures

#### 2.3.3.1. General structuring considerations

For the establishment of UCITS master-feeder structures, a wide range of tax issues would need to be addressed, amongst others, relating the tax neutrality of the relevant master-feeder fund vehicles and the withholding tax implications on payments going through the fund structure. Also the relevant tax treaty application might give rise to specific tax issues. If, for example, a UCITS master-feeder structure were to also contain tax transparent fund entities (e.g. interposed as master fund), the additional feeder-“fund layer” may complicate the application of tax treaty benefits. For granting these benefits, the tax authorities from the underlying investment jurisdiction would need to look through the master entity and also assess the tax classification of the feeder fund. In some jurisdictions the classification of especially contractual fund entities (which potentially qualify as tax transparent) may turn out to be a complicated exercise.

Further, VAT structuring considerations should also be taken into account, including in respect of any payments for services between the UCITS feeder and master funds. As to the restructuring steps, in some jurisdictions the transfer of assets by an envisaged feeder fund into the master fund in return of units, can give rise to taxation at the level of the contributing feeder fund (e.g. capital gains taxation) and at the level of the receiving master fund (e.g. transfer tax), although in some cases rollover relief would be available (see also the discussion in section 2.3.2. in respect of the complexities in relation to (cross-border) mergers, which actually from a tax perspective entails the same issue). As also indicated above, in some jurisdictions such relief may not apply in connection with the establishment of a cross-border master-feeder fund structure. In the Netherlands, however, the establishment of a master-feeder structure should, in principle, not trigger additional taxation for the relevant UCITS fund entities, as applicable merger exemptions would be granted.

#### 2.3.3.2. Tax neutrality or additional taxation?

As discussed above, the tax planning surrounding UCITS fund structures is typically based on the tax neutrality of the structure and provides for only limited or no withholding tax leakage. In practice, the favourable tax-neutrality regime would be granted by the specific EU Member State where the UCITS has its tax residency; however if such UCITS changes its role into becoming a “master” fund (with another UCITS as feeder) specific requirements may be imposed by local tax authorities to ensure that the structure is not predominantly used for tax avoidance purposes, especially where the feeder fund would itself also fall under a favourable tax-neutral regime. If a UCITS master-feeder were to be established in a single jurisdiction, one may expect that generally similar requirements and tax rules would apply to both “fund layers”, as the relevant tax authorities are in a position to effectively supervise the whole structure. Payments between the master-feeder UCITS structure would then also not necessarily trigger additional withholding taxation as an exemption, or credit or reclaim system might be available.

If, however, the UCITS master fund were to be located in a different EU Member State from the UCITS feeder fund, the tax authorities of jurisdiction of the master UCITS may impose additional requirements, or may even – effectively – prevent cross-border structures from being established under local restrictions. Furthermore, such structure may be subject to (additional) withholding taxation on distributions made by the master to the feeder UCITS and/or (additional) taxation imposed by the jurisdiction of residence of the UCITS master on capital gains generated from the master UCITS investment in the hands of the feeder UCITS.

The authors believe that additional (administrative) requirements for EU cross-border UCITS master-feeder structures would, in principle, not be in line with a Member State’s ability to enforce control on the basis of Directive 2011/16/EU providing for administrative cooperation between Member States in the field of taxation. Moreover, a withholding or capital gains tax burden incurred by a non-local feeder UCITS (where a local feeder UCITS would be effectively exempt from such withholding or capital gains taxation) is arguably in conflict with the EU Treaty freedoms, as could be reasoned on the basis of EU case law that has evolved over recent years. Some grey areas regarding the scope and implications of this EU case law still exist, however, and at this stage the tax authorities in most EU jurisdictions do not seem willing to grant a (full) withholding tax refund or a (full) exemption of capital gains taxation to a non-local UCITS feeder. This would then force such feeder fund to engage in (costly) proceedings if it were to choose to test and effectuate its entitlement under the EU Treaty freedoms to reclaim.

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15. In this regard, in the Netherlands the “investor qualification” restrictions, as would apply to a Dutch UCITS fund that enjoys the fiscal investment institution regime (see also above), are amended to ensure that a non-Dutch UCITS which would be treated as a tax-neutral fund entity in its home state, is allowed to invest in such Dutch UCITS fund.

16. For instance under Dutch tax regulations, participations held by a non-Dutch feeder UCITS (where a local feeder UCITS would be effectively exempt from such withholding or capital gains taxation) is arguably in conflict with the EU Treaty freedoms, as could be reasoned on the basis of EU case law that has evolved over recent years. Some grey areas regarding the scope and implications of this EU case law still exist, however, and at this stage the tax authorities in most EU jurisdictions do not seem willing to grant a (full) withholding tax refund or a (full) exemption of capital gains taxation to a non-local UCITS feeder. This would then force such feeder fund to engage in (costly) proceedings if it were to choose to test and effectuate its entitlement under the EU Treaty freedoms to reclaim.

relevant withholding taxes or obtain an exemption from capital gains taxation.

In the recent Santander case (Case C-338/11), the ECJ ruled that where under French tax regulations a dividend distribution to a non-local UCITS is subject to French withholding tax and, on the other hand, a dividend distribution to a local/French UCITS would be exempt from French withholding taxation, such incongruity qualifies as an infringement of the EU freedom as to the free movement of capital. This ruling indicates that, in principle, a different tax treatment of local and non-local UCITS is not acceptable under the EU Treaty, especially if such discriminatory treatment is solely based on the place of residence of the UCITS rather than by looking at other factors such as the (potentially different) tax position of the participants in the UCITS. The ECJ seems to have opened the door to any EU fund entity operating under the regulatory UCITS regime, to claim an equal tax treatment as such, i.e. irrespective of the fact that a (non-local) UCITS entity might have a different legal form (e.g. a “contractual fund”, or an entity having legal personality) and/or have a different tax status (e.g. taxable, exempt, tax-transparent or opaque in its jurisdiction of residence). The Santander case is definitely an important step towards an EU-wide approach to facilitate for any UCITS regulated entity the ability to claim an exemption from tax on income and gains in a relevant EU Member State if a local UCITS were to enjoy the same exemption. Obviously, there are still some uncertainties, for example regarding what the outcome would be if the source jurisdiction were to operate different tax regimes for local UCITS (as is the case in the Netherlands). The authors would expect, however, that within the foreseeable future the ECJ will issue further guidance on this point.

3. AIFM Directive

As the AIFM Directive has a different background than the UCITS, there are no strict requirements under the AIFM Directive in respect of the establishment and operation of “alternative fund” structures. It can be said that where the purpose of the AIFM Directive would be to regulate fund management as such, there is no immediate focus on the whole of the fund structure, although, for instance, the AIFM Directive also provides regulations for the depositary and custodian role in a fund structure.

The general tax implications that are relevant for UCITS fund structuring (e.g. in relation to master-feeder structures and the implementation of fund mergers as set out above) could equally be relevant and apply to the “alternative funds” environment, although such tax issues would, for the most part, not be in conflict with the provisions and goals as reflected in the wording of the AIFM Directive itself. Having said this, there would be one important exception. Similar to UCITS IV, the provisions of the AIFM Directive envisage the rendering of cross-border management services, which could trigger tax issues in respect of the tax residency of a fund entity. As set out in section 2.3.1.2., if a manager of a fund were to operate from a different EU Member State than the jurisdiction of establishment of the fund entity itself, the fund could, under application of the doctrine of the “place of effective management”, be considered to be transferred to jurisdiction from which the manager were to operate its management services to the fund. In the Netherlands, as part of the implementation of the AIFM Directive in Dutch law, this issue has been directly addressed with a proposal by the Dutch Ministry of Finance to also amend Dutch tax regulations to ensure that the place of effective management doctrine does not apply to AIFM Directive-regulated funds, i.e. similar to the amendment that has been implemented to create clarity from a Dutch tax perspective as to tax residency of UCITS.

On a separate note, it would be interesting to see whether, if the ECJ were to grant equal treatment for UCITS Directive-regulated funds on the basis of the EU Treaty freedoms, as discussed above, a similar equal treatment could somehow be established in respect of AIFM Directive-regulated funds. Where the background and scope of the UCITS and AIFM Directives do not fully coincide, at this stage such equal treatment analysis for AIFM Directive-regulated funds by the ECJ is not necessarily evident.

4. Conclusion

The establishment of UCITS fund (management) structures and implementation of mergers in line with the amended UCITS IV provisions would generally, at a domestic level, not trigger specific tax issues in an EU Member State. However, cross-border EU structuring will in many cases trigger additional tax costs, especially in the hands of the investors in a UCITS fund structure. Furthermore, tax inefficiencies may arise in connection with the establishment of cross-border fund management services for UCITS or AIFM Directive-regulated funds, which would be triggered by questions surrounding the tax residency classification of a relevant fund. Furthermore, in view of the VAT structuring inefficiencies that might arise, it would

18. See joint cases FR: ECJ, 10 May 2012, Case C-338/11, Santander Asset Management SGIC SA and others v. Direction des résidents à l’étranger et des services généraux, ECJ Case Law IBFD and C-347/11. As a further item, also arisen in this matter, it seems that on the basis of free movement of capital under the EU Treaty – in certain situations – such equal treatment could also be claimed by UCITS (or UCITS-like fund entities) that operate from outside the European Union.

19. A Dutch lower tax court has granted a Finnish investment fund (exempt from Finnish corporate taxation) a refund of Dutch dividend withholding tax on the basis that a similar Dutch investment fund (enjoying the tax-neutral fiscal investment institution (FFI) regime mentioned above) would have been able to reclaim its Dutch dividend withholding tax. The fact that the Finnish investment fund if it were to have operated in the Netherlands, would not have been able to meet the relevant requirements of the Dutch FFI regime, could not justify the different Dutch dividend withholding tax treatment, according to this Dutch court ruling. See Gerechtshof’s Hertogenbosch, 9 Mar. 2012, case 11/00451.

be very helpful if the current, ongoing review of the VAT Directive were to result in the necessary amendments to take away (most of the) distortions between the Member States’ VAT systems in the near future.\textsuperscript{21}

As an exception to most EU Member States, under Dutch local tax regulations, cross-border UCITS structuring, including the use of a cross-border UCITS management company, does not necessarily trigger additional tax costs in the Netherlands. In some circumstances, however, a non-Dutch feeder UCITS might not be able to avoid Dutch capital gains taxation on its investments in a Dutch (master) UCITS. Arguably, this would be an unacceptable restriction on the free movement of capital under the EU Treaty.

The impediments for tax-neutral cross-border UCITS restructurings inflicted by the local tax rules of Member States caused the Committee of European Securities Regulators to bring this issue to the attention of the European Commission in 2009. However, to the best of the authors’ knowledge, to date no specific steps have been undertaken by the Commission to further address these issues. \textsuperscript{22} The authors would think that it is time for Brussels and EU Member States to take action to complete the remaining steps to facilitate a truly EU cross-border funds market.

\begin{itemize}
\item \textsuperscript{21} Currently the financial services provisions of the VAT Directive are under review by the European Commission.
\item \textsuperscript{22} CESR’s technical advice to the European Commission on level 2 measures relating to mergers of UCITS, master-feeder UCITS structures and cross-border notification of UCITS, (CESR/09-1186) of Dec. 2009.
\end{itemize}