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Adrift between Scylla and Charybdis? The trust caught between a civil law rock and a fiscal hard place

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Abstract

In a seminal case, the EFTA Court has ruled in *Olsen* that a trust, as a form of establishment, may fall within the scope of both the rules on the freedom of establishment and the rules concerning the free movement of capital. Therefore, the *Olsen* judgment is also of significant importance regarding European Union (EU) law. However, this important judgment raises questions regarding the private international law and tax law treatment of trusts, since different EU Member States have adopted special tax rules concerning trusts. Especially, the question to what extent trusts may be used to carry on 'genuine economic activities' is relevant in this respect.

Introduction

1. Problem definition: In a seminal case regarding trust matters, the Court of Justice of the European Free Trade Association States ('EFTA Court') has ruled in the *Olsen* case[1] that the trust, as a form of establishment, may fall within the scope of Article 31 Agreement on the European Economic Area ('EEA Agreement'). Moreover, the EFTA Court ruled that beneficiaries of capital assets set up in the form of a trust may also be able to invoke Article 40 of the EEA Agreement, relating to the free movement of capital, in the event that recourse to the freedom of establishment should prove not to be possible due to the facts of the case at hand.[2] As it was decided on the basis of the freedom of establishment and the free movement of capital, the *Olsen* judgment is also of significant importance for European Union (EU) law.[3]

The decision in *Olsen* confirmed for the first time that 'entities such as trusts' may also be covered by the freedom of establishment and the free movement of capital within the EEA. The EFTA Court did not distinguish between different types of trusts, but, seemingly, ruled that the trust, as a generic legal

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1. The *Olsen* case concerned a discretionary, irrevocable, and perpetual trust established in Liechtenstein. The beneficiaries of the trust were members of the Norse Olsen family. Ptarmigan trust owned shares in a Dutch holding company, which in turn held shares in a significant number of other corporations. The assets of Ptarmigan trust were divided into two funds, each fund having a separate group of beneficiaries of the same family.

The case turned on the question whether, under the applicable Norse CFC rules, the beneficiaries of Ptarmigan trust were taxable on income that had already been received by the trust, but had not yet been distributed to its beneficiaries. Additionally, the question arose whether the beneficiaries of the trust could also be subjected to the Norse annual net wealth tax.

2. EFTA Court, 9 July 2014, E-3/13 and E-20/13, *Fred Olsen et al v The Norwegian State* [2014] EFTA Ct Rep 400.

3. After all, both the CJEU and the EFTA Court have already held that substantially identical provisions of the TFEU and the EEA Agreement, which have the same legal scope, should be given a uniform interpretation. See CJEU, 1 April 2004, C-286/02, *Bellio Fratelli Srl v Prefeturra di Treviso*, Jur 2004, I-3465, s 34; EFTA Court, 12 December 2003, E-01/03, *EFTA Surveillance Authority v Iceland* [2003] EFTA Ct Rep 143, s 27.

This is both the case for the provisions regarding the freedom of establishment and the provisions regarding the free movement of capital.

Specially, regarding the free movement of capital, see EFTA Court, 14 July 2000, E-01/00, *State Debt Management Agency v Íslandsbanki-FBA hf* [2000–01] EFTA Ct Rep 8, s 16; CJEU, 20 October 2011, C-284/09, *Commission v Germany*, Jur 2011, I-9879, s 96; CJEU, 22 September 2003, C-452/01, *Ospelt*, Jur 2003, I-9743, s 28.

paras 93–103 of the *Olsen* judgment are an illustration of the application of this principle within the context of the right of establishment.

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form, could indeed fall under the personal scope of the freedom of establishment. The *Olsen* judgment principally concerned Norse Controlled Foreign Corporation ('CFC') legislation[4] and has been widely reported in the literature for its specific importance in tax matters.[5] However, it is submitted that the *Olsen* judgment may have considerable ramifications for other branches of the law as well, especially in the case of private (international) law. The *Olsen* case indeed raises some fundamental questions in this regard. For example, can trusts actually be considered as 'entities' to which the freedom of establishment may apply? Is it immaterial that trusts generally lack any form of legal personality and that the beneficiaries/taxpayers are often not the ones who settled the trust in first place?

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Note that these questions are not only relevant when viewed from the perspective of private (international) law. In *Olsen*, the EFTA Court continued on the path set by the Court of Justice of the EU (CJEU) in the *Cadbury Schweppes* case,[6] where it was held that national CFC legislation may not infringe the freedom of establishment. Only in the case where the CFC legislation is targeted at 'wholly artificial arrangements intended to escape the national tax normally payable' will it withstand scrutiny under EU law. However, in order to fall under the scope of the freedom of establishment in the first place, it is required that the 'controlled company' is actually established in another Member State of the EU or EEA and that it carries on 'genuine economic activities'. In other words, in order to be protected by the freedom of establishment, a certain threshold of economic 'substance' has to be reached at the level of the entity involved.[7] The term 'genuine economic activities' should be considered to be a term of art, given an autonomous meaning by the CJEU. Therefore, as we shall discuss, not all activities carried on by different entities can be considered to be 'genuine economic activities' as understood in the jurisprudence of the CJEU. However, the requirements mentioned also relate back to the questions posed in the previous paragraph. Can trusts actually be considered as entities that can carry on 'genuine economic activities'? And are trusts apt to perform qualifying economic activities at all?

These questions are strongly interrelated and merit a separate analysis, which is the main purpose of this contribution.

2. Plan: In order to provide a satisfying answer to the questions posed above (margin no 1), we shall start by shortly examining some important features of trusts, especially vis-à-vis (corporate) entities. This discussion is not meant to be exhaustive. Only those features that prove to be of importance for the subsequent discussion will be addressed. Secondly, we will, at a general level, discuss the CJEU's seminal jurisprudence concerning the freedom of establishment and examine whether trusts can be fit into the legal scheme developed by the CJEU. As we shall see,

4. CFC legislation is principally aimed at limiting the phenomenon of artificially deferring taxes by using controlled foreign entities, which are usually established in low-taxed jurisdictions. CFC legislation allows to tax the income obtained by these foreign entities to be taxed at the level of the persons or entities controlling the foreign entities in question.

5. For example, A Van Zantbeek, 'Olsen. Duidelijke krijtlijnen voor CFC-wetgeving, transparante belastingheffingen en kaaimantaksen binnen de Europese Economische Ruimte' (case note under EFTA Court, 9 July 2014) Tijdschrift voor Fiscaal Recht 2015, 945–48; F Zimmer, 'Norway, The Olsen Cases' in M Lang and others (eds), *ECJ – Recent Developments in Direct Taxation 2014* (Linde 2015) 109–20.

6. CJEU, 12 September 2006, C-196/04, *Cadbury Schweppes*, Jur 2006, I-7995.

7. Note that, in legal doctrine, it is disputed whether the substance test should take place on a stand-alone basis (ie exclusively at the level of the foreign entity involved), or on a group level, allowing to take the (active) entities in which the foreign entity has a stake into account. De broe deems, on the basis of the CJEU's *Segers, Centros,* and *Inspire Art* cases, that the latter approach is the right one. However, other authors disagree. It is not the author's intention to interfere in this debate here.

See L De Broe, *International Tax Planning and the Prevention of Abuse* (IBFD 2008) 860; see on the other hand, DS Smit, 'Substance Requirements for Entities Located in a Harmful Tax Jurisdiction under the CFC Rules and the EU Freedom of Establishment' (2014) 16 Derivatives and Financial Instruments 263; O Thömmes and K Nakhai, 'New Case Law on Anti-Abuse Provisions in Germany' (2005) 33 Intertax 79; ECCM Kemmeren, *Principle of Origin in Tax Conventions – A Rethinking of Models* (Pijnenburg 2001) 184–85.

the EFTA Court's ruling in what is essentially a tax case, may have some unexpected consequences for other branches of the law as well. Thirdly, on the basis of the foregoing discussion, we will analyse the relationship between trusts and the freedom of establishment from a tax law perspective. In doing so, we will dedicate special attention to the so-called substance requirement. Fourthly and finally, we will consider the relationship between trusts and free movement of capital, as the *Olsen* case also raises questions in this regard.

3. A general note on trusts—demarcation of the research: Before considering the trust in more detail, it is fitting to provide a general introductory note concerning trusts. Doing so also allows us to indicate some necessary demarcations of the research presented in this article.

Trusts are often considered to be recalcitrant creatures, probably rightly so. Because of their plasticity, it is an arduous task to identify the determining legal characteristics that distinguish it from other legal figures.[8] A layer of complexity is added when one realizes that 'the' prototypical trust does not even exist.[9] For example, it is conceded that *Black's Law Dictionary* mentions more than 150 types and categories of trusts.[10] Moreover, a consensus has emerged in academic literature that it is, for all practical purposes, impossible to provide any definition of the concept of 'trust'.[11]

Especially in recent times, matters have become even more complex. Although the exact origins of the trust are still being debated,[12] it has often been claimed that trusts were probably of the most 'distinctive achievements of English lawyers'[13] to legal theory in general. Today, however, different kinds of trusts can be found in different jurisdictions, which do not always belong to the common law family. For example, today 'trusts' or '*fiducies*' can be found within the Civil Codes of France (ie the French *fiducie*),[14] Luxembourg,[15] the Czech Republic, Romania,[16] Liechtenstein,[17] and Curaçao.[18] Traditionally, different kinds of trusts can also be found in so-called 'mixed jurisdictions', such as Scotland,[19] Québec,[20] and South Africa.[21] Moreover, (common law) trusts also exist in Irish law.

The foregoing implies that it is practically impossible to write any contribution on 'trusts' in general, and that we should make clear at the outset that this contribution will mainly focus on traditional common law trusts, as employed by private individuals within the context of their estate planning, the latter also being the main aim of the trust in the *Olsen* case. However, where appropriate, reference will be made to the use of common law trusts within other contexts as well, especially trusts employed in a commercial context. Charitable trusts, on the other hand, are excluded from the scope of this contribution, as are other trust types that are not voluntarily created

8. See eg T Honoré, 'Trusts: The Inessentials' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths 2003) 7–20.

9. C Webb and T Akkouh, *Trusts Law* (Palgrave Macmillan 2011) 1.

10. BA Garner (ed), *Black's Law Dictionary, Eighth Edition* (Thompson Business 2004).

11. D Hayton, ' "Trusts" in Private International Law' in Académie de Droit International de La Haye, *Recueil des Cours,* vol 366 (Nijhoff 2013) 17; A Peyrot, *Le trust de common law et l'exécution force en Suisse* (Schulthess 2011) 19; M Lupoi, 'Trusts in the Civil Law – An Introduction' (1996) Trusts & Trustees 9, 20; A Von Overbeck, *Explanatory Report on the 1985 Hague Trust Convention* (HCCH Publications 1985) 36–38; FW Maitland, *Equity* (CUP 1936) 43.

12. See eg A Avini, 'The Origins of the Modern English Trust Revisited' (1995–96) 70 Tulane Law Review 1139.

13. Maitland (n 11) 23.

14. Loi no 2007-211 du 19 février 2007 instituant la fiducie, Journal Officiel no 44 du 21 février 2007.

15. Loi du 27 juillet 2003, Journal Officiel du Grand-Duché de Luxembourg, 3 Septembre 2003.

16. See eg D Moreanu, 'The Trust under Romanian Law. Form of Patrimony Split for Natural and Legal Persons' (2015) 4 Perspectives of Business Law Journal 79.

17. FA Schurr, 'A Comparative Introduction to the Trust in the Principality of Liechtenstein' in H Heiss and others (eds), *Trusts in the Principality of Liechtenstein and Similar Jurisdictions* (Dike Verlag 2014) 3–39.

18. Landsverordening trust van, 15 December 2011, *Publicatieblad van Curaçao (P.B.),* 15 December 2011, no 67.

19. Regarding Scottish Trusts, see WM Gordon and S Wortley, *Scottish Land Law,* vol 1 (Thompson Reuters 2009) 505–23; G Gretton, 'Trusts without Equity' (2000) 49 International and Comparative Law Quarterly 619; KGC Reid, 'Patrimony not Equity: The Trust in Scotland' (2000) 8 European Review of Private Law 427.

20. See, *inter alia,* M Cantin Cumyn, 'Regarding the Diversity of the Trust' in L Smith (ed), *Re-Imagining the Trust* (CUP 2012) 20–23.

21. Regarding South African trusts, see MJ de Waal, 'The Uniformity of Ownership, *Numerus Clausus* and the Reception of the Trust in South African Law' (2000) 8 European Review of Private Law 448.

by their settlors, such as resulting trusts and constructive trusts.

As this contribution was being written, it is still unclear whether the UK will remain within the EU or whether it will effectively withdraw from it.[22] Even in the case of an actual 'Brexit', the UK might still remain within the EEA, thereby retaining access to the internal market. However, as we have noted in a previous paragraph, 'trusts' now exist in different forms in different EU and EFTA Member States. Even though their exact legal nature might differ in some respects, we may presume that most of the conclusions put forward in this article are also valid in the cases were, instead of an English trust, another trust form is being used. This is because, on a functional level, other trust forms operate in similar ways as classic common law trusts and may serve to attain similar purposes.[23] The mere fact that the trust in the *Olsen* case was a Liechtenstein trust at least provides an indication in this respect. However, absent further research in this regard, this point can only serve as a working hypothesis.

Some characteristics of the traditional trust model

Basic characteristics of the trust

4. Historical note: Even though the circumstances relating to the genesis of the trust remain unclear, it is beyond doubt that the traditional trust model was conceived within the womb of English common law *sensu lato*. Historically, English law is characterized by the distinction between the common law *sensu stricto* and equity, which was developed by the Lords Chancellor to supplement the rigid common law. It is within the contours of equity that the use, the forerunner of the trust, originated.[24] Many of the particularities that have come to denote the trust can be traced back to the fact that the trust is creature born between the verges of these two legal worlds.

5. Trusts: some basics: A private, voluntarily created trust is characterized by a tripartite structure, which generally involves three actors, which may the same persons acting in different capacities. Such a trust is created when the settlor transfers the legal title of certain goods to a trustee, or declares himself to be trustee thereof, to hold and administer these goods for the benefit of certain beneficiaries. While the trustee is considered to be the holder of the legal title to these goods, the beneficiary holds the equitable title. Even though the exact legal nature of the equitable title has been the subject of stark debates within the Anglo-American legal doctrine for centuries,[25] in the eyes of many civil law lawyers, this structure has been regarded as some form of 'split' or 'dual ownership'.[26] While the trustee's legal title to the goods allows him to manage these goods and allows him to interact with third parties as if he were the singular

22. For a discussion of some of the possible tax consequences of a 'Brexit', see V Sigurvaldadottir, 'The Applicability of Direct Tax EU Directives within EEA States: The Position of the UK on Withdrawal from the EU' (2014) British Tax Review 544.

23. For example, the French *fiducie* was introduced in the French legal order to able to provide a legal vehicle that could compete with common law trusts, see Projet de loi instituant la fiducie, no 2583, 20 février 1992; Proposition de loi du 8 février 2005 instituant la fiducie, Senate 2004–2005, no 178; F Barrière, 'The French *fiducie*, or the Chaotic Awakening of a Sleeping Beauty' in Smith (n 20) 223.

24. Maitland (n 11) 23ff.

25. The discussion generally centres on the question whether the beneficiary of a trust should be regarded as having a right *in rem* to the trust goods or whether it is essentially a right *in personam*.

See, *inter alia*, Maitland (n 11); AW Scott, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Columbia Law Review 269; P Bordwell, 'Equity and the Law of Property' (1934) 20 Iowa Law Review, 1 et seq.; C Langdell, 'A Brief Survey of Equity Jurisdiction' (1887) 1 Harvard Law Review, 55 et seq.; HF Stone, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Columbia Law Review 467; B Mcfarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1–28; JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Canadian Journal of Law and Jurisprudence 473.

26. See examples taken from Belgian legal doctrine: M Vandendijk and C Hendrickx, 'Angelsaksische Trust. Gebruik in het kader van successieplanning voor Belgische rijksinwoners' AFT (2008) nr 5, 12; D Van Laere and P Missoul, 'De trust en het nieuwe IPR Wetboek' (2005) *Successierechten – Nieuwsbrief* nr 2, 4; ME Storme, 'Vertrouwen is goed, dual ownership is beter. Elf essentialia bij de invoering van trustachtige figuur of fiduciaire overeenkomst in het Belgische recht' (1996) Rechtskundig Weekblad 137–54.

Dyer and van Loon state in this regard that:

> Civil lawyers, when they write about the trust, tend to highlight 'dual ownership' as one of the essential characteristics of the trust. It will be clear from the foregoing that 'dual ownership' is an image for a way of fragmentation unknown in civil law of a concept of ownership which is itself essentially

owner of these goods, the beneficiaries' equitable title ensures that they are given the possibility to monitor the trustee's activities and thereby ensure that the trustee is acting in their best interests. To ensure that the trustee will act in the beneficiaries' best interests, he or she is burdened with arduous fiduciary duties, which are (arguably) even stricter than those placed on directors of corporations.[27] In many ways, trust law has developed two distinct approaches towards the goods placed under trust.[28] On the one hand, the goods are treated as goods *ut singuli* in the hands of the trustee, who, by virtue of his legal title is able to manage the trust assets and deal with them. On the other hand, the beneficiaries, through their equitable title, have a claim to the *value* that these goods, taken together, represent. We may also note that, after the creation of a trust, the settlor, in least in his or her capacity as settlor, drops out of the picture, unless he or she reserved some powers for his- or herself in the trust instrument. Such powers may include the power to revoke the trust, to discharge and appoint new trustees or beneficiaries, etc.

Are trusts 'entities'?

6. What constitutes an 'entity': Traditional legal doctrine rejects the view that trusts can be considered to be 'separate legal entities'.[29] In essence, trusts are merely a way in which property can be held by a trustee.[30] Nevertheless, certain authors contend that trusts are indeed 'legal entities'.[31]

Starting out from the observation that in economic theory, 'firms' are generally considered to be the central counterparty in a complex set of legal relationships, and, therefore, a *nexus of contracts*,[32] Hansmann, Kraakman, and Mattei state that, in itself, this explanation does not seem to suffice. Instead, these authors contend that, to effectively serve as a 'nexus of contracts', any entity should display two essential characteristics.[33] The first is a well-defined decision-making authority. The second is that the entity needs to have a dedicated pool of assets that are available to satisfy the claims of entity's creditors. In other words, it is essential for any entity to possess a dedicated pool of assets to which the entity's creditors have a priority claim. Inversely, this means that the personal creditors of the entity's owners, managers, shareholders, or beneficiaries are not on the same footing as the entity's creditors, when it comes to satisfying their claims by taking entity assets. The authors call this phenomenon 'affirmative asset partitioning' or 'entity shielding', and contend that this characteristic is essential to any 'legal entity'. Entity shielding may be contrasted with the non-essential

different from that of civil law. Because of this underlying difference in the concept of property itself, the image should be used with care, as it may be sometimes more elusive than illuminating.

A Dyer and H van Loon, 'Report on Trusts and Analogous Institutions' in Conference de la Haye De Droit International Privé, *Actes et documents de la Quinzième session (1984) – Trust, loi applicable et reconnaissance* (HCCH Publications 1985) 17.

27. AJ Warburton, 'Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms' (2009) 36 Journal of Corporation Law 102; JH Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale Law Journal 182; R Sitkoff, 'An Economic Theory of Fiduciary Law' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014) 203.

However, other scholars note that the differences between fiduciary duties placed on trustees and corporate directors are slowly converging. See A Hofri, 'The Erosion of Fiduciary Singularity: Contract, Trust and Corporation' (2016) Iowa Law Review, forthcoming <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736559> accessed 27 September 2016.

28. See B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 Oxford Journal of Legal Studies 81–97.

29. B Shah, 'Trustee's Indemnity and Creditor's Rights' (2013) 19 Trusts & Trustees 79; D Hayton, 'Foundations and Trusts contrasted' (2011) 17 Trusts & Trustees 462; DWM Waters, 'The Concept Called ''The Trust'' ' (1999) Bulletin for International Fiscal Documentation 126; DWM Waters, 'The Institution of the Trust in Civil and Common Law' in Académie de Droit International de la Haye, *Recueil des Cours,* vol 229 (Nijhoff 1995) 427.

30. L Smith, 'Trust and Patrimony' (2009) 28 Estates, Trusts and Pensions Journal 336.

31. H Hansmann and U Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 46 NYU Law Review 434; H Hansmann and U Mattei, 'Trust Law in the United States. A Basic Study of Its Special Contribution' (1998) 73 The American Journal of Comparative Law 133; H Hansmann and R Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale Law Journal 387.

32. MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 310.

33. Hansmann and Kraakman (n 31) 392.

characteristic of 'limited liability' or 'defensive asset partitioning', a characteristic typically associated with entities that enjoy legal personality.[34]

7. Trusts as entities: Interestingly, Hansmann, Kraakman, and Mattei note that trusts also display the essential characteristic of 'entity shielding' because the trustee's personal creditors cannot attach to the trust assets.[35] In other words, the integrity of the trust fund is assured, even in the case where the trustee becomes insolvent. This is also one of the core reasons why civil law lawyers generally refer back to the concept of dual ownership in order to be able to explain this phenomenon. Coupled with the observation that trustees, because of their legal title, have the primary decision-making authority regarding the segregated pool of trust assets, the trust indeed appears to be, at least *prima facie*, a legal entity. Moreover, in practice, trusts are often spoken of as if they were actual entities.[36] It is, therefore, hardly surprising that different authors from civil law backgrounds have argued that the trust may be best understood as a legal person.[37] It is, therefore, not surprising that the EFTA Court in *Olsen* ruled that 'legal entities . . . whether they have legal personality or not, provided that they have been formed in accordance with the law of an EU State or an EFTA State' may fall under the scope *ratione personae* of the freedom of establishment.[38] Before, in the absence of clear case-law, certain commentators concluded that the position of entities without legal personality was unclear.[39] However, due to the ruling in *Olsen*, there can be no more doubt regarding this question.

Before, in the absence of clear case-law, certain commentators concluded that the position of entities without legal personality was unclear. However, due to the ruling in Olsen, there can be no more doubt regarding this question

8. Critical analysis: Assuming that trusts are actual legal entities, the decision in *Olsen* is logical in and by itself. However, there are certain aspects of trust law that shed doubt on this assumption.

While it is a given fact that the segregation of trust assets provides for protection against the trustee's insolvency, we contend that, upon closer inspection, the classification of trusts as a type of 'entity' seems to break down. As noted above, a crucial distinction can be made between the personal creditors of the owners, managers, shareholders, and other persons involved with the entity and the entity's creditors. Therefore, when the trustee contracts as trustee[40] and even when the trustee commits a tort as trustee,[41] one would expect these specific creditors to be 'trust creditors'. Under English law, this is not the case. All these creditors are in fact personal creditors of the trustee.[42] This observation correlates with the fact that only assets can be held on trust, and never liabilities, as the latter are to be attributed to the trustee personally. When acting *intra vires*, the trustee does have the

34. While there are legal persons who do not provide limited liability to their owners, managers, or shareholders, it is harder to imagine entities without legal personality that do provide such limited liability.

35. Hansmann and Mattei (n 31) 454ff.

36. G Gretton, 'Up There in the *Begriffshimmel*' in L Smith (ed), *The Worlds of the Trust* (CUP 2013) 529.

37. P Lepaulle, 'Review of *La propriété dans le trust* (by R. Pasqual)' (1952) Revue International de Droit Comparé 378, 'la solution le plus efface et la plus simple est de doter le trust de la personne morale . . .'; HCF Schoordijk, 'Trust en rechtspersoonlijkheid, afgescheiden vermogen, vertegenwoordiging en bewindsbevoegdheid' in H Cousy and others (eds), *Liber Amicorum Walter Van Gerven* (Kluwer 2000) 573–86.

Upon closer inspection, the analogy between trusts and legal persons seems to break down. One of the essential characteristics of legal personality is that all proprietary links between the assets of the legal person and its shareholders or members are cut through. These assets are considered to be owned by the legal person, without being encumbered by any rights *in rem* attributed to the members or shareholders. In German legal doctrine, this phenomenon is referred to as the '*Trennungsprinzip*'. By contrast, in a trust, the assets are owned by the trustee, and the legal nature of the equitable rights held by the beneficiaries is a much debated issue.

See in this regard, J Vananroye, *Onverdeelde boedel en rechtspersoon* (Biblo 2014) 10ff; see also ICJ, *Belgium v Spain*, 5 February 1970 (Barcelona Traction) ICJ Rep, ss 41–44. The International Court of Justice (ICJ) refers to 'a firm distinction between the separate entity of the company and shareholder, each with a distinct set of rights'. The ICJ also states that '[t]he separation of property rights as between company and shareholder is an important manifestation of this distinction.'

38. *Olsen* (n 2) s 93.

39. For example, De Broe (n 7) 843.

40. AJ Oakley, *Parker and Mellows: The Modern Law of Trusts* (8th edn, Butterworths 2003) 22–23.

41. CE Rounds, *Loring and Rounds: A Trustee's Handbook* (Kluwer 2015) 800.

42. Smith (n 30) 339; Shah (n 29) 79; Peyrot (n 11) 117–31.

possibility to pay creditors with funds deriving from the trust or to take any such funds to repay himself.[43] Should the trustee fail to do so, these creditors have at their disposal a so-called 'subrogation claim', which allows them to step into the trustee's shoes and attach to the trust fund in the place of the trustee.[44] Crucially, this implies that any claim of the trust creditors on the trust fund can never be stronger than the one the trustee himself has. However, when the trustee acted in breach of trust, and thus *ultra vires*, any possibility for the trust creditors to reach the trust fund directly, may—and probably will—be cut off.[45] Moreover, when contracting with third parties, the trustee is allowed to stipulate that his personal goods are unavailable for trust creditors. This is, however, a feature of contract law and not trust law. Although, taken together, these rules may operate to the detriment of 'trust creditors'. In the absence of genuine trust creditors, however, one may doubt whether common law trusts may actually considered to be entities.

Note that, due to their character as separate patrimonies,[46] many other trust forms from civil law jurisdictions or mixed jurisdictions display more entity-like aspects, as there usually will be actual trust creditors. Nevertheless, this does not always mean that these trust forms display strong forms of entity shielding or defensive asset partitioning. For example, in the case of the French *fiducie*, there are instances where the creditors of the *constituant* (ie the 'settlor' of the *fiducie*) can attach to the assets contained in the *fiducie*.[47] Moreover, when the assets contained in the *fiducie* do not suffice to satisfy the claims of the *fiducie* creditors, these creditors may seek recourse against the personal assets of the *constituant*.[48] Thirdly, in cases where this is expressly stipulated in the *fiducie* contract, the trust creditors may seek recourse against the personal assets of the *fiduciaire* (ie the trustee), unless the trust creditors have expressly accepted that the personal assets of the *fiduciaire* may not be attached.[49]

9. 'Entities' in private international law: One of the main stumbling blocks in European private international law on corporations is the existence of two competing schools of thought regarding the identification of the connecting factor of the *lex societatis*.[50] According to one theory, the *lex societatis* is to be determined by reference to the corporation's formal, statutory seat (incorporation theory). However, the *lex societatis* can also be determined by a material criterion, ie the law of the state where the corporation has its effective seat of management (real seat theory). It is common knowledge that different European states employ (variations of) both theories in their national law. For example, while Belgian law applies the real seat theory, English and Dutch law apply the incorporation theory. In fact, these differences have always been one of the main reasons why the CJEU has taken a (seemingly) stricter stance against immigration states than against emigration states, in the case of a cross-border transfer of a company seat within the EU.[51] In the absence of further harmonization, it is for the national law involved to determine whether a company may transfer its statutory seat or its real seat to another Member State while retaining its prior status and identity. However, in *Cartesio*, the CJEU added that the emigration state cannot require the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member

43. N Le Poidevin, 'Going Bust: Insolvency and Trusts' (2010) 16 Trusts & Trustees 306.
44. Shah (n 29) 82; Le Poidevin, ibid.
45. Rounds (n 41) 797.
46. France: R Libchaber, 'Les aspects civils de la fiducie dans la loi du 19 février 2007 (1re partie)' (*Defrénois* 2007) art 38631, (1094) 1101, no 9. Scotland: Gretton (n 19); Reid (n 19). Romania: Moreanu (n 16). Liechtenstein: M Raczynska, 'Parallels Between the Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund' in Smith (n 36) 454.
47. Code Civil, art 2025, para 1.
48. Code Civil, art 2025, para 2.
49. Code Civil, art 2025, para 3.
50. K Geens and others, 'De rol van het nationale recht in het Europese vennootschapsrecht' in I Samoy, V Sagaert and E Terryn (eds), *Invloed van het Europese recht op het Belgische privaatrecht* (Intersentia 2010) 360.
51. See, especially, CJEU, 27 September 1988, 81/87, *The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail*, Jur 1988, I-5483; CJEU, 16 December 2008, C-210/06, *Cartesio Oktató és Szolgáltató bt,* Jur 2008, I-9641.

State (ie the immigration state) to the extent that it is permitted to do so under the law of the immigration state.[52]

Here, it is important to note that, in case of trusts, these two competing theories simply do not exist. For trusts, the applicable law is usually not determined by reference to any sort of 'seat' or 'domicile'. On the contrary, according to the dominant current in private international law, the law applicable to the trust may be freely chosen by the settlor.[53] Because trusts are in essence simply legal relationships, they are not 'incorporated' in any way. For example, there is, in principle, nothing stopping a settlor from appointing an English trustee, while choosing the law of the Cayman Islands as the applicable trust law.

Here, it is important to note that, in case of trusts, these two competing theories simply do not exist. For trusts, the applicable law is usually not determined by reference to any sort of 'seat' or 'domicile'. On the contrary, according to the dominant current in private international law, the law applicable to the trust may be freely chosen by the settlor

References to a trust 'seat' or 'domicile' are, however, not unheard of. In British tax law, for example, the trust's 'residency' is determined by reference to the residency of its trustees.[54] In the case of multiple trustees, these are treated together as a single nominal person, distinct from the persons who actually are the trustees. Also, the place of administration of the trust can be taken into account, among other criteria, in order to determine the applicable law to trust, in the case where the settlor did not make any explicit choice regarding the applicable law.[55] Traces of a trust 'seat' can also be found in current Swiss private international law, which, historically, tended to treat foreign trusts on more or less the same footing as foreign corporations.[56] Moreover, in the third paragraph of Article 63 of the Brussel I *bis*-Regulation reference is made to a 'domicile' of the trust, in order to determine which courts may assume jurisdiction in trust cases. In the Schlosser Report, it was confirmed that the concept of 'domicile' is indeed not unknown in legal theory. However, the Report refers to a Scottish author in order to substantiate this claim.[57] However, in a mixed jurisdiction as Scotland, which is influenced both by common law and civil law systems, such a notion has a slightly less 'foreign' feel than in common law jurisdictions. After all, different Scottish authors attribute some entity-like aspects to a Scottish trust, thereby differentiating the Scottish trust model from the classic common law model.[58]

The role of trusts in commerce as opposed to corporate legal forms

10. The role of trusts in commerce: We have already touched upon the fact that, in order for entities to come under the scope of the freedom of establishment, it is required that these entities should engage in some form of 'genuine economic activity'. Yet, after having established that trusts are a very special form of entity, if they are to be considered as entities at all, a further question rises.

52. *Cartesio,* ibid, s 112.

In *VALE*, the CJEU added that the national legislation of immigration states, in so far it allows for the conversion of companies that already have their seat in the Member States concerned, may not prevent a company that previously had its seat in another Member State to convert into a company under the law of that immigration state. *In casu*, an Italian company wished to transfer its seat to Hungary and convert into a Hungarian company. This request was denied, however, because Hungarian law did not contain any regulations regarding the incoming cross-border transfer of companies that previously had their seat in another (member) state. See CJEU, 12 July 2012, C-378/10, *VALE Építési Kft*, Jur 2012, I-0000.

53. See eg art 6 of the 1985 Hague Trust Convention and art 124 of the Belgian Private International Law Code.

54. See ss 474–76 of the Income Tax Act 2007.

55. See eg art 7 of the 1985 Hague Trust Convention.

56. W Wiegand and C Hurni, 'National Report for Switzerland' in SCJJ Kortmann and others (eds), *Towards an EU Directive on Protected Funds* (Kluwer 2009) 317–18.

57. Report on the Convention on the Association of the Kingdom of Denmark and the UK of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and to the Protocol on its interpretation by the Court of Justice (by P Schlosser), *PB C,* 5 March 1979, no 59/71, s 114.

58. Gretton (n 19); Reid (n 19).

Whether or not trusts are to be considered as entities, are they, as organizational forms, at least capable of or suited for supporting economic activities in the first place? After all, the primary role of many trusts is to function as a (private) wealth management device.[59] In order to examine the trust's capacity to sustain genuine 'economic substance', we shall inquire into the different functions served by trusts in commerce. Though long neglected, around the turn of the millennium, various scholars pointed towards the role that trusts played in various commercial activities.[60] On the basis of statistical evidence, these authors pointed out that, even at the end of the 20th century, several billions of dollars were held and managed in various types of trusts in different commercial sectors. Given the growth of the financial industry and the economy as a whole since the beginning of the millennium, there is little reason to assume that these numbers will have diminished. Interestingly, when these authors[61] give examples of commercial uses of trusts, they primarily point to pension trusts, investment trusts, mutual funds, asset securitization trust, and so on. The authors themselves note that:

> their activities are largely confined to management of a pool of relatively liquid financial assets. The business trust form … is not used at present to organize 'operating' firms – that is firms engaged in manufacturing or other industries that involve the production or distribution of complex goods and services.[62]

The primary role of many trusts is to function as a (private) wealth management device

As was first noted by Coase, economic activities will tend to take place within a firm, rather than on the open market, when the *ex ante* expected costs of allocating resources within one organization would be lower than the expected costs of undertaking the same activities on the open market, due to various transaction costs. Conversely, when the organization grows, the costs of the internal system of direction will start to increase. The size of the firm will, therefore, generally tend to be determined by the point of balance between both countervailing types of costs.[63] One consequence of economic activities taking place within a firm is that several 'intra-firm' transactions will occur. In the normal course of business, different actors within the firm pass on different (unfinished) goods or services to one another, with the aim of contributing to the work in progress. Only when the service or product in finished as far as the firm as a whole is concerned will the product be directed towards the open market. Yet, with regard to trusts, different authors note that these 'intra-firm transactions' are largely absent.[64] This correlates with the observation that, while trusts are commonly used as commercial vehicles and thus have the intrinsic capacity to be employed for economic gain, they seem best suited for different forms of asset holding, asset management, and asset investment. However, it seems that, as an organizational form, trusts are much less apt for carrying on 'operational' activities.

However, it seems that, as an organizational form, trusts are much less apt for carrying on 'operational' activities

Different authors have speculated on why this could be so. We will consider their views in the following paragraphs.

11. Distinguishing between trusts and corporations: One reason may be that, as organizational forms, trusts do not lend themselves very well for taking on entrepreneurial risk. We have already

59. J Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale Law Journal 630.
60. Langbein (n 27) 165–89; R Sitkoff, 'Trust as "Uncorporation": A Research Agenda' (2005) University of Illinois Law Review 31; Hansmann and Mattei (n 31) 133–50.
61. Especially, Langbein (n 27) 167–73; Hansmann and Mattei (n 31) 466–69.
62. Hansmann and Mattei (n 31) 476–77.
63. R Coase, 'The Nature of the Firm' (1937) 4 Economica 386; see also E Rock and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Interdoctrinal Legal Transplants' (2002) 96 Northwestern University Law Review 665.
64. R Sitkoff, 'An Agency Costs Theory of Trust Law' (2004) 89 Cornell Law Review 635; Rock and Wachter, ibid, 664–66.

pointed out that a trustee's duty of care is held to be stricter than the duties generally resting on directors of corporations. Because trustees principally enjoy less leeway to make business decisions based on their own insights, they are likely to behave more risk-averse than directors of corporations. This phenomenon may even be amplified depending on the type of trust involved.

Logically, one can expect a trustee enjoying a high degree of discretion (eg in a non-revocable discretionary trust) to be held to stricter standards of loyalty and care than trustees who are not awarded much discretion (eg in a revocable fixed trust, where the settlor or the beneficiaries possess certain powers that allow them to monitor the trustee's activities more closely). Therefore, in general terms, one may expect an important connection between the onerousness of the trustee's fiduciary duties and the degree of discretion the trustee enjoys. On the other hand, in the default situation, a corporation's shareholders have more opportunities and instruments available to police the conduct of the directors than beneficiaries of a trust generally have.

The assertion that the strict nature of the trustee's duty of care indeed plays a role seems to be supported by empirical analysis.[65] In the 1990s, British regulations were amended as to allow mutual funds to organize themselves either under the form of a trust or a corporation. After examining and comparing the performance of both organizational forms in the British mutual fund industry, Warburton found that mutual funds that were organized as trusts took on less risky investments, because of trust law's ability to curtail opportunistic and risky behaviour on part of the fund's managers. Because the funds that were organized as corporations took on more risky investments, they yielded, on average, higher returns. When adjusted for risk, the performance of both types of funds was more or less the same, but the numbers still showed that funds that were set up as corporations yielded slightly higher returns on investment. The results, therefore, show that (i) trust law contains effective deterrents that discourage risky behaviour on part of the trustees and (ii) that trusts are, therefore, better suited to act as (rather passive) asset-holding structures that generally take on rather conservative investment strategies, as trustees will generally choose lower levels of risk. According to Warburton, these differences are mainly attributable to trust law's strict duties of care and prudence, which mitigate agency conflicts in a more effective way. However, the same rules form a heavy constraint on flexibility in decision-making.[66]

Other authors, such as Schwarcz, point to the trustee's duty of impartiality as an important factor in distinguishing between trusts and corporations.[67] Put shortly, the trustee's duty of impartiality obliges the trustee to treat each and every beneficiary on the same footing. However, trusts allow for the settlor to create a range of different classes of equitable interests. It is, for example, entirely possible to create a distinction between beneficiaries who have priority claims over other beneficiaries, resulting the creation of different classes of claimants. While some will be 'senior claimants', other will only have a residual, subordinated claim. Due to the trustee's duty of impartiality, the trustee should act in the best interests of all classes of claimants. The choice in favour of a corporate form, however, where, as a default, no such duty exists, might be less suitable for striking such a balance. Therefore, trusts may be the better choice for activities such as asset securitization. However, it is submitted that fiduciary duties are, in most cases, mere default rules that may be altered by contractual agreement between the parties involved.[68] Moreover, recent scholarship shows

65. Warburton (n 27) 101–38.
66. ibid 138.
67. SL Schwarcz, 'Commercial Trusts as Business Organizations: Unravelling the Mystery' (2003) 58 The Business Lawyer 559.
68. Sitkoff (n 27) 204.

that, in practice, there rules indeed often are modified and that trust law and corporate law are converging in this regard.[69]

Without purporting to provide a definitive answer on this question, which would merit a thorough study in its own right, we can point again at the differences we already uncovered regarding the organizational structure of typical corporate entities and trusts. As we have discussed, according to common law, trusts lack real 'entity creditors'. While all these creditors are considered to be personal creditors of the trustee, contract law allows for the trustee to effectively shield his or her personal goods from these creditor's claims. Thus, while the trust structure does not provide for any form of limited liability of the trustee, in some cases, the trust provides for no effective liability at all, considering that these creditor's claims can never be stronger than the trustee's own claim to them. Also, as the trust is merely a way in which assets can be held, it cannot normally be the subject of separate bankruptcy proceedings. Only the trustee himself can go bankrupt.[70] On the other hand, if the trustee is not able to contractually shield his personal assets from trust creditors, he will be personally liable. Moreover, the trustee will also be personally liable towards tort creditors. Due to the fact that the trust does not have a separate legal personality or limited liability, it cannot function as a 'legal shell' to shield trustees and beneficiaries when dealing with third parties, nor can it shield any 'intra-firm transactions'.

The central point, however, is that, while trusts are not ideally suited for developing operational activities, they seem to be well-suited for other economic ends. The commercial practice shows that trusts can effectively operate as structures for asset holding, asset investment, and asset management.

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Trusts and the freedom of establishment

12. Relevant case law of the CJEU: Even though it is not the aim of this contribution to discuss the CJEU's jurisprudence regarding the freedom of establishment (Article 49 Treaty on the Functioning of the European Union ['TFEU'] ff) in detail,[71] it is required to provide a general overview of the CJEU's most important case law in order to enable a discussion of the possible consequences of the *Olsen* judgment for trusts in this regard.

The freedom of establishment, which can be further divided into a primary freedom of establishment (the freedom of EU citizens to establish themselves in other EU Member States) and a secondary freedom of establishment (the freedom of EU citizens to set up agencies, branches, or subsidiaries in other EU Member States),[72] has been the subject of some seminal case law of the CJEU. The most important aspects of the case law of the CJEU can be summarized as follows.

First and foremost, the freedom of establishment is granted both to individuals who are EU citizens and legal entities who have been formed in accordance with the law of an EU Member State and have their registered office, principal place of business or central administration in an EU Member State. However, as

69. Hofri (n 27).

70. Interestingly, some countries that 'recognize' foreign trusts on the basis of the 1985 Hague Trust Convention have amended their national insolvency laws as to accommodate the trust. This is, for example, the case in Switzerland, which in effect has introduced a procedure regarding the bankruptcy of the trust fund. For example, art 284a *Loi fédérale sur la poursuite pour dettes et la faillite*. Several commentators have noted that is hard to reconcile such a proceeding with the actual legal structure of trusts under common law. See Peyrot (n 11) 173–75; P Panico, *International Trust Laws* (OUP 2010) 236.

71. See eg G Van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016) 342–56, for a general overview of each particular case; see also K Maresceau, 'Het vrij vestigingsrecht, de problematiek van de zetelverplaatsing en zijn impact op het internationaal privaatrecht: een stand van zaken na de zaak *Cartesio*' *Tijdschrift voor Belgisch Handelsrecht – Revue de Droit Commercial* (2009) 581–609.

72. BJM Terra and P Wattel, *European Tax Law* (Kluwer 2012) 68.

entities are creatures of national law, which exist only by virtue of the Member States' national legislation, their incorporation and functioning are determined by national law.[73] In the absence of a uniform definition in European law of the companies that may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether an entity can actually be considered to be a 'national' of an EU Member State, cannot be resolved by EU law itself. A Member State can, therefore, define for itself when it regards an entity as validly 'incorporated' under its national law and thus enjoying the right of establishment.[74] Therefore, a Member State is able to subject the entity's right to retain its legal personality under its own law to restrictions, when that entity transfers its seat of effective management to another Member State.[75] However, these restrictions cannot go so far as to require the entity to be winded-up and liquidated because it intends to transfer its seat to another Member State with the aim of converting itself into a company that is governed by the law of the host Member State.[76] Thus, because entities only exist by virtue of the law of the Member States, the Member States are, in the absence of further harmonization, free to determine the connecting factor that leads to the application of their law as the governing *lex societatis*. As was shown, however, this does not mean that the Member States enjoy immunity from the rules regarding the freedom of establishment. These observations correlate with the remark we already made concerning the stance of the CJEU towards emigration states (margin no 9).

As regards immigration states, the CJEU has often taken a much stricter stance. For example, it was decided in *Überseering* that Member States may not deny the legal capacity of entities properly incorporated in another Member State. Such a restriction is 'tantamount to an outright negation of the freedom of establishment'.[77] Moreover, in *Centros* and *Inspire Art*, the CJEU held that immigration states should in principle recognize (branches of) entities formed in accordance with the law of another Member State, where they were validly incorporated.[78] Both cases concerned English limited companies that were incorporated in the UK (an incorporation state), but did not conduct any economic activities in the state of corporation. Rather, all economic activities were conducted via a branch in another Member State. The CJEU held that it was immaterial that the company was formed in one Member State only for the purpose of establishing itself in a second Member State, where its business is conducted. The fact that the company was formed in another Member State solely because that Member State's favourable legislation did not in itself constitute a form of abuse which the Member States could tackle.[79]

Thus, measures other than those that are issued by the Member State of incorporation and which regulate the 'recognition' of the legal entity as a separate entity under national law and which do not require the entity to be winded-up and dissolved when transferring its seat to another Member State with the latter Member State's consent, may restrict the freedom of establishment within the EU, and can, therefore, be reviewed against EU law. According to Article 52, section 1 TFEU, such restrictions may be justified on the basis of public policy, public health, or public security. Alternatively, any other restriction may be justified under the so-called 'rule of reason'. The rule of

73. *VALE* (n 52) s 27; *Queen v HM Treasury* (n 51) s 19; *Cartesio* (n 51) s 104.
74. CJEU, 29 November 2011, C-372/10, *National Grid Indus BV*, Jur 2011, I-12273, ss 26–27.
75. CJEU, 5 November 2002, C-208/00, *Überseering*, Jur 2002, I-9919, s 70.
76. *Cartesio* (n 51) s 112.
77. *Überseering* (n 75) s 93.
78. CJEU, 9 March 1999, C-212/97, *Centros*, Jur 1999, I-1459; CJEU, 30 September 2003, C-167/01, *Inspire Art*, Jur 2003, I-10155.
79. *Centros*, ibid, s 27; *Inspire Art*, ibid, ss 95–96.

reason entails that any imperative requirement in the general importance may be justified when it is held to be non-discriminatory (on the grounds of nationality)[80] and is held to be suitable and proportionate in light of its aim.[81] It is according to these principles that the cases mentioned in this paragraph were decided.

13. Trusts and the scope of the freedom of establishment: In order for the freedom of establishment to apply in any specific case, it is presupposed that the given case can actually be brought under the scope of this fundamental freedom. Especially in relation to trusts, this is not self-evident.

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It is submitted that the freedom of establishment applies to 'nationals of a member state' of the EU or the EEA.[82] From the EFTA Court's ruling in *Olsen*, it can be deduced that the freedom of establishment needs to be interpreted broadly, and that, in the view of the EFTA Court, trusts, as 'legal entities' also come under the personal scope of the freedom of establishment.[83] Trusts are thus treated, in a certain way, as 'nationals of a Member State', provided that they were formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the EU or EEA.[84] Immediately, a principal difference between trusts and corporations emerges. While it is not possible to incorporate a company in a given state (even if it is an 'incorporation state'), while choosing the law of a third state as the applicable *lex societatis*, it is, as have seen, entirely possible to appoint an English trustee with regard to goods situated in England, while choosing the law of any other trust state as the governing law.[85] This is so, even when all the trust assets are located in England. Because English private international law allows such a choice, perhaps such trusts can be considered to be formed 'in accordance with English law', as English law will generally hold such trusts to be validly constituted.[86] The matter seems, however, far from clear. While the corporate equivalent of nationality and domicile is the *lex societatis*,[87] it seems, at least in this respect, harder to determine the 'nationality' of such a trust.

More uncertainties arise when we take into account the material scope of the freedom of establishment. It is generally accepted that, in order to fall under the material scope of the freedom of establishment, the primary or secondary establishment of a 'national of member state', four cumulative conditions must be satisfied: there must be (i) an actual pursuit of an 'economic activity', (ii) through a fixed establishment, (iii) for an indefinite period (iv) in another Member State.[88]

Interestingly, in *Olsen*, the EFTA Court considered that:

> [t]he essential feature of real and genuine business activities that constitute establishment is that a person or an entity carries on a business, such as by offering services, which are effected for consideration, for an indefinite period through a fixed establishment.[89]

80. However, in recent times, the CJEU has also applied the 'rule of reason' in the case of certain discriminatory measures. It follows that these may also be justified on the basis of the 'rule of reason'. See DS Smit, *EU Freedoms, Non-EU Countries and Company Taxation* (Kluwer 2012) 250.
81. CJEU, 30 November 1995, C-55/94, *Gebhard*, Jur 1995, I-4165, s 37; CJEU, 31 March 1993, C-19/92, *Kraus*, Jur 1993, I-1663, s 32.
82. De Broe (n 7) 864.
83. *Olsen* (n 2) ss 93–94.
84. CJEU, 10 July 1986, *Segers*, Jur 1986, 2375, s 16; Smit (n 80) 42.
85. art 6 of the Recognition of Trusts Act 1987.
86. Unless they infringe upon certain imperative rules of the forum. In this regards, we may refer to arts 15, 16, and 18 of the Hague Trust Convention, to which the UK is a signatory.
87. Van Calster (n 71) 342.
88. CJEU, 25 July 1991, C-221/89, *Factortame Ltd*, Jur 1991, I-3905, s 20; CJEU, 11 December 2007, C-438/05, *International Transport Worker's Federation*, Jur 2007, I-10779, s 70.
89. *Olsen* (n 2) s 97.

Alternatively, in *Baars*, the CJEU held that a national of Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment, thereby seemingly adding an additional criterion.[90] While this additional criterion is not so much helpful in answering the question whether a fixed establishment actually exists, it may serve as benchmark of identifying to whom that fixed establishment belongs.[91] By exercising such control, the controlling person(s) or entity/-ies involve themselves in the management of the controlled undertaking, and must be seen as participating in the economic activities of the controlled undertaking. This criterion was replicated by the EFTA Court in *Olsen*.[92]

14. Trusts, freedom of establishment and private international law: From the foregoing, it follows that, once that it is established that the trust in question satisfies these requirements, it also falls under the material scope of the freedom of establishment. The observation that trusts may also fall under the material scope of these provisions may lead, however, to certain unexpected consequences. Even though the *Olsen* judgment was mainly decided from a tax perspective—to which we will come back shortly—it may some ramifications for the Member States' private international law regarding trusts.

The observation that trusts may also fall under the material scope of these provisions may lead, however, to certain unexpected consequences

Empirical research showed, as a consequence of the CJEU's ruling in *Centros*, an increase in the number of English limited companies being used in both Germany and the Netherlands.[93] When the rulings of the CJEU in *Centros* and *Inspire Art* are applied to the situation of trusts, it becomes clear that it is permissible for nationals of EEA Member States to establish a trust in a 'trust state' within the EEA, thereby only retaining a formal link between the trust and its state of establishment. It follows from *Olsen* that it is not required that any economic activities take place within the state of establishment. It suffices that they take effect in any Member State of the EEA.[94] The choice in favour of a trust as a legal relationship, therefore, cannot constitute, in itself, a form of abuse, not even when that choice is made solely because of the fact that the chosen trust law is less restrictive than the law of the Member State of which the settlor is a citizen.

This conclusion is seemingly at odds with certain private international law rules regarding trusts, which are applied in different (EU and EEA) states. For example, under the Hague Trust Convention, it is perfectly permissible for Member States to refuse the recognition of foreign trusts because of the mere reason that all of the trust's 'significant elements' are more closely connected with states that do not know of the institution of the trust.[95] Therefore, a trust established by a settlor who is a national of a state which does not know this legal institution, may

90. CJEU, 13 April 2000, C-251/98, *Baars*, Jur 2000, I-2787, s 22.

91. Smit (n 80) 43.

92. *Olsen* (n 2) ss 113, 125; see also EFTA Court, 2 December 2013, E-14/13, *EFTA Surveillance Authority v Iceland* [2013] EFTA Ct Rep 924, s 27.

93. However, the popularity of these corporate forms soon faded away, even though no notable legislative or judicial interventions had taken place. See M. Brecht, C. Mayer and H. Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry' (2008) 14 Journal of Corporate Finance 241; WM Bratton, JA Mccahery and EPM Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis' (2009) 57 The American Journal of Comparative Law 380; WG Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition' (2013) 10 European Company and Financial Law Review 230; see also C Behme, 'The Principle of Mutual Recognition in the European Internal Market with Special Regard to the Cross-Border Mobility of Companies' (2016) 30 European Company and Financial Law Review 31.

94. *Olsen* (n 2) s 99.

95. art 13 of the Hague Trust Convention. A similar rule can be found in art 124, s 1 *in fine* of the Belgian Private International Law Code.

However, art 13 of the Hague Trust Convention does not oblige Member States to refuse to grant any such recognition. For example, in Italy, which has since long been a signatory to the Hague Trust Convention, so-called 'internal trusts' have become a rather widespread phenomenon. The validity of these trusts is generally—but apparently not in each and every case—upheld by the Italian Courts. See M Lupoi, *La giurisprudenza italiana sui trust dal 1899 al 2011* (Ipsoa Wolters Kluwer 2011); S Ferrero, 'The Scope and the Effects of Mandatory Rules and Public Policy under the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition' (2013) 11 (7) Il Nuovo Diritto Delle Società 35.

not be recognized by that state in the case where all of the trust's significant elements are linked to this state. It follows from the ruling in *Olsen*, that such private international law rules cannot be applied in the case of trusts falling within the scope of the freedom of establishment. After all, in the words of the CJEU, any such 'non-recognition' would be tantamount to an outright negation of the freedom of establishment.

However, even in the case of an English limited company, which is formally established in England, but conducts its business in another EU Member State, there exists a formal link between the state of incorporation and the company itself. It is, therefore, submitted that a settlor cannot simply establish a trust in the EU or EEA by simply making a choice in favour of, for example, English of Liechtenstein trust law. The situation of the English limited companies is different from the case where, for example, a Dutch settlor nominates a Dutch person to be a trustee over assets situated in the Netherlands in favour of Dutch beneficiaries and chooses English law to govern this relationship. Apart from this choice of law, no link between the trust and the state of the governing law exists. While in the case of the limited companies, the 'choice' of law is made conditional on the incorporation of the company in that state.

Because the trust is not incorporated or even a free-standing legal entity, the necessary (minimal) link between its state of 'nationality' and the trust itself may be found in the person of the trustee, through the trustee's principal place of establishment. It should, therefore, be possible for the Dutch settlor to transfer goods situated in the Netherlands to a trustee established in England, in order to conduct activities in the Netherlands in favour of Dutch beneficiaries, even if the actual management of the trust assets takes place within the Netherlands. Such a construction, where the place of establishment of the trustee is, apart from the choice of law, the only international element, already seems to go beyond what certain states would seem to allow.[96] Moreover, such a requirement is not expressly included in the *Olsen* judgment.

Because the trust is not incorporated or even a free-standing legal entity, the necessary (minimal) link between its state of 'nationality' and the trust itself may be found in the person of the trustee

15. Trusts and property law: One of the main reasons why states generally demand that there be enough 'international elements' before recognizing a foreign trust, is because, if it were indeed possible to establish a wholly 'internal trust', this would upset their national property law systems. This problem does not disappear in the case where the only link between the trust and its state of 'establishment' would be the place of establishment of the trustee, as this is very easy to manipulate. A mere choice in favour of a foreign trustee would suffice. If all actual activities are being conducted in a 'non-trust state', the latter state's system of property law might be just as upset.

For example, what would be the legal consequences when such a trustee deals with third parties? As we have established, the legal title of the trust assets will be held by the trustee. Therefore, the trustee will appear as owner of these assets. To be sure, in *Centros*, the CJEU held that, because a limited company will indeed appear as an English company, its creditors will be on notice of the fact that the company is governed by a different law than they would normally expect.[97] But if the trustee fails to disclose this capacity towards third parties, the latter parties

96. For example, in the Explanatory Memorandum accompanying the draft Belgian Private International Law Code, the drafters seemed to pay more attention to the place of establishment of the trust's settlors and beneficiaries and the place where the trust goods are located. The reason is probably that, apart from the choice of law, the place of establishment of the trustee can easily be 'manipulated' by the settlor in question. If, in order to establish a foreign trust which can be recognized in Belgium, all the settlor had to do was appoint an English trustee and choose English (or any trust law) to govern this legal relationship, almost any given situation can be 'internationalised' rather easily. According to the Explanatory Memorandum, the drafters of the Belgian Private International Law Code seemed to be of the opinion that such actions would constitute a form of 'abuse'. It is mainly this view that sets states as Belgium apart from states which allow for 'internal trusts', such as Italy.

See Bill concerning the Code of Private International Law, *Parl St,* Senate 2003–04, no 27/1, 140.

97. *Centros* (n 78) s 36.

will not be on notice. Combined with the strong tracing rights of the beneficiaries and the asset-partitioning inherent to trusts, creditors and third-party acquirers may thus be adversely affected. Apart from the fact that trusts are not incorporated, the fact that third parties interact with the trustee and not the trust itself, again constitutes an important difference between trusts and most corporations.

But then again, because of—*inter alia*—their strong asset-partitioning effects, all 'entities' have an important property law dimension. In the specific case of an English limited company, there are no general requirements as to the available minimum capital, as opposed to many continental European corporate forms that entail limited liability for their directors and shareholders. As is shown by the *Centros* and *Inspire Art* cases, this was one of the main reasons why Danish and Dutch nationals chose to incorporate English limited companies in the first place.

In our view, a balance needs to be struck between the recognition of trusts as 'entities' under the freedom of establishment and the interests of third parties. For example, it seems justified for Member States to exclude the beneficiaries' right to trace if a third-party acquirer did not know he or she was dealing with a trustee. After all, considering Article 345 TFEU,[98] which states that the EU treaties will in no way prejudice the Member States' rules concerning property ownership, Member States need not accept such far reaching consequences.

In our view, a balance needs to be struck between the recognition of trusts as 'entities' under the freedom of establishment and the interests of third parties

Trusts, freedom of establishment, and tax law

16. Rise of special tax regimes concerning trusts: In recent times, several EU Member States have developed special tax rules concerning—*inter alia*—trusts, often under the guise of CFC rules.[99] The Norse legislation which was at issue in the *Olsen* judgment may serve as an example. Additionally, countries such as Belgium ('Cayman tax')[100] and the Netherlands ('APV regime')[101] have introduced similar rules in their national tax legislation. In both countries, either the income (Cayman tax) generated by a foreign trust or both the trust assets and the income which these assets generate (APV regime) are attributed, for tax purposes, to the persons considered to be the founder(s) or the beneficiary/-ies of these 'legal constructs'. Note that, in both counties, this attribution may take place on the basis of a legal presumption inscribed in the le-

98. See also art 125 of the EEA Agreement.

99. N Appermont, 'De kaaimantaks: geen paradijselijke maatregel' (2015), nr. 11, 13 Algemeen Fiscaal Tijdschrift; GD Goyvaerts, 'De kaaimantaks, een kritische beschouwing' (2015), Tijdschrift voor Fiscaal Recht, nr. 490-91, 868.

Interestingly, in the past, Belgium supported the view that such CFC legislation was not in conformity with the OECD Model Tax Convention on Income and Capital:

> 27.4 Belgium cannot share the views expressed in paragraph 23 of the Commentary. Belgium considers that the application of controlled foreign companies legislation is contrary to the provisions of paragraph 7 of Article 5, paragraph 1 of Article 7 and paragraph 5 of Article 10 of the Convention. This is especially the case where a Contracting State taxes one of its residents on income derived by a foreign entity by using a fiction attributing to that resident, in proportion to his participation in the capital of the foreign entity, the income derived by that entity. By doing so, that State increases the tax base of its resident by including in it income which has not been derived by that resident but by a foreign entity which is not taxable in that State in accordance with the Convention. That Contracting State thus disregards the legal personality of the foreign entity and, therefore, acts contrary to the Convention (see also paragraph 79 of the Commentary on Article 7 and paragraph 68.1 of the Commentary on Article 10).

Commentaries on the articles of the Model Tax Convention, Commentary on art 1, no 27.4 <http://www.oecd.org/berlin/publikationen/43324465.pdf>.

100. In this regard, see Appermont, ibid (11) 5–37; Goyvaerts, ibid, 865–923. For a contribution in the English language, see J Draye and A Nijs, 'The Cayman Tax: A Game Changer for the Belgian Income Tax Treatment of Trusts' (2016) 22 Trusts & Trustees 508.

101. JP Boer, 'Het APV-Regime: overzicht en actuele ontwikkelingen' (2013) Weekblad voor Privaatrecht, Notariaat en Registratie 982 ; AE De Leeuw, 'Afgezonderd particulier vermogen: de Nederlandse ''doorkijkbelasting'' ' (2015) Tijdschrift voor Fiscaal Recht, nr. 492, 957; A van der Smeede, 'The new Dutch Tax Law on Trusts and New Opportunities' (2011) 17 Trusts & Trustees 690; C Langereis, O Duzgun and S Limbach, 'A Dutch View on Allocated Funds in Trusts and Foundations' (2012) 18 Trusts & Trustees 588.

gislation itself.[102] We may also note that these special tax regimes are, foremost, part of the personal income tax regime of both countries and not part of their corporate tax rules.[103] For example, as a default rule, the income is attributed to the taxpayer who is considered to be the 'founder' of the trust, regardless of the question whether this settlor is actually a beneficiary of the trust. Under the Belgian regime, the presumption can be rebutted by the founder by showing that the income generated by the trust in a certain fiscal year was distributed to a beneficiary living in Belgium or another state with which Belgium may exchange information in tax matters during the same fiscal year.

In 2011, special tax rules concerning trusts were also introduced in France.[104] Even though the French rules are not based on the principle of fiscal transparency as regards the income tax treatment, as beneficiaries will only be taxed on income actually derived from the trust, a presumption of ownership of the trust assets was inscribed into French tax law within the context of inheritance taxes.[105] However, it is the trustee who is responsible for the payment of the taxes involved.[106] Even though, in our view, the French rules differ from the Belgian and Dutch regimes in different respects, it seems to be clear that the French rules are inspired by an aspiration to counter tax avoidance, giving them the appearance of anti-abuse rules.[107] Interestingly, in the wake of the publication of the 'Panama Papers', the French government decided to grant public access to its register of 'beneficial owners' of trusts.[108]

17. CFC rules and EU law: However, since the CJEU's ruling in *Cadbury Schweppes*, it is firmly established that such national CFC legislation may not infringe on the freedom of establishment. After all, because CFC legislation introduces a difference in treatment between foreign and domestic subsidiaries, this difference in treatment needs to be justified on the basis of an overriding reason of general interest.[109] In *Cadbury Schweppes*, the CJEU accepted the need to combat tax avoidance as such a justification ground.[110] Member states are, however, not at liberty to withhold this fundamental freedom to fixed establishments in other Member States, which exercise genuine economic activities, as such measures are held to be disproportional, and, therefore, unjustifiable under the 'rule of reason'.

After all, because CFC legislation introduces a difference in treatment between foreign and domestic subsidiaries, this difference in treatment needs to be justified on the basis of an overriding reason of general interest

This is because, in order to conclude that any abuse under EU law is present, one first needs to establish on the basis of a combination of objective circumstances that an actor intended to obtain benefits awarded by EU law by setting up an artificial

102. We may note that, under EU law, in order for the anti-abuse rule to satisfy the proportionality test, the taxpayer involved must be given the possibility to rebut any legal presumption which operates to his disadvantage, resulting in the possibility to escape the application of the anti-abuse rule.
See F Debelva and others, 'LOB Clauses and EU-Law Compatibility: A Debate Revived by BEPS?' (2015) 24 EC Tax Review 139; C Sano, 'National Tax Presumptions and EU Law' (2014) 23 EC Tax Review 204.

103. Although Belgium's Cayman tax also applies in the income tax regime of certain legal persons, which do not fall under the corporate tax regime.

104. B Hermant and C Flaicher, 'First Experiences Regarding French Tax Rules Applicable to Trusts' (2014) 21 Journal of International Tax, Trust and Corporate Planning 206; J-L Bochatay, A Moreau and G Aubineau, 'The New French Rules of Taxation for Trusts: Wide (Scope), Heavy (Tax) and Severe (Penalty)' (2012) 18 Trusts & Trustees 116.

105. art 752 Code Générale des Impôts.

106. Hermant and Flaicher (n 104) 211–12.

107. ibid 215.

108. Décret no 2016-567 du 10 mai 2016 relatif au registre public des trusts; A de l'Estoile Campi and A Meidani, 'French Tax Treatment of Foreign Trusts and the Related New Public Register' (2016) 56 European Taxation, 404–407.

109. *Cadbury Schweppes* (n 6) s 46; CJEU, 23 April 2008, C-201/05, *Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland Revenue*, Jur 2008, I-2875, s 75.

110. *Cadbury Schweppes* (n 6) ss 51–55; interestingly, in the *Felixstowe* case, the Grand Chamber of the CJEU accepted, for the first time, the objective of combating tax havens as an overriding reason of general interest. Naturally, the objective of combating tax havens could also be invoked in the case of CFC legislation. It does not seem, however, that by invoking this objective as an overriding reason of general interest, Member States are able to restrict the free movement through other tax measures than the ones aimed at wholly artificial arrangements. See CJEU, 1 April 2014, C-80/12, *Felixstowe Dock and Railway Company*, Jur 2014, not yet published, s 32; see also MGH Schaper, 'The Need to Prevent Abusive Practices and Fraud as a Composite Justification' (2014) EC Tax Review 226.

arrangement, thereby formally observing EU law (subjective element). But, despite the actor's formal observance to the conditions laid down by EU law, the object and purpose of EU law would be frustrated if those benefits were indeed awarded to the actor in question (objective element).[111] However, the mere fact that any controlled entity is established in a low tax regime does not constitute in and of itself a form of abuse.[112] A distinction should, therefore, be made between legitimate tax avoidance and illegitimate tax avoidance, whereby the latter constitutes as a form of abuse of EU law.[113]

Going back to the specific case of CFC legislation, such measures can be justified when they are solely aimed at combating situations where such abuse actually exists. When considering the circumstances under which such a measure may indeed be justified, the CJEU seemingly[114] turned back to the requirements which need to be fulfilled in order for an entity to come under the scope of the freedom of establishment in the first place: only in the case where there is no actual fixed establishment intended to carry on genuine economic activities, such an establishment may be legitimately targeted by CFC rules under EU law. Thus, the inclusion of the income from a CFC in the tax base of a resident national or company must be restricted to the cases where there exists a wholly artificial arrangement which do not reflect economic reality and are intended to escape the tax normally due.[115] Whether such an abusive practice is taking place needs to be determined, in each separate case, on the basis of objective factors, ascertainable by third parties, to the extent to which the controlled foreign establishment actually/physically exists in terms of premises, staff, and equipment.[116]

In general, the EFTA Court in *Olsen* reiterated many of the rules which were already established by the CJEU in earlier cases, such as in *Cadbury Schweppes*.[117] All in all, any national judge might be hard pressed to find any additional information in *Olsen*, which could not already be derived from earlier case law. However, upon closer inspection, the EFTA Court did seem to touch upon some additional elements in its judgment. For example, the EFTA Court stated that it not necessary that any economic activity conducted by the entity in question necessarily has to take place in the Member State of establishment. According to the Court, it suffices if these take place within the EEA.[118] The exact scope of this dictum is not clear, as the EFTA Court made this statement only in relation to the question whether the entity in

111. CJEU, 14 December 2000, C-110/99, *Emsland Stärke GmbH*, Jur 2000, I-11569; CJEU, 21 February 2006, C-255/02, *Halifax*, Jur 2006, I-1609; see also D Weber, 'Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Taxation Case Law of the ECJ – Part 1' (2013) 53 European Taxation 251; D Weber, 'Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Taxation Case Law of the ECJ – Part 2' (2013) 53 European Taxation 313.

112. CJEU, 26 October 1999, C-294/97, *Eurowings Luftverkehrs AG*, Jur 1999, I-7447, s 44; *Cadbury Schweppes* (n 6) s 49; CJEU, 26 June 2003, C-422/01, *Skandia and Ramstedt*, Jur 2003, I-6817, s 52; Smit (n 7) 263–64.

113. De Broe (n 7) 825; Weber (n 111) 251; Debelva (n 102) 138.

See also Opinion of Advocate-General Geelhoed delivered on 29 June 2006, C-524/07, *Test Claimants in the Thin Cap Group Litigation*, Jur 2007, I-2107, s 63.

114. In the literature, it is debated whether the requirements to come under the material scope of the freedom of establishment coincide with the requirements to justify a measure such as CFC legislation. According to Wattel, the CJEU's judgment contains a circular reasoning in this regard. If there is no economic substance, this writer contends, then the freedom of establishment does not apply in the first place, so there is no freedom which the Member State can restrict. On the other hand, CFC legislation may only be aimed at 'wholly artificial arrangements', but as the freedom of establishment does not apply, such CFC legislation cannot restrict it. See PJ Wattel, Note under *Cadbury Schweppes*, BNB 2007/54, s 4.

Other authors contend that a distinction should be made between the concept of establishment for the purpose of establishing whether an establishment falls under the material scope of the freedom of establishment, and between the concept of establishment within the context of the justification question (in tax matters). In the latter case, according to these authors, it should be tested whether any genuine economic activity is taking place at the level of the establishment in question. When ascertaining whether an establishment actually comes under the scope of the freedom of establishment in the first place, it is not required that the required genuine economic activities are taking place of the level of the establishment itself, as such economic activity may also be developed on the level of any subsidiaries of the establishment in question. See BJ Wolf and AQC Van Vuuren, 'De zaak-Fred Olsen en de aangepaste Moederdochterrichtlijn: de substance-vereisten binnen het Europese misbruikconcept' WFR 2015/734, no 3.3.1.3; Kemmeren (n 7) 185–86.

These questions also relate back to the question whether substance test should take place on a stand-alone basis, or on a group level, see (n 7).

115. Sano (n 102) 204; Weber (n 111) 258;

see also CJEU, 12 June 2014, C-39/13, *SCA Group Holding BV et al*, Jur 2014, I-0000, s 42; *Cadbury Schweppes* (n 6) s 55; CJEU, 16 July 1998, C-264/96, *ICI*, Jur 1998, I-4695, s26.

116. *Cadbury Schweppes* (n 6) s 68.

117. Notably, para 166 and onwards of the *Olsen* judgment.

118. *Olsen* (n 2) s 99.

question falls under the material scope of the freedom of establishment ('material scope question'). It did not expressly repeat this dictum when dealing with the question whether the CFC legislation at hand could be regarded as a justifiable restriction of the freedom of establishment ('justification question').[119] Rather, when dealing with the justification question, the EFTA Court seemed to require that the entity in question had to carry out a genuine economic activity in the territory of the Member State of establishment.[120] Moreover, again within the context of the material scope question, the EFTA Court stated that the question whether an entity conducts a genuine economic activity cannot be answered in the abstract. It is necessary to examine, on a case-by-case basis, on the basis of the trust deed and on the basis of the actual activities taking place, whether the entity conducts a genuine economic activity.[121] This seems to imply that it does not suffice just to check *in abstracto* whether the entity involved merely exists in terms of premises, staff, and equipment. When dealing with the justification question, the EFTA Court did explicitly refer back to its considerations regarding the material scope question on this particular issue.[122]

The EFTA Court stated that the question whether an entity conducts a genuine economic activity cannot be answered in the abstract

18. CFC rules and the EC's draft directive on tax avoidance: We may also note that, as a part of its 'Anti-Tax Avoidance Package' of 28 January 2016, the European Commission also proposed, partly in response to the OECD's Base Erosion and Profit Shifting (BEPS) project, a draft directive, laying down rules against tax avoidance practices that directly affect the functioning of the EU's internal market.[123] Although the draft directive is only meant to apply to taxpayers that are subject to corporate tax in one or more Member States[124]—whereas this article is mainly concerned with trusts that are settled by natural persons, not subject to any corporate income taxation—we may note that the draft directive also contains CFC rules.[125] When reading the CFC rules contained within the draft directive, it immediately becomes apparent that the rules contained in the proposed directive are heavily influenced by—*inter alia*—the CJEU's ruling in *Cadbury Schweppes*.[126]

19. Influence of EU law on the Belgian Cayman tax: In its advice concerning the draft version of the bill concerning the Cayman tax as it was envisioned by a former legislature, the Belgian *Conseil d'État* noted that, in order to comply with EU law, an exception might be added, in order to exclude entities which passed a 'substance-test' from the scope of this tax regime.[127] This proposed exception was retained

119. Again, it is rather unclear as to which extent one needs to differentiate between both questions. See (n 7 and 114).

120. ibid, s 177.

121. *Olsen* (n 2) s 99.

122. In para 176 of the *Olsen* judgment, the EFTA Court referred back to paras 96–99 of its own judgment. Interestingly, paras 96–99 also include the Court's dictum that it suffices if the entity's genuine economic activities take place within the EER. This conflicts with the EFTA Court's statements in para 177, to which we referred in n 120.

123. Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM (2016) 26 final.

124. See art 1 of the draft directive.

125. See art 8 of the draft directive.

126. After all, para 2 of art 8 of the proposed directive states that the CFC rules contained within its para 1 shall not apply where an entity is tax resident in a Member State or a third country which is party to the EEA Agreement or in respect of a permanent establishment of a third country entity which is established in a Member State, unless the establishment of the entity is wholly artificial or to the extent that the entity engages, in the course of its activity, in non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. Neither will para 1 of draft art 8 apply to financial undertakings which are tax resident in a Member State or an EEA state or in respect of their permanent establishments in one or more Member States.

127. Adv.RvS 57.455/1-2-3-4, 5 May 2015, Bill concerning miscellaneous legal provisions, *Parl St,* Chamber of Representatives 2014–15, no 54-1125/001, 163, fn 21.

Interestingly, in its advice concerning the bill which contained the draft version of the Cayman tax, the *Conseil d'Etat* only referred to the *Cadbury Schweppes* case. However, in its advice concerning a bill containing a similar tax regime, which was submitted by the parliamentary opposition, the *Conseil d'Etat* explicitly referred to the *Olsen* case. This referral was not copied into the advice on the bill concerning the Cayman tax. This omission is believed to be due to the time constraints imposed on the *Conseil d'Etat*. See Adv.RvS 57.064/3 of 7 April, Bill concerning amendments to the Income Tax Code 1992 as regards the tax on legal constructs, *Parl St,* Chamber of Representatives 2014–15, no 54-0679/003, 9–11.

However, shortly after the introduction of the Cayman tax, the Belgian legislator already passed some amendments to this new tax regime. In the original regime, entities that reached a certain threshold of economic substance were excluded from this tax regime per se. After the amendments, which were made in December 2015, the taxpayers who are considered to be the founders and the beneficiaries of the entities involved are obliged to declare the existence of these entities, as well

in the definitive version of the Cayman tax.[128] Any entity established in an EEA state or even a state with which Belgium may exchange information in tax matters, will not be considered to be a 'legal construct' within the meaning of the Cayman tax, in the case where it exercises a genuine economic activity in its place of establishment and when this establishment has at its disposal a set of premises, staff, and equipment in its place of establishment which is proportionate to its economic activities.

Interestingly, the Belgian 'substance-exclusion' seems to be both narrower and broader in scope than the traditional rules put forward in *Cadbury Schweppes* and *Olsen*.

Broader, because the Belgian legislator did not limit the application of this exception to entities established in another EU or EEA state. Other than the states mentioned, any state of establishment with whom Belgium has concluded an international agreement which allows for exchange of information in tax matters may qualify.[129] Having regard to FATCA and the developments taking place at the OECD level regarding automatic exchange of information, especially the OECD's *Common Reporting Standard* (CRS), this exception might include a very significant number of third states in the near future. This broadening of the scope of the exception is particularly interesting because, as we shall discuss below, in *Olsen*, the EFTA Court ruled that such CFC rules may also come under the scope of the free movement of capital, which is the only freedom which also applies vis-à-vis third countries. In this regard, the CJEU has already ruled that, in relation to third countries and EEA states, a tax exemption can be made conditional on the existence of a convention on administrative assistance between the Member State and the third state involved.[130]

Narrower, because the Belgian legislator included an additional requirement into the text of the law itself. The Belgian law requires that any genuine economic activity conducted by the legal entity at hand, takes place in the context of a 'professional activity'. But the text does not state whose 'professional activity' should be taken into account. Normally, and on the basis of the case law examined above, one would expect that this requirement should be examined on the level of the legal entity itself. However, the Explanatory Memorandum accompanying the bill concerning the Cayman tax seems to point in the opposite direction.[131] It seems that the Belgian legislator intended to exclude activities concerning 'private wealth management' from the scope of the substance exception and only allow for types of income which would qualify for Belgian tax purposes as 'professional income' of the entity's (presumed) founder to fall under the scope of this exception.[132] However, this is only the Belgian legislator's interpretation of the text, which is not conclusive in any way. For Belgian tax purposes, the income at hand in the *Olsen* case should normally qualify as income derived from movables and, possibly, miscellaneous income, but not as income deriving from professional activities.[133] In our opinion, the restriction advocated by the Belgian legislator does not seem in line with the principles put forward in the *Olsen* and *Cadbury Schweppes* rulings. Moreover, the Belgian law requires that any genuine economic activity should be conducted in the state of establishment of the entity. As was discussed above, whether this requirement is in line with the *Olsen* and *Cadbury Schweppes* rulings is up for debate, depending on whether one distinguishes between the 'material scope question' and the 'justification question' in this regard.

as their full name, legal form, address and, if applicable, their identification number. The special income tax regime put in place by the Cayman tax will, however, not apply to such entities. See GD Goyvaerts, 'Kaaimantaks gerepareerd en aangescherpt' (2015) Fiscale Actualiteit, nr. 42, 6.

128. Bill concerning miscellaneous legal provisions, Explanatory Memorandum, *Parl St,* Chamber of Representatives 2014–15, no 54-1125/001, 37–39.

129. See, in this regard, art 5/1, s 3(b) of the Belgian Income Tax Code 1992.

130. CJEU, 28 October 2010, C-72/09, *Rimbaud*, Jur 2010, I-10659, s 52; CJEU, 10 April 2014, C-190/12, *Emerging Markets Series of FDA Investment Trust Company*, not yet published, s 105.

131. Explanatory Memorandum (n 128) 39.

132. Appermont (n 99) (11, 31); Goyvaerts (n 99) (490–91) 892.

133. Appermont, ibid (11, 32).

20. Preliminary conclusion: the 'one million dollar question': From all of the above, it can be deduced that, in order to provide an answer to many of the questions raised, it needs to be established which economic activities may qualify as 'genuine economic activities'. As was discussed above, it is certainly not in doubt that corporate entities at least have the capacity to support 'genuine economic activities'. Indeed, the entire notion of freedom of establishment, as far as it concerned legal entities, is heavily modelled to accommodate corporate entities. One only has to look at, for example, Article 54 TFEU, which determined to what extent legal entities are protected by the freedom of establishment and which only mentions 'companies or firms' or to the case law and vast literature concerning the intra-Union mobility of (corporate) entities and the importance of the national connecting factors for the determination of the *lex societatis*. Moreover, when considering the meaning usually given by the CJEU to the concept of 'genuine economic activities', it becomes clear that, rather unsurprisingly, the CJEU mainly points to activities such offering goods and services on the open market.[134] However, because trusts generally lack intra-firm transactions and are not suited for conducting activities such as offering goods or services, it becomes necessary to examine to what extent asset-holding activities are considered to be 'genuine economic activities' by the CJEU. After all, it seems that these are the economic activities for which trusts are generally best suited. The one million dollar question thus becomes whether such asset-holding activities may be considered to be 'genuine economic activities'. If it turns out this is not the case, this conclusion would render the inclusion of trusts under the scope of the freedom of establishment almost entirely moot. After all, it does not seem very meaningful to, on the hand, accept that trusts are 'legal entities' that may fall under the personal scope of the freedom of establishment, while, on the other hand, categorically excluding the activities which trusts perform best as 'economic activities' from the material scope of the freedom of establishment.

From all of the above, it can be deduced that, in order to provide an answer to many of the questions raised, it needs to be established which economic activities may qualify as 'genuine economic activities'

The one million dollar question thus becomes whether such asset-holding activities may be considered to be 'genuine economic activities'

Apart from the requirement that there must be an actual pursuit of a genuine economic activity ('the substance requirement'), the trust must also pursue such activities through a fixed establishment in another Member State. All in all, as we shall discuss, this requirement seems less bothersome in the case of trusts.

The 'substance requirement' and trusts

21. General remarks: First off, we may note that the (EU law) concept of 'economic activities' is not only used within the framework of the freedom of establishment. It is also a prominent concept in other areas of EU law, such as the free movement of workers, Value Added Tax (VAT) law and EU competition law. The first question is whether the content of this concept can be transposed from one area of EU law to

134. CJEU, 12 September 2000, C-180/98–C-184/98, *Pavlov et al*, Jur 2000, I-6451, s 75; CJEU, 16 June 1987, C-118/85, *Commission v Italy*, Jur 1987, 283; CJEU, 10 January 2006, C-222/04, *Cassa di Risparmio di Firenze et al*, Jur 2006, I-289, s 108. For a recent case confirming this point of view, see CJEU, 23 February 2016, C-174/14, *Commission v Hungary*, not yet published, s 148.

This point of view was seemingly confirmed by the EFTA Court in *Olsen*, see *Olsen* (n 2) s 97; see also EFTA Court, 9 July 2011, E-4/10, E-6/10, and E-7/10, *Principality of Liechtenstein et al v EFTA Surveillance Authority* [2011] EFTA Ct Rep 16, s 54.

another. Several authors have, by referring to the CJEU's *Denkavit* case, contended that this is not the case or are at least reluctant to do so.[135] Other authors disagree,[136] and point to AG Jacobs' Opinion in the *Cassa di Risparmio di Firenze* case, where the AG stated that:

> for the sake of coherence and uniformity, the same concepts in different areas of Community law should, as a general rule, be given identical meaning, unless otherwise justified by the nature or specific features of the area in which that concept is being inserted and which may warrant an ad hoc reading.[137]

The CJEU did not address this issue in the case itself, although it did seem to transpose the same principles it already had developed in other fields of the law to a case concerning competition law.[138] All in all, it seems to us that, while the specific nature of the area of law in which the concept is being placed should of course be taken in account, one should be able at least to attach some indicative value to CJEU judgments in this regard. While this would not be the same as the automatic transposition of the meaning of the concept of 'genuine economic activities' from one area of law to another, one can image that it can at least be presumed that the concept holds a single autonomous meaning, unless of course this presumption can be rebutted by referral to the specific nature of the area of law at hand.[139] In our view, the concept of 'genuine economic activities' is, therefore, a unitary one in its core, but ultimately malleable to suit the specific area of law in which it is applied.

As a general rule, the concept of 'genuine economic activities' may not be interpreted restrictively.[140] On the other hand, in order to be effective and genuine, such activities may not be purely marginal or ancillary.

22. Are 'passive' or 'holding' activities also 'genuine economic activities'?: While some authors contend that certain activities that are understood to be of a rather passive nature, will generally not qualify as 'genuine economic activities',[141] other authors are of the opinion that, for example, the mere exploitation of assets for the purpose of deriving passive income may indeed qualify as a 'genuine economic activity'.[142] In a series of cases, many of which relate to VAT law or competition law, the CJEU has deemed it necessary to decide on whether certain of these activities may count as 'genuine economic activities' or not. For example, the CJEU has held that the 'mere acquisition, holding and sale shares, do not, in themselves, constitute economic activities in the within the meaning of the Sixth [VAT] Directive'.[143] Nor does it count to take a mere financial holding in other undertakings, because any dividend income derived from such a financial holding is, according to the CJEU, a mere result of the ownership of that property.[144] However, within the context of EU competition law, it was decided that things are different when the entity actually involves itself, directly or indirectly, in the management of the company/-ies in which it has acquired a holding.[145]

135. De Broe (n 7) 846–47; G Maisto and P Pistone, 'A European Model for Member States Legislation on the Taxation of Controlled Foreign Subsidiaries (CFC's) – Part 1' (2008) 48 European Taxation 505; D Weber, *Tax Avoidance and the EC Treaty Freedoms, A Study of the Limitations under European Law to the Prevention of Tax Avoidance* (Kluwer Law International 2005) 10;
see also CJEU, 14 December 2006, C-170/05, *Denkavit Internationaal BV*, Jur 2006, I-11949, s 31.

136. Smit (n 80) 43–44.

137. Opinion of Advocate-General Jacobs delivered on 27 October 2005, C-222/04, *Cassa di Risparmio di Firenze et al*, Jur 2006, I-289, fn 26.

138. *Cassa di Risparmio di Firenze* (n 134) s 111–12; Smit (n 80) 44.

139. Cf the position taken by Wolf and Van Vuuren: Wolf and Van Vuuren (n 114) no 3.3.1.

140. CJEU, 13 April 2000, C-176/96, *Lethonen*, Jur 2000, I-2681, s 42; E Robert and D Toff, 'The Substance Requirement and the Future of Domestic Anti-Abuse Rules within the Internal Market' (2011) European Taxation 437.

141. Wolf and Van Vuuren (n 114) no 3.3.1.1.–3.3.1.2.; Smit (n 7) 261–62.

142. Robert and Toff (n 140) 51 438; see also F Debelva and J Luts, 'The General Anti-Abuse Rule of the Parent-Subsidiary Directive' (2015) 55 European Taxation 227; Terra and Wattel (n 72) 1012.

143. CJEU, 29 October 2009, C-29/08, *Skatteverket*, Jur 2009, I-10413, s 28; see also CJEU, 8 February 2007, C-435/05, *Investrand*, Jur 2007, I-1315, s 25; CJEU, 29 April 2004, C-77/01, *Empresa de Desenvolvimento Mineiro SGPS SA*, Jur 2004, I-4295, s 59; CJEU, 6 February 1997, C-80/95, *Harnas & Helm*, Jur 1997, I-0745, s 15.

144. *Empresa de Desenvolvimento Mineiro SGPS SA*, ibid, s 58; *Harnas & Helm*, ibid, s 15; CJEU, 22 June 1993, C-333/91, *Sofitam v Ministre Chargé du Budget*, Jur 1993, I-3515, s 12.

145. *Cassa di Risparmio di Firenze* (n 134) s 112–13; CJEU, 14 November 2000, C-142/99, *Floridienne and Berginvest*, Jur 2000, I-9569, s 18; CJEU, 20 June 1991, C-60/90, *Polysar*, Jur 1991, I-6663, s 14; *Skatteverket* (n 143) s 30; see also *Baars* (n 90) s 22.

Importantly, in the *Wellcome Trust* case, which was also decided in a VAT context, the CJEU established that a charitable trust's investment activities consisted essentially in the acquisition and sale of shares and other securities with a view of maximizing dividends and capital yields, which were destined to be used to support the charitable trust's purpose, the support of medical research.[146] However, because the trust was forbidden to involve itself in the management of the companies of which it held shares and to avoid engaging in any trade when exercising its powers, the CJEU concluded that the trust was in a comparable position to a private investor, managing an investment portfolio.[147] The Court also distinguished the situation where a holding company makes capital available to its subsidiaries, thereby exploiting that capital with the view to obtain interest as remuneration on a continuing basis from the situation where one manages an investment portfolio in the same way as a private investor.[148] Similarly, the passive management of immovables located in another Member State do not qualify as economic activities under the provisions relating to the freedom of establishment.[149]

However, there are also other cases that seem to point in another direction. Against the background of EU competition law, the General Court has already held (indirectly) that the management of a pool of assets by specialized investment vehicles constituted an economic activity.[150] Importantly, the CJEU has also held that drawing revenue on a continuing basis from activities that go beyond the compass of the simple acquisition and sale of securities, such as transactions carried out in the course of a business trading in securities, may indeed constitute a genuine economic activity.[151] Also, specifically against the background of Article 49 TFEU, different financial activities conducted within a group structure, may count as genuine economic activities, according to the CJEU.[152] In *Régie Dauphinoise*, a VAT case, the Court distinguished the receipt of dividends by a holding company from interest received by a property management company on investments made for its own account, because such interest does not arise simply from the ownership of the underlying assets, but is a consideration for placing capital at the disposition of a third party. Therefore, the receipt of a manager of interest resulting of the placement of monies received from clients in the course of managing their properties constitutes a direct, necessary, and permanent extension of the lending company's activity.[153] Moreover, the EFTA Court also ruled that, within the context of a group structure, the activities of captive insurance companies were to be considered, to some extent, as economic activities, even though these companies exclusively provided captive insurance services to other companies of the same group, not offering any services on the open market.[154]

Alternatively, above (margin no 13), it was established that an entity that holds capital of another company established in another Member State, which gives the entity definitive influence over the company's decisions is exercising its right of establishment.[155] This can be coupled to our observation that when the entity actually involves itself, directly or indirectly, in the management of the companies in which it has acquired a holding, this situation cannot be equated to a 'mere financial holding', the latter situation not constituting an economic activity under EU competition law, according to the CJEU. This determination is not always an easy one, as the actual influence that an entity may assert upon any company or other entity in which it holds a stake may

146. CJEU, 20 June 1996, C-155/94, *Wellcome Trust*, Jur 1996, I-3013, s 34.
147. ibid, ss 35–36. Also concerning activities that do not extend beyond straightforward asset management: *Harnas & Helm* (n 143) s 18.
148. *Floridienne and Berginvest* (n 145) s 28.
149. CJEU, 11 October 2007, C-451/05, *ELISA*, Jur 2007, I-8251, ss 64–66; CJEU, 14 September 2006, C-386/04, *Stauffer*, Jur 2006, I-8203, s 19. However, such activities may come under the scope of the free movement of capital, see A Tiberghien, *Handboek voor Fiscaal Recht 2015 – 2016* (Kluwer 2015) 2022.
150. General Court, 4 March 2009, T-445/05, *Associazione italiana del risparmio gestito and Fineco Asset Management SpA*, Jur 2009, II-0289, s 135.
151. *Empresa de Desenvolvimento Mineiro SGPS SA* (n 144) s 59.
152. *Cadbury Schweppes* (n 6); *Olsen* (n 2) s 99; Kemmeren (n 7) 180.
153. CJEU, 11 July 1996, C-306/94, *Régie Dauphinoise*, Jur 1996, I-3695, ss 17–18.
154. *Principality of Liechtenstein et al* (n 134) s 56.
155. The same holds true for the establishment of foreign branches and partnerships, see Smit (n 80) 50–51.

differ, depending the exact circumstances.[156] In the *Olsen* judgment, the EFTA Court indicated that it might indeed suffice if the trust is involved in the management of the companies of which it holds shares.[157]

23. Application to trusts: The foregoing shows that the CJEU is generally more willing to accept that activities such as holding or managing assets are more likely to classified as an 'economic activity' where such activities share a business purpose, thereby possibly being encapsulated in a group structure. At least within the context of VAT law, the CJEU seems much less inclined to accept that the mere holding of assets in order to derive a passive income is to be considered as a genuine economic activity. According to the Court, there is difference between the case where one holds such assets in more or less the same way as a private investment portfolio or the case where these assets are held in order to ensure exert influence on the management and activities of the underlying companies.

Whereas many trusts that are being used for commercial activities can at least be regarded as specialized holding or investment vehicles, this is probably not the case for the majority of the trusts used outside of the commercial sphere, as was, for example, the case in *Olsen*. It is submitted that, in most cases, these trusts are being used for the purposes which trusts serve best: holding and managing different forms of assets, while deriving income therefrom. In a commercial setting, chances are that such trusts are being used to serve a business purpose, eg in their form of specialized investment vehicles. In a private setting, however, trusts will usually be used to attain essentially the same goals: to manage assets in a safe and effective way, while providing the ability to detach the beneficial enjoyment of the trust assets from the management and control thereof. But, as organizational structures, trusts provide the managers (ie the trustees) with incentives to manage these assets in a rather conservative and passive manner. Having regard to the CJEU's case law, it is clear that a certain tension exists between the CJEU's conception of 'genuine economic activities' and the economic activities for which trusts are ideally suited. Again, in a commercial and institutional setting, this tension might be alleviated by other factors,[158] but in a setting where such trusts are rather closely held, ie where these trusts are being employed in a non-institutional setting while being settled by and for the benefit of a select group of persons, their activities might be hard to reconcile with the CJEU's conceptions. But then again, cases such as the *Wellcome Trust* case, which arguably provide the most guidance in this regard, were often decided within a specific VAT or competition context. Above, it was established that the concept of 'genuine economic activities' is a unitary one in its core, and should not be interpreted restrictively, but is ultimately malleable to suit the specific area of law in which it is applied. We submit, therefore, that, within the specific situation of trusts and the freedom of establishment, the specific characteristics of these legal figures should be taken into account, as it would seem to be a self-defeating exercise to bring trusts under the personal scope of the freedom of establishment, while excluding the activities which they perform best from the material scope of that same freedom.

By the same token, not all trustees will involve themselves in the management of the companies of which the shares are held on trust. It will probably depend on the type of trust involved, whether the trustee can or may assume such a task in the first place. Such a trust would, we submit, have to function as an extension of the settlor's or even the beneficiaries' will in order to function, as not many people would be inclined to hand over assets to a trustee while giving the latter *carte blanche* to involve himself

156. For example, the CJEU has already submitted that a shareholding exceeding 2.5% may also allow the person holding the shares to exert a definitive influence on the company that issued these shares, depending on the manner in which the remainder of the company's capital is distributed. See CJEU, 21 October 2010, C-81/09, *Idryma Typou AE*, Jur 2010, I-10161, ss 51–52.

157. *Olsen* (n 2) s 99.

158. Cf *Commission v Hungary* (n 134) s 154.

on their behalf in the management of the underlying companies. Unless, perhaps, in the case where the settlor declared himself as trustee. All in all, the determination whether any trust engages in 'genuine economic activities', should be established on a case-by-case basis. However, the guidance provided by the CJEU regarding the correct interpretation of this concept is fragmentary at best and gives rise to uncertainty. This situation is aggravated by the fact that trusts cannot be considered as 'entities' in the conventional way, and are generally not suited to engage in 'economic activities' as generally understood.

All in all, the determination whether any trust engages in 'genuine economic activities', should be established on a case-by-case basis. However, the guidance provided by the CJEU regarding the correct interpretation of this concept is fragmentary at best and gives rise to uncertainty

24. The requirement of a fixed establishment: The second main prong of the CJEU's concept of establishment is the requirement that there must be an actual establishment that allows the entity to pursue genuine economic activities.[159] Classically, under EU law, significant emphasis was placed on the requirement of a physical establishment, or the physical presence of the entity in another Member State.[160] In the *Cadbury Schweppes* and *Olsen* cases, this requirement again rears its head through the requirement that the establishment should have at its disposal a set of premises, staff, and equipment in its place of establishment.[161] Moreover, the CJEU seems to attach some importance to the question where the place of central management of the entity in question may be located.[162] Again, it should be taken into account that, by its nature, a trust cannot be considered to be a free-standing or autonomous entity. On the contrary, a trust only exists where there is a trustee who holds assets which are subject to a trust relationship. Accordingly, in our opinion, in order to establish whether 'a trust' actually has a form of physical establishment, one should principally look at the establishment of the trustee. Moreover, significant support exists for the position took by the EFTA Court in *Olsen* that the question whether a fixed establishment exists cannot be answered in the abstract, or just by reference to the trinity of 'premises, staff and equipment'. In an age of internet and globalization, it is indeed possible to penetrate the economic tissue of a Member State by using nothing more than a server or laptop computer in a single room.[163] The position that, when assessing these criteria, due attention should be given to the nature of the activities of the entity in question is well established in scholarly literature.[164] Accordingly, activities, which mainly concern the asset management and investment activities, normally do not require the presence of staff or office space. What does matter, however, is that actual activities are taking place. Criteria such as the presence of staff, premises, and equipment may generally serve as proxies to determine whether economic activities are taking place, but such proxies should not be elevated to requirements in and of themselves. If anything, the fact that proxies such as these are being used, may in itself be an indicator that the jurisprudence concerning the freedom of establishment is rather geared towards suiting typical corporate forms that constitute 'operating firms'.

159. Weber (n 111) 258.

160. *Queen v HM Treasury* (n 51) 21; Opinion of Advocate-General Léger delivered on 2 May 2006, C-196/04, *Cadbury Schweppes*, Jur 2006, I-7995, s 112; Smit (n 7) 262.

161. *Cadbury Schweppes* (n 6) s 68; *Olsen* (n 2) s 98.

162. See especially CJEU, 28 June 2007, C-73/06, *Planzer*, Jur 2007, I-5655, ss 60–61; CJEU, 2 May 2006, C-341/04, *Eurofood*, Jur 2006, I-3813, ss 37; *Factortame* (n 88) ss 34–35.

163. See eg Opinion of Advocate General Cruz Villalón delivered on 25 June 2015, C-230/14, *Weltimmo sro*, not yet published, s 29ff; CJEU, 1 October 2015, C-230/14, *Weltimmo sro*, not yet published, s 29.

164. Robert and Toff (n 140) 438; De Broe (n 7) 852–53; Wolf and Van Vuuren (n 114) no 3.3.2; M Lang and S Heidenbauer, 'Wholly Artificial Arrangements' in *Liber Amicorum Fiscalium: A Vision of Taxes within and outside European Borders, Festschrift in honour of prof. em. Frans Vanistendael* (Kluwer 2007) 603–04.

Accordingly, in our opinion, in order to establish whether 'a trust' actually has a form of physical establishment, one should principally look at the establishment of the trustee

25. Conclusion on trusts and the freedom of establishment: From all of the above, it follows that the marriage between trusts and the freedom of establishment, as it was concluded in the *Olsen* case, is an uneasy one. On the face of it, the starting point is straightforward enough: trusts, as 'entities' may be brought, in principle, under the scope of the freedom of establishment within the EU and the EEA. On closer inspection, however, different problems emerge. These problems are mostly due to the fact that (common law) trusts are not 'entities' as this term is conventionally understood.

A trust is, first and foremost, a specific kind of legal relationship that concerns assets which are held by a certain person, the trustee, in a specific way, ie on trust for other persons or in order to attain a specific purpose. Even though a trust may bear resemblances a legal entity, this does not turn it into one. In our view, this observation explains why a lot of rules and concepts deriving from the classic jurisprudence regarding the freedom of establishment are hard to transpose to the field of trusts. Trusts are not incorporated and private international law generally leaves the settlor with the option to choose the applicable law. In this respect, the rules of private international law regarding trusts resemble those of contract law, rather than those concerning corporate law. It is, therefore, harder to determine the 'nationality' of a trust, for the purpose of applying the rules regarding the freedom of establishment. While some private international law rules concerning trusts resemble those found in the field of contracts, trusts are primarily creatures of property law. Due to their asset-partitioning effects, the fact that trust beneficiaries are in principle allowed to trace trust assets which have alienated in breach of trust and the fact that the trustee may appear to be the full and unencumbered owner of the trust assets, dealing with a trustee might have a significant impact on third parties. Arguably more so than in the comparable case where third parties deal with a foreign corporate form. This is generally one of the reasons why the private international law rules of different states require the presence of enough 'international' elements before recognizing foreign trusts in a specific case. However, in the case of a trust falling under the scope of the freedom of establishment, such rules are hard to maintain.

Additionally, it was shown that trusts generally do not fulfil the same (economic) purposes as corporate legal forms. While corporate legal forms can be used for myriad purposes, trusts seem to be uniquely suited for asset holding and asset management, while providing incentives to the managers of these assets to steer clear from risky behaviour. Again, a friction exists between the classical notion of 'economic activities' which that can be derived from the jurisprudence of the CJEU and the EFTA Court and the economic activities for which trusts are suited best. The bulk of the jurisprudence regarding the freedom of establishment has, understandably, been written to suit natural persons who perform economic activities on the one hand and corporate legal forms on the other. Trusts, as legal institutions *sui generis*, do not really fit within either category.

A friction exists between the classical notion of 'economic activities' which that can be derived from the jurisprudence of the CJEU and the EFTA Court and the economic activities for which trusts are suited best

We may conclude, therefore, that, having regard to the specific situation of trusts, the decision that trusts may come under the scope of the freedom of establishment was a rather unfortunate one. Not only is it not self-evident for trusts to meet the necessary criteria to come under the material scope of the freedom of establishment, but when they do, discrepancies may arise rather quickly.

The free movement of capital and trusts

26. The *Olsen* case also concerned the free movement of capital: Interestingly, in the *Olsen* case, the

EFTA Court did not only rule on questions regarding trusts, the freedom of establishment, and CFC rules. The question whether the Norse CFC rules were compatible with the free movement of capital was also addressed by the Court.[165] This question may complicate matters even further, as the relationship between the freedom of establishment and the free movement of capital has traditionally been a difficult one.[166] Much of the difficulty concerned the identification of a fixed set of 'collision-rules' that would allow for legal certainty regarding the question which of both freedoms would apply in a given case. In other words, according to which criteria can be determined whether the one freedom or the other receives priority in a given case. In the *Olsen* judgment, the EFTA Court followed the example set by the CJEU in some earlier cases.[167] In doing so, the EFTA Court held that, in order to determine the predominant freedom at stake in the case at hand, one should first look at the type of legislation involved ('applicable legislation-rule'). If it had turned out that the national legislation applied only to shareholdings acquired solely with the intention of making financial investments without any intention to influence the management and control of then entity involved, such measures must be examined exclusively in the light of the free movement of capital.[168] If, however, the legislation at issue does apply only to shareholdings that enable the holder to exert a definite influence on an entity's decisions and to determine its activities, such legislation falls under the scope of the freedom of establishment. However, it turned out the Norse legislation at issue applied to both cases, rendering an application of the applicable legislation rule, *de facto* moot. The EFTA Court then continued by postulating a second rule: in such circumstances, the Court takes account of the facts of the case at hand, in order to determine in which category the dispute would fall ('facts-of-the-case-rule'). It turned out, however, that exactly those facts were being disputed between the parties.[169] According to the EFTA Court, the decision whether the dispute actually fell under the scope of the free movement of capital or under the scope of the freedom of establishment should, therefore, be made by the national courts.[170]

27. Trusts and the free movement of capital, a better combination?: Interestingly, the concept of 'capital' under the TFEU has never been given an authoritative definition. One, therefore, has to resort the CJEU case law and secondary EU legislation in order to determine the content of the concept of 'capital' under the treaty. One thing, that is for sure, is that monetary capital should qualify in any case, unless the movement of that monetary capital would constitute a remuneration for goods or services delivered.[171] Moreover, the CJEU attaches quite some importance to the Nomenclature from former Directive 88/361/EG,[172] which contains a non-exhaustive list of transactions which qualify as capital

165. *Olsen* (n 2) s 108ff.

166. See, in this regard, A Cordewener, GW Kofler and CP Schneider, 'Free Movement and Third Countries: Exploring the Outer Boundaries with *Lasertec, A and B* and *Holböck*' (2007) 47 European Taxation 371; A Cordewener, GW Kofler and CP Schneider, 'Free Movement of Capital, Third Country Relationships and National Tax Law: An Emerging Issue before the ECJ' (2007) European Taxation 107; S Den Boer, 'Freedom of Establishment Versus Free Movement of Capital: Ongoing Confusion at the ECJ and in the National Courts' (2010) 50 European Taxation 250; A Cordewener, 'Free Movement of Capital Between EU Member States and Third Countries: How Far Has the Door Been Closed?' (2009) 49 EC Tax Review 260: S Hemels and others, 'Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority?' (2010) 19 EC Tax Review 19–31; DS Smit, 'The Relationship Between the Free Movement of Capital and the Other EC Treaty Freedoms in Third Country Relationships in the Field of Direct Taxation: A Question of Exclusivity, Parallelism or Causality?' (2007) 16 EC Tax Review 252; Terra and Wattel (n 72) 79ff.

167. The EFTA Court based its approach mainly on the following cases: CJEU, 16 September 2008, C-468/06–C-478/06, *GlaxoSmithKline*, Jur 2008, I-7139, s 37; CJEU, 12 December 2006, C-446/04, *Test Claimants in the FII Group Litigation*, Jur 2006, I-11753, s 92; CJEU, 28 February 2013, C-168/11, *Beker*, published online, s 26; see also *Emerging Markets Series of FDA Investment Trust Company* (n 130) ss 25–28.

168. *Beker*, ibid, s 26; *Olsen* (n 2) s 114; Terra and Wattel (n 72) 80.

169. *Olsen* (n 2) s 119.

170. ibid.

171. CJEU, 23 February 1995, C-358/93, *Bordessa*, Jur 1995, I-361. Also in *Luisi and Carbone*, the CJEU mentioned that:

> current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service.

See CJEU, 31 January 1984, 286/82, *Luisi and Carbone*, Jur 1984, 377, s 21.

172. Council Directive 88/361/EG of 24 June 1988 for the implementation of art 67 of the Treaty, OJ L178/5.

movements.[173] The CJEU distinguishes between two types of capital movements, ie direct investments and portfolio investments.[174] Especially, the latter type of capital movements may be interesting for our discussion, as portfolio investments are generally considered to be of a more passive nature, whereas direct investments are normally related to carrying on a business, thereby again involving 'economic activities'.[175] Furthermore, capital movements such as gifts also qualify as capital movements within the meaning of the TFEU, unless its constituent elements are situated within one Member State only.[176] Different authors have, therefore, stated that, in order for the free movement of capital to apply, it is or may not always strictly required that there be an 'economic activity'.[177]

From the above discussion, it can be deduced that many trusts are actually more 'at home' within the context of the free movement of capital, as we have just described, than within the context of the freedom of establishment. Not only will many trusts mainly engage in 'portfolio-investment' activities, many of these trusts, at least when used in a private context, are actually donative instruments. This does not necessarily mean that they should be qualified as 'gifts' in any strict technical sense, but it is no secret that many trusts are created by settlors to achieve some donative aim. This has led Rudden to describe the trust as 'essentially a gift, projected on the plane of time and so subjected to a management regime'.[178] Furthermore, the EFTA Court ruled that beneficiaries of capital assets set up in the form of a trust, who are subjected to a tax regime such as the one at hand may be able to invoke the free movement of capital in the event that they are not found to have exercised definite influence over an independent undertaking in another EEA state or are engaged in an economic activity that falls within the scope of the freedom of establishment.[179] But, as a default rule, neither the beneficiaries nor the settlor are awarded with many powers to influence the decisions of the trustee. Only in the case where the settlor confers such powers either to himself or to others in the trust instrument, will they be able to exert such influence over the trustee and, therefore, over the trust assets themselves. In the default situation, therefore, and according to the 'collision-rule' postulated by the CJEU and the EFTA Court, trusts are generally associated more with the free movement of capital, rather than with the freedom of establishment. Of course, the beneficiaries—and not the settlor—have standing to sue the trustee in the case of a breach of trust, but this is still a far cry from being able to exert, through the trustee, any form of definite influence over the trust assets themselves.

From the above discussion, it can be deduced that many trusts are actually more 'at home' within the context of the free movement of capital

However, when the EFTA Court arrived at the question whether the separate tax treatment of CFC under the Norse legislation, which was found to be a potential hindrance to either the right of establishment or the free movement of capital, could be justified by overriding reasons in the public interest, the EFTA Court noted that the Norwegian government invoked the need to combat tax evasion as a justification ground.[180] By referring to the CJEU's decision in *Itelcar*,[181] the EFTA Court ruled that for the purposes of combating tax avoidance, a national measure restricting the free movement of capital may be justified

173. CJEU, 19 March 1999, C-222/97, *Trummer and Mayer*, Jur 1999, I-1661, s 21; CJEU, 17 September 2015, C-589/13, *Familienprivatstiftung Eisenstadt*, not yet published, s 36.
174. CJEU, 20 May 2008, C-194/06, *Orange European Smallcap Fund*, Jur 2008, I-3747, s 98ff.
175. Smit (n 80) 68–69; Terra and Wattel (n 72) 70.
176. *Familienprivatstiftung Eisenstadt* (n 173) ss 36–37; CJEU, 27 January 2009, C-318/07, *Pesche*, Jur 2009, I-395, s 27; Tiberghien (n 149) 2020–22.
177. De Broe (n 7) 862–63; Lang and Heidenbauer (n 164) 606;
see also *Olsen* (n 2) s 124.
178. B Rudden, 'Gifts and Promises. By John P. Dawson' (1981) 44 Modern Law Review 610.
179. *Olsen* (n 2) s 125.
180. ibid, s 153.
181. CJEU, 3 October 2013, C-282/12, *Itelcar*, published electronically.

where it specifically targets wholly artificial arrangements that do not reflect economic reality and the sole purpose of which is to avoid the tax normally payable. The EFTA Court thus equated the possibility of justifying a restriction of the free movement of capital by reference to the prevention of tax avoidance, with the justification ground of a restriction of the freedom of establishment.[182] In doing so, the EFTA Court again imported the requirements of a fixed establishment and 'genuine economic activities' into the framework of the free movement of capital.[183] If applied in the same manner, it does not matter whether the freedom of establishment or the free movement of capital will apply in any given case, because, if any restriction to either one of these freedoms is involved, the same requirements should be fulfilled in order to justify that restriction. This seems somewhat unfortunate, as it would shift the question from whether these requirements should be fulfilled from the material scope question of the free movement of capital towards the justification question. It is submitted that it would be better to arrive at a differentiated application of the justification question, depending on whether the freedom of establishment or the free movement of capital is involved, at least in those cases where the application of the free movement of capital does not depend on the existence of direct investments.

This should of course not be taken to mean that national (tax) legislation that aims to counter (tax) abuse through the use of foreign entities and trusts should be swept away in its entirety. The essential aim to counter 'artificial' legal arrangements, solely set up to gain a tax advantage, can and should be maintained, but may be aligned with the aims of the free movement of capital itself. Even though in the eyes of different governments and their tax administrations, trusts may have a bad reputation,[184] especially when it comes to their capacity to facilitate tax avoidance or even tax fraud, they are able to serve different, entirely legitimate, goals as well. As we have seen, trusts may facilitate portfolio investments by serving as a flexible legal vehicle through which these investments may be conducted. Moreover, trusts can be regarded as an exponent of regulatory competition because of their ability to slice and dice legal entitlements to the trust assets, facilitating effective intergenerational transfers of the trust assets. In effect, the legal title of the trustee functions as a screen, hiding an adaptable and tailor-made system of beneficial entitlements. We have also seen that trust law, because of its effective way of curtailing risky management behaviour, may help to keep intact the value of a family estate. And last but not least, trusts may be used because of privacy considerations.[185] These goals are not necessarily tax related, and at least some of them seem to accord with the main aims of the free movement of capital itself. While, in our view, CFC legislation such as the Norse legislation, the Dutch APV regime and the Belgian Cayman tax are essentially, by their nature, anti-abuse mechanisms. It is submitted that their field of application should, therefore, be limited to those cases where such a form of (tax) abuse is actually present. To lump all trusts together, regardless of the aim they serve, seems to go too far. Normally, those cases that fall under the material scope of the

182. *Olsen* (n 2) s 166.

183. This position seems to be supported by the fact that, in para 181 of the judgment in *Olsen*, the Court mentions both the freedom of establishment and the free movement of capital and by subsequently stating that:

> [t]he restriction is proportionate if it relates only to wholly artificial arrangements which seek to escape the national tax payable in comparable situations. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives a CFC is actually established in the host EEA State and carries on genuine economic activities, which take effect in the EEA.

184. Again, we may refer to the Explanatory Memorandum accompanying the Belgian Cayman tax, where the Belgian legislator seems to assume that discretionary trusts in reality do not exist and points to the usage of offshore trusts in order to escape taxes. See Bill concerning miscellaneous legal provisions, Explanatory Memorandum, *Parl St*, Chamber of Representatives 2014–15, no 54-1125/001, 25–29.

185. See eg Prince M von and zu Liechtenstein, 'Possible Uses of Liechtenstein Wealth Preservation Structures' in H Heiss and others (eds), *Trusts in the Principality of Liechtenstein and Similar Jurisdictions* (Dike Verlag 2014) 39–50; M Lakhan, 'The Beginning of the End of Anonymity?' in H Heiss and others (eds), *Trusts in the Principality of Liechtenstein and Similar Jurisdictions* (Dike Verlag 2014) 51–55.

freedom of establishment and satisfy the applicable requirements in this regard should already be carved out from these tax regimes. In our view, the question that must be raised whether, when viewed from the perspective of the free movement of capital, other situations should be exempted from such tax regimes as well. We would contend that this should indeed be so. A balance between the interests of the states and the taxpayers may be found by expanding the possibility to rebut the presumption of tax avoidance in those cases where foreign trusts are used.

While it is not problematic, under EU law, to include a presumption of tax avoidance into tax legislation, in order for the anti-abuse rule in question to satisfy the proportionality test, the taxpayer involved must indeed be given the possibility to rebut any legal presumption which operates to his disadvantage, resulting in the possibility to escape the application of the anti-abuse rule.[186] Already, taxpayers may escape the application of such rules by showing that the entity involved is not a 'wholly artificial arrangement', but that is effectively established in another Member State and carries on genuine economic activities. In principle, it does not seem impossible to expand the number of ways in which the presumption of tax avoidance may be rebutted, eg by showing that the trust at hand was settled in order to pursue a legitimate aim, taking into account the scope of the free movement of capital.

General conclusion

28. Between Scylla and Charybdis: This contribution started with the observation that trusts are considered to be recalcitrant creatures. Our further discussion highlighted why this is indeed the case. The decision of the EFTA Court in the *Olsen* case highlighted for the first time that trusts, as 'legal entities', may come under the scope of the freedom of establishment. However, when examined in more detail, this conclusion is not as straightforward as it might seem upon first glance. It was shown that trusts are a special type of entity, if they are to be considered to be legal entities at all. Because of trusts' *sui generis* nature, the decision in *Olsen* could have some consequences that were probably not foreseen by the EFTA Court, as the decision that trusts may come under the scope of the freedom of establishment was taken in a specific tax law context. Because the freedom of establishment traditionally concerns natural persons on the one hand and corporate legal entities on the other, some of the existing rules and case law concerning this fundamental freedom are not easily applicable to trusts and their effective application might lead to unexpected (and even unwanted) results, for example, within the context of private international law and property law. For example, acquirers of trust assets might be confronted with beneficiaries' tracing rights under the applicable trust law.

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The *Olsen* case is also of significant importance for the field in which it was decided, ie tax law. Different EU and EEA states have in recent times adopted special legislation concerning the use of foreign legal entities, such as trusts, by their taxpayers. After the *Olsen* case, there can be no more doubt that such legislation should be drafted in such a way that it does not contain unjustifiable restrictions to the freedom of establishment within the EU and the EEA.

However, all this presupposes that the trust in question actually can be brought under the scope of the freedom of establishment. While the decision in *Olsen* confirmed for the first time that trusts may fall under the personal scope of this fundamental freedom, the EFTA Court did not provide us with new insights concerning the material scope of the freedom of

186. See n 102 and the sources cited in that footnote.

establishment. This is a pity, because it is not self-evident for trusts to meet the necessary criteria in order to be brought under the material scope of this fundamental freedom. Especially the requirement of a 'genuine economic activity' seems to fit badly with trusts. Moreover, it seems that, even in those cases where trusts may meet the necessary criteria, the application of established principles of the freedom of establishment gives rise to uncertainties or may lead to unexpected or unwanted results.

In this regard, we also noted that, in the case trusts, recourse to the free movement of capital might be more useful in many cases. However, many uncertainties regarding the concrete application of this body of rules to trusts still remain. For example, it seems unclear whether trusts that have been set up to serve legitimate aims which accord with the main aims of the free movement of capital, may actually escape the scope of anti-abuse rules, such as the Belgian Cayman tax, the Dutch APV regime, or the French rules concerning the use of foreign trusts.

Many uncertainties regarding the concrete application of this body of rules to trusts still remain

It may be noted that, while the EFTA Court postulated some general rules, it left the concrete application of these rules in the case at hand to the national judge. Therefore, any national judge might be hard pressed to find any guidance in the EFTA Court's judgment on how to exactly apply these general rules to a concrete case. Coupled with the observations on the trust's specific nature, this may lead us to conclude that, while the general principles flowing from the *Olsen* case may be clear, their concrete application is fraught with legal uncertainty. Therefore, even though trusts may be brought under the scope of both the freedom of establishment and the free movement of capital, those settlors, trustees, and beneficiaries wishing to exercise these treaty freedoms may find themselves adrift between a civil law Scylla and a fiscal Charybdis.

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