OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 December 2016 (1)

Case C-646/15

Trustees of the P Panayi Accumulation & Maintenance Settlements
v
Commissioners for Her Majesty's Revenue and Customs

(Request for a preliminary ruling
from the First-tier Tribunal (Tax Chamber) of the United Kingdom)

(Tax legislation — Direct taxes — Exit taxation — Application of the fundamental freedoms to a trust which has no separate legal personality — Proportionality of exit taxation notwithstanding the continued existence of an option to tax — No option to defer — Relevance of later changes in value — Taking into account of a later option to tax)

I – Introduction

1. The present case raises before the Court, inter alia, the question of whether the fundamental freedoms provided for in the TFEU may also be relied on by a trust (an arrangement for the administration of third-party property that is found primarily in the United Kingdom). This is a matter on which only the EFTA Court has previously ruled, albeit in different circumstances. (2)

2. That question has arisen in the context of the taxation of unrealised capital gains (known as hidden reserves) via a particular form of exit tax. This is triggered when the majority of the trustees transfer their residence abroad or on the appointment of trustees most of whom are resident abroad. There is now an extensive body of case-law on the subject of exit taxation, (3) which is in principle permissible. The exit cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer. (4) The same principle must also apply to the right to correct a previously granted tax credit for depreciation where this too has led to the accrual of hidden reserves. Over time, however, that case-law has formulated certain requirements to which exit taxation is subject. The EU legislature was itself guided by those requirements when it recently went so far as to introduce a similar obligation to tax the exit of assets in Article 5 of Directive (EU) 2016/1164, (5) not applicable here. (6) This is clearly indicative of a gradual shift in legal awareness which may also impact upon retrospective legal assessment. (7)

3. In the present case, it falls to the Court to decide whether there is also a right to tax where the exit State to some extent retains an option to tax notwithstanding the exit. It must also be decided whether the fact that hidden reserves are voluntarily realised after the assessment to tax but before the due date for payment of the tax debt may have a bearing on that assessment.

II – Legal framework

A – *EU law*

4. The EU law framework is made up of the fundamental freedoms provided for in Articles 49, 56, 63 and 54 TFEU (previously Articles 43, 49, 56 and 48 of the EC Treaty). (8) In that connection, Article 54 TFEU governs the applicability of the freedom of establishment and the freedom to provide services (in conjunction with Article 62 TFEU) to companies or firms:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law,save for those which are non-profit-making.'

B – *National law*

5. According to the account given by the referring court, the taxation of capital gains tax in the United Kingdom is governed primarily by the Taxation of Chargeable Gains Act 1992 (the 'TCGA'). Under section 2(1) of the TCGA, (9) a person is to be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he was resident in the United Kingdom, or during which he was ordinarily, that is to say regularly, resident in the United Kingdom. Under section 69 of the TCGA, in the version applicable to the facts of the main proceedings, trustees are to be treated 'as being a single and continuing body of persons', distinct from the persons who may from time to time be the trustees. Section 69 further provides that 'that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is carried on outside the United Kingdom and the trustees or the majority of them for the time being are not resident or ordinarily resident in the United Kingdom'.

6. Under section 15(2) of the TCGA, all gains are chargeable for the purposes of capital gains tax. The assets covered by the tax include all forms of incorporeal property, including shares in companies (section 21(1)).

7. Under section 80 of the TCGA, a disposal is deemed to have taken place where the majority of the trustees of a trust become at any time neither resident nor ordinarily resident in the United Kingdom. In those circumstances, they are deemed immediately before that time to have disposed of and immediately to have reacquired certain 'defined assets' in the trust at market value. The due date for payment of that tax is 31 January of the following year. The trustees have no option to defer payment of the tax beyond that date or to pay the tax in instalments.

8. According to the information provided by the referring court, section 87 of the TCGA provides, however, that capital gains realised by trustees who are not resident or ordinarily resident in the United Kingdom must be attributed to beneficiaries to the extent that capital payments are made to them. In that regard, capital gains realised by non-resident trustees are computed as if the trustees were resident in the United Kingdom. That pool of capital gains is then attributed to beneficiaries who receive capital payments from the trustees. Beneficiaries who are resident in the United Kingdom are liable to pay capital gains tax on the gains from the capital payments attributed to them.

III – The main proceedings

9. The dispute in the main proceedings concerns four trusts originally managed by trustees who were resident in the United Kingdom but some of whom were later replaced by new trustees, with the result that the majority of the trustees were then resident in Cyprus. The appellants are the current — Cyprus-resident — trustees of the four trusts.

10. The four trusts were created by Mr Panayi (born in Cyprus) in 1992 for the benefit of his three children and other members of his family ('the beneficiaries'). Although he, like his wife, is not a beneficiary of the trusts while he is alive, he has retained the right, as 'protector', to appoint new or additional trustees to the trusts. The beneficiaries have no power to appoint trustees.

11. At the time when Mr Panayi created the trust[s] in 1992, he, his wife and his children were all resident in the United Kingdom.

12. Mr Panayi had previously established a successful business venture ('Cambos') in the United Kingdom. When setting up the trusts, he transferred to them 40% of the shares in the holding company for

that business. The original trustees of the trusts were Mr Panayi and a UK-resident trust company by the name of KSL Trustees Ltd ('KSL'). Mrs Panayi was added as a trustee in 2003.

13. Early in 2004, Mr and Mrs Panayi decided to leave the United Kingdom to return to Cyprus permanently. Although there was no legal requirement to do so, they both resigned as trustees of the trusts on 19 August 2004. On the same day, Mr Panayi appointed three new trustees who were all resident in Cyprus. As a result of those appointments, the administration of the trusts was moved to Cyprus. Since the majority of the trustees of the four trusts at issue ceased to be resident in the United Kingdom on 19 August 2004, the deemed disposal provided for in section 80 occurred on that date. This triggered a charge to capital gains tax on the increase in value of the assets contained in the trust fund which had accrued up to 19 August 2004. This constituted a capital gain chargeable for the 2004/2005 tax year. The due date for payment of that tax was 31 January 2006. As indicated, the trustees had no option to defer payment of the tax beyond that date or to pay the tax in instalments.

14. On 1 September 2004, Mrs Panayi left the United Kingdom and moved to Cyprus together with her youngest child. The two elder children, who were both beneficiaries of the trusts, initially remained in the United Kingdom in order to complete their university studies. It was only later that they moved to Cyprus. Mr Panayi followed them on 23 March 2005.

15. On 14 December 2005, KSL resigned as a trustee of the four trusts. On 19 December 2005, the trustees sold the Cambos shares held by the trusts. Their combined share of the net sale proceeds was approximately GBP 30 million.

16. On 11 May 2006, Mr and Mrs Panayi were reappointed as trustees of the trusts. From that point, all of the current trustees were resident in Cyprus.

IV – Procedure before the Court of Justice

17. On 3 December 2015, the First-tier Tribunal (Tax Chamber) of the United Kingdom, before which the dispute had been brought, referred the following questions to the Court for a preliminary ruling in accordance with Article 267 TFEU:

'(1) Is it compatible with the freedom of establishment, the free movement of capital, or the freedom to provide services for a Member State to enact and maintain legislation such as section 80 of the Taxation of Chargeable Gains Act 1992 under which a charge to tax arises on the unrealised gains in value of the assets comprised in a trust fund if the trustees of a trust become at any time neither resident nor ordinarily resident in the Member State?

(2) On the assumption that such a charge to tax restricts the exercise of the relevant freedom, is such a charge justifiable in accordance with the balanced allocation of powers of taxation, and is such a charge proportionate where the legislation neither grants the trustees the option to defer the charge to tax or to pay in instalments, nor does it take into account any subsequent fall in the value of the trust assets?

Specifically, the following questions are referred:

(3) Are any of the fundamental freedoms engaged where a Member State imposes a charge to tax on unrealised capital gains on the increase in value of assets held by trusts at the time when the majority of the trustees cease to be resident or ordinarily resident in that Member State?

(4) Is a restriction on the freedom created by that exit charge justified in order to ensure balanced allocation of powers of taxation, in circumstances where it was possible that capital gains tax might still be imposed on the realised gains, but only if specific circumstances arose in the future?

(5) Is proportionality to be determined on the facts of the individual case? In particular, is the restriction created by such a charge to tax proportionate in circumstances where:

(a) the legislation makes no provision for an option to defer the payment of tax or for payment in instalments, or for account to be taken of any subsequent fall in the value of the trust assets after the exit,

(b) but in the particular circumstances of the assessment to tax under appeal, the assets were sold before the tax was payable and the relevant assets did not decrease in value between the relocation of the trust and the date of sale?'

18. Written observations on those questions have been submitted by the trustees of the four trusts created by Mr Panayi, the Republic of Austria, the EFTA Surveillance Authority, the Norwegian Government, the United Kingdom and the Commission. The hearing on 20 October 2016 was attended by the trustees of the four trusts created by Mr Panayi, the EFTA Surveillance Authority, the United Kingdom and the Commission.

V – Legal assessment

A – *Whether admissible*

19. The Republic of Austria submits that Question 5(a), concerning the taking into account of any later fall in value, is hypothetical, since, in this particular case, the majority of the assets were disposed of and no fall in value was reported as having occurred in the intervening period.

20. According to settled case-law, questions referred by a national court enjoy the presumption of relevance. That is certainly the case where the national court asks questions on the interpretation of EU law in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine. (10) The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose. The same applies where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11)

21. By question 5(a), the referring court asks whether the measure at issue (taxation on exit) is proportionate where the law forming the basis of the taxation makes no provision for account to be taken of any later fall in value. However, the proportionality of taxation at the time of the assessment to tax may indeed fall to be analysed at that juncture, and, therefore, without regard to any circumstances arising subsequently in the context of the collection of the tax. Consequently, the referring court's question is certainly not obviously hypothetical.

B – *Substantive assessment of the questions referred*

1. The first and third questions

a) Trusts as other legal persons

22. The first and third questions referred for a preliminary ruling, which must be examined together, raise the issue, first, of whether an 'arrangement' such as a trust (created under UK law) may rely on one of the fundamental freedoms in the present case.

23. That depends on whether trusts are 'other legal persons' within the meaning of Article 54 TFEU. The Court has not yet ruled on that question. The EFTA Court, on the other hand, held the fundamental freedoms to be applicable to a trust created in Liechtenstein the 'participants' in which were taxed in Norway. (12)

24. The starting point for answering this question is the fact that Article 54 TFEU extends the scope of the fundamental freedoms concerned to actors other than natural persons. In particular, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union are to be treated in the same way as natural persons.

25. The benefit of those freedoms thus extends both to the natural persons using the trust in their (original) capacity as nationals of a Member State and the trust itself. The latter is the case, however, only if the trust can be regarded as a company or firm within the meaning of the first sentence of Article 54 TFEU.

26. According to the second sentence of Article 54 TFEU, 'companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law. The particular feature of a trust is that, by virtue of its structure, it exists 'only' as a vehicle for the management of assets by trustees for the benefit of a third party.

27. In principle, a purely contractual obligation to administer external assets (the definition of a trust) is not in itself sufficient to constitute a company or firm within the meaning of Article 54 TFEU that is distinguishable from its administrator (trustee). Moreover, the trust at issue here does not have its own legal

personality under national law, as the referring court, the Commission and the Norwegian Government all submit.

28. However, a separate legal personality is not necessary for the purposes of Article 54 TFEU. If that were not the case, the relevant national legislature could extend or restrict the scope of the freedom of establishment and the freedom to provide services at will by granting or withdrawing separate legal personality. It is in any event virtually impossible to determine what difference there is supposed to be between an independent legal personality and 'mere' legal capacity. (13)

29. The distinction which national law occasionally draws between organisational structures according to whether they do or do not have legal personality cannot therefore — contrary to the view expressed by the United Kingdom at the hearing — be transposed to EU law. Accordingly, the Court has already described a company which had no legal personality under national law as a 'legal person governed by private law'. (14)

30. Furthermore, Article 54 TFEU, and, therefore, the concept of 'other legal persons' too, may not be interpreted strictly. (15)The extension of fundamental freedoms to companies and firms takes into account in particular the fact that significant market players are organised in the form of companies or firms. That extension serves to achieve the internal market objective laid down in Article 26(2) TFEU. That objective indicates that the concept of 'other legal persons' includes forms of organisation such as a trust. It is true that, in any event, the members of a company or firm could rely on the fundamental freedoms without Article 54 TFEU. However, this would be a very laborious process and would mean that, while a company or firm would be able to act on its own behalf in legal transactions, it would not be able to avail itself of the fundamental freedoms in its own right but only indirectly through its members.

31. Article 54 TFEU is therefore intended to ensure that individuals may pursue those of their interests which are protected by the fundamental freedoms even when establishing or acquiring 'other legal persons'. This makes for the effective organisation of an economic activity and thus facilitates the exercise of the fundamental freedoms. The responsibility for alleging infringement of such a freedom falls not to the individuals acting through the medium of a company, firm or 'other legal person' but to the economic operator primarily affected by it.

32. In the light of that objective, the concept of 'other legal persons' within the meaning of Article 54 TFEU must be interpreted autonomously, contrary to the view expressed by Norway. It does not, for example, refer only to companies or firms with an independent legal personality that would have to be assessed in the light of the different provisions of national law applicable in this regard.

33. Consequently, the EU-law concept of 'other legal persons' includes any organisational unit that enables its members (that is to say the persons that use it) to engage in legal transactions. However, in order for the organisational unit as such (as opposed to each individual member of it) to be affected, it must enjoy a degree of independence allowing it to operate *in its own right*. It must also be capable of uniform decision making such that it distinguishes itself from the persons that use it.

34. However, as regards the question of whether such market operators are different from the persons using them, regard must be had to the relevant national legal system. In so far as the national law confers or imposes independent rights and obligations on the individual entity (here, the trust), that entity engages in legal transactions *in its own right*. This — as the United Kingdom submitted at the hearing — is a preliminary matter which, as EU law now stands, can be resolved only by the applicable national law and not by the Court in each individual case. (16) That said, there is some support in the present case for the proposition — also advanced by the applicant, the Commission and the Republic of Austria — that, on account not least of the form of words used in section 69 of the TCGA, the legal business of the trust is conducted by the trust in its own right (inasmuch as a single place of residence is allocated to the entirety of the trustees) and not only by the trustees in their capacity as individuals.

35. It is for the national court to decide whether, in the present case, the legal business of the trust may be conducted by the trust in its own right or only by the trustees exercising their own rights and obligations. If the trust acts in its own right, then it too must be regarded as '[another] legal [person]' within the meaning of the second sentence of Article 54 TFEU.

b) Freedom of establishment

36. Moreover, it must be decided which fundamental freedom either the trust or the trustees may rely on where unrealised hidden reserves are taxed for the sole reason that the place of effective management of the trust (or the place where the majority of the trustees are resident or ordinarily resident) is deemed by

national law to have been transferred to another Member State. The parties mention the freedom of movement of capital, the freedom to provide services and the freedom of establishment in this regard.

37. According to Article 43 of the EC Treaty (now Article 49 TFEU), the freedom of establishment includes the right for nationals of one Member State to take up and pursue activities as self-employed persons on the territory of another Member State. (17) Even though, according to their wording, the provisions of the Treaty concerning freedom of establishment aim to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. (18)

38. The management of external assets by a trust or its trustees is an activity pursued on a self-employed basis. The necessary participation in economic life is also present, since the fact that the assets are actively managed is sufficient for that criterion to be met. (19)

39. Even if, in certain circumstances, the active management of external assets does not fall within the scope of VAT law, (20) it is nonetheless an economic activity pursued on a self-employed basis. Contrary to the Norwegian Government's submission, the principles governing the assumption of the status of taxable person for VAT purposes are not applicable to the assessment, as a condition of enjoyment of the freedom of establishment, of whether an activity is an economic activity pursued on a self-employed basis. This is true not least because the fundamental freedoms, in eliminating obstacles in the internal market, and VAT law, in taxing the end consumer, pursue different objectives. It is true that, according to settled case-law, (21) a simple holding company (known as a financial holding company) is not regarded as a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. (22) It may nonetheless rely on the freedom of establishment where its profits are taxed on the ground that its registered office has been transferred. (23)

40. The freedom of establishment nonetheless presupposes that an economic activity is actually pursued through a fixed establishment in the host Member State for an indefinite period. (24) In the present case, no indication has been given in the proceedings before the Court that the activities carried on by the trust or the trustees will continue to be confined exclusively to the United Kingdom and that no activities have been or are being carried on in Cyprus. This, however, is a matter to be determined by the referring court. (25)

41. If an economic activity is indeed being carried on in Cyprus, there is ultimately no need to address here the question of whether the free movement of capital enjoyed by the trust or the trustees affected by the taxation or any other fundamental freedoms may also applicable. A clarification of the relationship between the concurrent freedoms would have a bearing on the outcome of the case only if the latter exhibited links with third States, thus significantly extending the extended scope of the free movement of capital. In purely intra-community situations such as that in the present case, the relationship between the freedom of establishment, the free movement of capital and the freedom to provide services need not be resolved, since the conditions governing those fundamental freedoms are largely identical. (26)

c) Restriction of the freedom of establishment

42. If, by managing the assets for the benefit of the beneficiaries, the trust (as such or in the person of the trustees) carries on an economic activity in Cyprus, it is necessary to answer the question whether the taxation of unrealised capital gains (that is to say the taxation of hidden reserves) on the transfer of the place of effective management constitutes a restriction on the freedom of establishment.

43. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom. (27) The Court has held on a number of occasions that the taxation of hidden reserves on the transfer of the place of effective management also constitutes a restriction of the freedom of establishment, where unrealised gains are not similarly taxed in a domestic scenario (that is to say in cases of transfer within national territory). (28)

44. In that connection, the freedom of establishment is restricted by the assessment to tax assessment itself, which takes place even though no actual gains have been realised. For, once assessed to tax, the taxable person owes and is liable for the tax immediately, even though it is not yet due for payment. The collection of the tax is to this extent simply the completion of the restriction.

45. In the main proceedings, a trust (as such or in the person of the trustees) which wishes to transfer its place of effective management outside the United Kingdom (or which national law deems to have been so transferred on the 'exit' of the majority of its trustees) suffers a liquidity disadvantage by comparison with similar actors who maintain their place of effective management in the United Kingdom. For, under the

national legislation at issue in the main proceedings, a transfer of the trust's place of effective management to another Member State triggers the immediate taxation (29) of any unrealised increases in the value of certain assets. Conversely, such increases in value are not taxed if a trust transfers its place of effective management within the United Kingdom. In that event, hidden reserves are not taxed until they are realised. That difference of treatment (the immediate taxation of unrealised increases in value on exit) is liable to prevent a trust (as such or in the person of the trustees) from moving its place of effective management to another Member State. This is true even where the trust has sufficient liquidity to be able to pay the tax without realising the hidden reserves.

46. The answer to the first and third questions must therefore be that the freedom of establishment is restricted where a trust (as such or in the person of the trustees) is taxed in the event that its place of effective management is transferred to another Member State but not in the event that its place of effective management is transferred within national territory.

2. The second, fourth and fifth questions

a) Ground of justification

47. A restriction of the freedom of establishment may be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that it should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective. (30)

48. The Court has already held on a number of occasions that, on the basis of the principle of fiscal territoriality in conjunction with the time consideration that the taxable person had its tax residence in national territory when the unrealised capital gains were generated, a Member State is entitled to tax those capital gains at the time of the taxpayer's exit. (31) Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its tax jurisdiction in respect of the activities carried out on its territory and can therefore be justified on grounds of preserving the allocation of the power to impose taxes between Member States. (32)

49. The foregoing is, however, predicated on the condition that the exit does in fact jeopardise the power of the exit State to impose taxes. That is certainly the case where the power of taxation ceases to exist. (33) The applicants express doubts as to the loss of the United Kingdom's right to impose taxes, however, given that, under national law, taxation still takes place in so far as the beneficiaries remain resident in national territory and continue to receive payments from the trust (as such or in the person of the trustees).

50. What distinguishes the power of taxation which the United Kingdom retains after the transfer of the trust's place of effective management, however, is that it is solely dependent on the decisions of the trust and/or the beneficiaries. This is a point that was also made by the Commission and the United Kingdom at the hearing. If the trust does not make any payments to beneficiaries resident in the United Kingdom, or if the beneficiaries move away from the United Kingdom, as is the case here, the United Kingdom's residual power of taxation is inoperative. Consequently, it is no longer within that Member State's discretion to decide whether a right to tax may still be exercised. This equates to the situation where a Member State's autonomous right to tax ceases to exist as a result of the transfer of the place of effective management.

51. The answer to the first part of Question 2 and Question 4 must therefore be that an exit tax such as that at issue here is in principle permissible for the purposes of preserving the allocation of the powers of taxation, even though tax may to some extent still be levied, albeit in circumstances which no longer fall within the discretion of the Member State.

52. However, the fact that tax may to some extent still be levied may have a bearing on the proportionality of taxation. For that possibility creates a risk of double taxation by the exit State alone. The unrealised capital gains are taxed in full upon exit and any further capital gains may be taxed on payment to the beneficiaries. That will be the case even though — the justification for exit taxation being the allocation of powers of taxation — the latter capital gains should by this stage actually be taxable by the State of destination. In those circumstances, the question of proportionality would probably depend on whether the exit tax is taken into account when tax is levied on the beneficiaries. That question does not arise in the present case, however, because the hidden reserves have already been realised and the beneficiaries are no longer resident in the United Kingdom.

b) Proportionality

53. The fifth question referred by the national court seeks to ascertain what assessment is to be made of the proportionality of the exit tax at issue in this particular case. It is concerned, first, with the lack of an option to defer the tax liability (see section i, concerning question 5(a)) and, secondly, the fact that the hidden reserves were realised without any fall in value after the assessment to tax but before the due date for payment of the tax debt (see section ii, concerning question 5(b)). It is also concerned with the failure to take into account any subsequent decreases in value (see section iii, concerning question 5(a)) in the levying of the exit tax.

54. The UK tax authority relies primarily in this regard on the special circumstance that the taxable person actually realised the value of the assets by selling them before the due date for payment of the tax debt. It maintains that, since the profit from that sale was sufficient to pay the tax debt previously incurred on account of the deemed disposal, the exit tax is proportionate in this particular case.

i) No option to defer

55. The Court has already held on a number of occasions that the taxable person must have the choice between immediate taxation and deferred payment, together with, if appropriate, interest in accordance with the applicable national legislation. (34) In that connection, it considered the act of recovering the tax on hidden reserves over a period of five years rather than immediately to be proportionate. (35) UK national law does not make any provision for deferment, however. Consequently, the tax debt relating to the unrealised hidden reserves was incurred immediately. That is disproportionate according to the case-law of the Court of Justice.

ii) Realisation of the hidden reserves after the assessment to tax but before the due date for payment

56. Even if it were necessary to take as the point of reference, as the UK tax authority does, the fact that the hidden reserves were successfully realised after the assessment to tax but before the due date for payment of the tax debt, which would be more favourable to the taxing State, the exit tax would still be disproportionate. Even then, there would continue to be a difference of treatment by comparison with the domestic context. For, if those reserves had been realised without the exit, the same tax would have fallen due for payment at a later date (as calculated from the time of realisation, exactly one year later in this instance).

57. Moreover, the assessment of the proportionality of action taken by the State, in this case the determination of the tax owed and the due date for payment of the tax debt, must not depend on the decision of the person affected — the very person whose rights have been encroached upon. Otherwise, only a taxable person who refuses to pay the tax due and does not therefore dispose of the assets incorporating the hidden reserves would be able to complain that his freedom of establishment has been disproportionately restricted. A person affected who complies with the order to pay issued by the State and realises the hidden reserves in order to do so, on the other hand, would be denied the opportunity to raise the objection that his fundamental freedoms have been disproportionately restricted.

58. The tax at issue in the present case therefore remains disproportionate despite the fact that the hidden reserves were realised before the due date for its payment because there was no option to defer payment at the time of the assessment to tax. Such an option to defer does not necessarily have to amount to the five years (36) referred to in the Court's case-law. (37) The UK legislature could instead have linked the option to defer to realisation of the hidden reserves within that five-year period (as now also provided for in Article 5(4) of Directive (EU) 2016/1164 (38)).

59. The answer to be given to the referring court in response to Question 5(b) must therefore be that the proportionality of a measure must be assessed by reference to the particular situation obtaining at the time when the exit tax is incurred. This is the case irrespective of whether the assets concerned were sold before the due date for payment and without any fall in value, where the tax debt would have fallen due at a later date if it had not been for the exit and there is no option to defer payment.

60. It is for the national court to examine whether the disproportionate nature of the legislation may conceivably arise from an EU-law-based interpretation of a right to defer provided for in the national law of tax procedure. As the applicant in the main proceedings submitted at the hearing, there would appear to be similar options for a discretionary decision in the United Kingdom too.

iii) Failure to take account of subsequent decreases in value

61. In accordance with the principle of territoriality, which is a criterion for the allocation of the powers of taxation, the tax base comprises the profits and losses arising from a taxable person's activities in the State of taxation. (39) The taking into account of both profits and losses in that country is also consistent with the symmetry principle. (40) Attendant upon those principles are the administrative difficulties associated with identifying both increases and decreases in value in cases where neither the body of assets nor the person concerned is present or resident in the territory of taxation. Indeed, it is because of those difficulties that there is no obligation to take account of subsequent decreases in the levying of a tax on the ground that the right to tax has ceased to exist (exit taxation). Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, (41) albeit not applicable to the present case, does not provide for such an obligation either.

62. The reason for this is that the justification for the fair allocation of the powers of taxation between the Member States is based ultimately on the attribution of increases and decreases in value which, on account of territorial proximity, have arisen up to a certain reference date. Even then, however, subsequent increases and decreases in value are in principle to be taken into account not in the exit State but only in the State of establishment (that is to say, in the State of destination).

63. That approach — to the effect that there is no obligation to take account of decreases in value — has been confirmed by the Court on a number of occasions in its recent judgments concerning exit taxation. (42) The only exception was a judgment concerning the imposition of an exit tax on a natural person in respect of his private assets (in the form of substantial shareholdings). Here, the Court pointed up the need to take account of any decrease in value that might arise following exit. (43) In its later case-law relating to the imposition of exit taxes on economically active entities and their operating assets, the Court (44) has stopped taking the latter approach.

64. Even though the more recent case-law was concerned in particular with organisations with legal capacity, a differentiation based on the legal form of the taxable person would be unconvincing. This is particularly apparent in the present case, where, depending on the formulation of the national legislation governing trusts, a trust is to be regarded either as '[another] legal [person]' or as a number of natural persons. Ultimately, when it comes to taking account of decreases in value, the Court has differentiated less according to whether the persons are natural or legal and more according to whether the assets are private or operational. (45) If a trust pursues an economic activity, however, the assets taxed are operating assets. There is therefore no need to decide whether the Court's findings in the judgment in *N* with respect to the taking into account of decreases in value have been observed. (46)

65. A decision consistent with the foregoing would be necessary only if the conclusion were reached that the trust's activity consists in the passive management of assets and is not therefore an economic activity. In that event, account would have to be taken of the fact that, for the purposes of the ground of justification of preserving the allocation of the powers of taxation between the Member States, it is irrelevant whether the assets in question are private or operational.

66. The answer to Question 5(a) must therefore be that, in this instance, the principle of proportionality does not oblige the exit State to take account of any subsequent fall in value.

VI – Conclusion

67. I therefore propose that the Court reply to the request for a preliminary ruling from the First-tier Tribunal (Tax Chamber) of the United Kingdom as follows:

(1) The answer to Questions 1 and 3 must be that a trust may rely on the fundamental freedoms provided for in Article 54 TFEU even though it has no legal personality under national law. The foregoing is subject to the condition that the trust is able to engage in economic transactions in its own right and to that extent benefits from and is subject to its own rights and obligations under national law. Taxing the unrealised capital gains accruing to a trust (as such or in the person of the trustees) on the ground that national law deems the place of effective management to have been transferred to another Member State constitutes a restriction of the freedom of establishment.

(2) The answer to Questions 2 and 4 must be that that restriction on the freedom of establishment can in principle be justified on the ground of preserving the allocation of the powers of taxation between the Member States. That is the case even where, although the exit State to some extent retains an option to tax, that option no longer lies within the autonomous discretion of that Member State but is essentially dependent on the decisions of the taxable person.

(3) The answer to questions 2 and 5 must be that the proportionality of the taxation of unrealised capital gains must be assessed by reference to the particular situation obtaining at the time of the assessment to tax. It is disproportionate where, as here, there is no option to defer payment and where the tax debt would fall due at a later date if it were not for the exit. This is the case irrespective of whether the assets concerned were disposed of before the due date for payment and without any fall in value. The principle of proportionality does not require the exit State to take account of any subsequent fall in the value of operating assets.

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1 Original language: German.

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2 Judgment of the EFTA Court of 9 July 2014, *Fred.Olsen* (E-3/13, E-20/13, EFTA Court Reports 2014, 400).

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3 Judgments of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 53 and the case-law cited); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 49); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraphs 44 to 45); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 46).

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4 Judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 46).

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5 Council Directive of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market — OJ 2016 L 193, p. 1.

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6 Article 5 of Directive (EU) 2016/1164 states: ‘A taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes, in any of the following circumstances: … (c) a taxpayer transfers its tax residence to another Member State ...’.

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7 See, to that effect, Doehring. K., ‘Die Wirkung des Zeitablaufs auf den Bestand völkerrechtlicher Regeln’, Jahrbuch der Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., Administrative Headquarters of the Max Planck Society, Munich, 1964, pp. 70 to 89.

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8 It is the provisions of the EC Treaties which are applicable *ratione temporis* here. Since the content of those provisions is identical, reference will hereafter be made to their current numbering, for the sake of ease of understanding.

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9 In the version applicable at the material time of the facts of the main proceedings.

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10 See, inter alia, judgment of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 29).

11 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 29), and of 22 January 2015, *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraph 26 and the case-law cited).

12 Judgment of the EFTA Court of 9 July 2014, *Fred.Olsen* (E-3/13, E-20/13, EFTA Court Reports 2014, 400).

13 See, for example, judgment of the German Federal Court of Justice of 29 January 2001 — II ZR 331/00, NJW 2001, 1056, concerning the 'limited legal subjectivity' of German partnerships.

14 See judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft* (C-102/08, EU:C:2009:345, paragraph 74).

15 See, to that effect, judgment of the EFTA Court of 9 July 2014, Fred. Olsen (E-3/13, E-20/13, EFTA Court Reports 2014, 400).

16 As in the case of undertakings: see judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 26).

17 Judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 40 and the case-law cited), and of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 38).

18 Judgments of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 39), and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 31).

19 See also judgment of 14 September 2006, *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568, paragraph 19).

20 Judgment of 20 June 1996, *Wellcome Trust* (C-155/94, EU:C:1996:243, paragraph 34 et seq.).

21 See, to that effect, judgments of 20 June 1991, *Polysar Investments Netherlands* (C-60/90, EU:C:1991:268, paragraph 13); of 14 November 2000, *Floridienne and Berginvest* (C-142/99, EU:C:2000:623, paragraph 17); of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraphs 19); and of 30 May 2013, *X* (C-651/11, EU:C:2013:346, paragraph 35).

22 OJ 2006 L 347, p. 1.

23 See also judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 107 et seq.), concerning the economic activities of a holding company operating in the field of State aid which might not have been regarded as a taxable person under VAT law.

24 Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 54 and the case-law cited).

25 Judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440, paragraph 35).

26 Opinion of Advocate General Kokott in *SGI* (C-311/08, EU:C:2009:545, points 37 to 38); the Court held that the freedom of establishment was alone applicable — judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 36).

27 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 34), and of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 56 and the case-law cited).

28 Judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 46); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 33); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 35); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 35).

29 Contrary to the view expressed by the United Kingdom, the fact that, in the United Kingdom, that tax does not become due for payment until 31 January of the following year does not warrant a different assessment, since the same deadline for payment would apply to the taxation of realised hidden reserves (that is to say accruing in national territory), which means that it is only in non-national contexts that the lack of liquidity is not taken into consideration.

30 Judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 42); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 47); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 35).

31 Judgments of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 53 and the case-law cited); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 49); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraphs 44 to 45); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 46).

32 Judgments of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraphs 45 to 46); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 48); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 47); and of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 60).

33 See, to that express effect, the judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 48); of 25 April 2013, *Commission* v *Spain* (C-64/11, not published, EU:C:2013:264, paragraph 31); and of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 60 and the case-law cited).

34 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 49); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraphs 56 et seq., 58 and 62); and of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 67 and the case-law cited).

35 Judgments of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 64), and of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 52).

36 Judgment of 23 January 2014, DMC (C 164/12, EU:C:2014:20, paragraph 64); and of 21 May 2015, Verder LabTec (C 657/13, EU:C:2015:331, paragraph 52).

37 See also in this regard Article 5(2) of Directive (EU) 2016/1164 — OJ 2016 L 193, p. 1.

38 OJ 2016 L 193, p. 1.

39 Judgments of 15 February 2007, *Centro Equestre* (C-345/04, EU:C:2007:1425, paragraph 22); of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 39); and of 15 May 1997, *Futura* (C-250/95, EU:C:1997:2471, paragraphs 21 to 22).

40 Judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraphs 56 et seq., 58 and 62).

41 OJ 2016 L 193, p. 1.

42 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 43 et seq.), and of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 56 et seq.).

43 Judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 51 et seq.).

44 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 43 et seq.), 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 56 et seq.) and 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 45 et seq.).

45 As suggested by the statements of the Court in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 57).

46 Judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 54).