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In depth

Trusts and the freedom of establishment. Implications of the Panayi Trust case and additional reflections on the importance of language: the example of 'trust insolvency', a 'hybrid mismatch'?

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Abstract

On 14 September 2017, the European Court of Justice ruled on the Panayi Trust case (Case C-646/15). In this article, we focus on some of the key issues presented by this case, such as the question of whether trusts can be regarded as 'entities' which can fall under the personal scope of the freedom of establishment. The article concludes by making some additional reflections on the disparities between the different language versions of the Panayi Trust judgment.

On 14 September 2017, the European Court of Justice ('CJEU') ruled on the Panayi Trust case (Case C-646/15).[1] The CJEU's ruling in the Panayi Trust case will provide ample opportunity for debate and reflection in the near future, especially with Brexit coming into view. In this article, we will focus on some of the key issues presented by this case, without purporting to provide an exhaustive discussion of each possible issue raised by this case. Indeed, even with (the possibility of a) Brexit coming into view, much remains to be said about the interplay between trusts and European law. For example, even in the case where the UK should fully withdraw from the internal market, common law-type trusts are still part and parcel of Irish law and even of Liechtenstein law. The article concludes by making some additional reflections on the disparities between the different language versions of the Panayi Trust judgment.

Context of the case

The Panayi case concerns an English capital gains tax levied on the transfer of the trustees' place of residence for tax purposes from the UK to Cyprus.

The facts of the case were as follows: in 1992, four trusts were created by Mr Panayi, a Cypriot national, for the benefit of his children and other family members. Previously, Panayi has established a successful business venture ('Cambos') in the UK. The trust assets constituted 40 per cent of the shares of a holding company of the businesses established by Panayi. Originally, the trustees of these four trusts were Panayi himself and a UK-resident trust company. The wife of Panayi was added as a trustee in the course of 2003. Mr Panayi and his wife were not the beneficiaries of these trusts. Panayi did have the

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1. CJEU, 14 September 2017, C-646/15, *Trustees of the P Panayi Accumulation and Maintenance Settlements v Commissioners for Her Majesty's Revenue and Customs*, *Jur.* 2017, not yet published.

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power, as protector, to appoint new trustees to the trusts.

However, in 2004, Panayi and his wife decided to leave the UK and return to Cyprus on a permanent basis. On this occasion, both Panayi and this wife resigned as trustees and three new trustees were appointed by Panayi. All three trustees were Cypriot residents. The UK resident trust company retained its capacity as trustee of these four trusts until December 2005. However, the appointment of the three Cypriot trustees meant that the majority of the trustees of these four trusts were no longer resident in the UK.

Subsequently, on 19 December 2005, after the UK trust company ceased to be a trustee, the shares held on trust were sold and the proceeds of the sale were reinvested. In December 2006, the remaining trustees filed tax returns for the tax year 20045, in respect of each of the trusts.

According to Section 69 of the UK Chargeable Gains Act 1992 ('TCGA'), the 'trustees of the settlement [i.e. the trust] shall for the purposes of this Act be treated as a single and continuing body of persons (distinct from the persons who may from time to time be the trustees)', for purposes of determining whether 'the settlement' in question is tax resident in the UK or abroad. A similar rule can be found in Section 474 of the UK Income Tax Act 2007.[2] For clarity's sake, it should be emphasized that these rules constitute fiscal fictions and are not part and parcel of UK trust law as such.

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Further, Section 80 TCGA states that when the trustees of a settlement cease to be resident or ordinarily resident in the UK, the trustees shall be deemed to have immediately disposed of the defined assets of the settlement in question, followed by an immediate reacquisition of these assets at their market value at the relevant point in time. Again, we are dealing with a fiscal fiction which allows to determine a(n unrealized) capital gain which, in turn, can be taxed. In essence, we are dealing with an 'exit tax'. UK tax law does not allow for any deferral of the payment of the tax, nor does it allow to taking into account any subsequent decrease in the valuation of the assets in question.

Because the relevant tax returns filed by the trustees of the Panayi trusts did not include self-assessments to a tax liability under Section 80 TCGA, the tax authorities opened inquiries. In 2010, the UK tax authorities issued a decision to the trustees in which they reassessed the tax on the basis that a charge was owed under Section 80 TCGA. The tax authorities concluded that the charge to tax was triggered by the appointment of the new trustees in 2004, since that appointment implied that the majority of the trustees ceased to be resident in the UK. The deadline for accounting for that tax was 31 December 2006. The Panayi trustees responded by bringing proceedings before the First-tier Tribunal (Tax Chamber) and challenged the compatibility of this exit tax and the requirement of immediate payment, as provided for by Section 80 TCGA, with the fundamental freedoms of movement within the EU. It is interesting to note that the tax authorities contested the applicability of these freedoms to the case, because of the legal status of the trust under the laws of England and Wales. The UK court noted that the CJEU, in cases relating to exit charges, had not yet been presented with the opportunity to examine whether a trust, its settlor, trustees or beneficiaries could rely on (one of) the relevant fundamental freedoms.

The questions referred

Therefore, the UK court referred some preliminary questions to the CJEU, which were subsequently reformulated by the CJEU as follows:

> the referring court seeks to ascertain, in essence, whether the provisions of the TFEU Treaty relating

2. See also: N Eastaway, J Kimber and I Richards, *Tax Adviser's Guide to Trusts* (5th edn, Bloomsbury 2016) 2078.

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> to freedom of establishment preclude, in circumstances, such as those in the main proceedings, where the trustees, under national law, are treated as a single and continuing body of persons, distinct from the persons who may from time to time be the trustees, legislation of a Member State, such as that at issue in the main proceedings, which provides for the taxation of unrealised gains in value of assets held in trust when the majority of the trustees transfer their residence to another Member State, and fails to permit deferred payment of the tax thus payable.[3]

A first observation is that the question on which the CJEU eventually ruled is actually quite narrow and specifically tailored to suit the legal context of the case in question. Accordingly, the answer of the Court was of the same nature. In short, the CJEU indeed ruled that the freedom of establishment does preclude legislation such as those at hand, given the relevant circumstances. The CJEU ruled as follows:

> The provisions of the FEU Treaty relating to freedom of establishment preclude, in circumstances, such as those in the main proceedings, where the trustees, under national law, are treated as a single and continuing body of persons, distinct from the persons who may from time to time be the trustees, legislation of a Member State, such as that at issue in the main proceedings, which provides for the taxation of unrealised gains in value of assets held in trust when the majority of the trustees transfer their residence to another Member State, but fails to permit payment of the tax payable to be deferred.[4]

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The trust as 'another legal person'

Nevertheless, the CJEU's ruling does provide interesting insights in the matter at hand. First, we will focus on the question whether trusts can be seen as 'other legal persons' within the meaning of article 54 TFEU.

When answering the question whether trusts can fall under the scope of the provisions relating to the freedom of establishment, the CJEU noted that trusts can be, at least for the purposes of this case, considered to be 'other legal persons' within the meaning of the second paragraph of Article 54 TFEU. The CJEU took a more definite stance on this matter than Advocate-General ('AG') Kokott did in her Opinion delivered in December 2016. In the Opinion, the AG stated that it should be left up to the national court to decide whether the trust could be seen as 'another legal person' within the sense of Article 54 TFEU.[5] Nevertheless, the AG took note of the Court of Justice of the European Free Trade Association States' ('EFTA Court) ruling in the Olsen-case (which we discussed in depth in a previous article[6]) and seemed to have some sympathy for the position that trusts could indeed be seen as an autonomies entities, given the English tax law rules in question. The AG concluded:

> 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.[7]

3. *Panayi Trust* (n 1) s 22.
4. *Panayi Trust* (n 1) s 62.
5. Opinion of Advocate-General Kokott delivered on 21 December 2016, C-646/15, *Trustees of the P Panayi Accumulation & Maintenance Settlements v Commissioners for Her Majesty's Revenue and Customs*, *Jur.* 2017, s 35.
6. See: N Appermont, 'Adrift Between Scylla and Charybdis? The Trust Caught between a Civil Law Rock and a Fiscal Hard Place' (2016) 22 T&T 1134–64. See also: P Panico, *International Trust Laws* (2nd edn, OUP 2017) 795–98.
7. Kokott Opinion (n 5) s 34.

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In contrast with the AG's Opinion, the CJEU ruled that:

> an entity such as a trust which, under national law, possesses rights and obligations that enable it to act in its own right, and which actually carries on an economic activity, may rely on freedom of establishment.

Now, apart from the question what constitutes an 'economic activity,' the CJEU's ruling makes it clear that the Court considers the trust to be an autonomous entity, which, under national law, possesses rights and obligations that enable it to act in its own right within the legal order concerned.

It is however, very interesting to note that the CJEU based its conclusion mainly on the English tax law treatment of the trust/trustees, rather than focusing on the underlying civil law and/or trust law-characteristics of the trust:

> Accordingly, it appears that the legislation at issue in the main proceedings, for the purposes of that legislation, holds the trustees as a body, as a unit and not individually, to be liable to pay the tax due on the unrealised gains in value of assets of the trust when that trust is deemed to have transferred its place of management to a Member State other than the United Kingdom. Such a transfer occurs when a majority of the trustees are no longer resident in the United Kingdom. The activity of the trustees in relation to the trust property and the management of its assets are therefore inextricably linked to the trust itself and, therefore, the trust and its trustees constitute an indivisible whole. That being the case, such a trust should be considered to be an entity which, under national law, possesses rights and obligations that enable it to act as such within the legal order concerned.[8]

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This ties in with the observation we already made above, regarding the narrow manner in which the CJEU is approaching the matter at hand. A close reading of the Court's judgment actually reveals that the CJEU is not ruling on the question whether trusts can be seen as 'other legal persons' within the sense of Article 54 TFEU at all, but only in the specific (UK) tax-related context which relies on a legal fiction.

To be fair, the CJEU did also note that the trust assets constitute 'a separate fund',[9] which is distinct from the property of the trustees, and that the trustees have the right and the obligation to manage those assets and to dispose of them in accordance with the conditions laid down in the trust instrument and in national law. However, according to English law, the trustees hold the legal title of the trust assets as joint tenants, meaning that the trustees are the 'titulars' of the trust assets. In and of itself, the foregoing does not, in our view, suffice to conclude that the trust is indeed a separate 'entity'.[10] All in all, a reading of the judgment reveals that the underlying tax law-considerations seem to have had a much more decisive influence.

Therefore, on the basis of this judgment alone, it remains an open question whether trusts can, in the abstract, be regarded as 'entities', capable of relying the freedom of establishment, given the narrow approach taken by the CJEU. However, given the fact that (i) the EFTA Court reached the same conclusion without taking such a narrow approach, (ii) the

8. *Panayi Trust* (n 1) s 32.
9. *Panayi Trust* (n 1) s 30.
10. Appermont (n 6) 1138–44.

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concept of 'other legal persons' within the meaning of Article 54 TFEU should be given an autonomous interpretation, and (iii) exceptions to the freedom of establishment should be interpreted restrictively, it can reasonably be expected that trusts can indeed be considered to be 'entities' which can come under the scope of the freedom of establishment.

Therefore, on the basis of this judgment alone, it remains an open question whether trusts can, in the abstract, be regarded as 'entities', capable of relying the freedom of establishment, given the narrow approach taken by the CJEU

Whether the trust can rely on the freedom of establishment

It is interesting to note that the CJEU does not delve very deep into the question whether the trust in question actually pursued a 'genuine economic activity'. In order for any person or entity to fall under the material scope of the freedom of establishment, it is required that a person or entity who is considered to be 'a national' of an EU- or an EEA-Member State, pursues an 'economic activity' through a fixed establishment, for an indefinite period in another member state.[11] In a previous article, we concluded that it will generally not be self-evident to conclude that the activities for which a trust-structure normally lends itself best, will qualify as 'genuine economic activities' as this concept is understood in the case law of the CJEU.[12] One of the main reasons for this finding was that the exact content of the concept of 'genuine economic activities' can only be fragmentarily be deduced from the existing case law of the CJEU. To make matters even worse, the concept of 'genuine economic activities' figures in different branches of EU law. Therefore, the question rises whether this concept retains its meaning when transposed from one area of EU law to another.

Curiously, in her Opinion, AG Kokott concluded that the meaning given to this concept in VAT law cannot, *ipso facto*, be transposed to a context where the freedom of establishment is at stake. The AG concluded that:

> [t]his is true not at least because the fundamental freedoms, in eliminating obstacles in the internal market, and VAT law, in taxing the end consumer, pursue different objectives.[13]

Therefore, the AG indeed seems to confirm our opinion that while the concept of 'genuine economic activities' may be unitary in its core, it is also ultimately malleable to suit the specific area of law in which it is applied.[14] The AG concludes that an entity which actively manages assets may rely on the freedom of establishment where its profits are taxed on the ground that its registered office has been transferred to another Member State.[15] From the Opinion, it does become clear that the AG does not purport to answer the question of whether the trustees are actually engaging in genuine economic activities in Cyprus herself. In the AG's opinion, this constitutes a matter to be ascertained by the referring court. It is made clear by the AG, however, that the freedom of establishment does presuppose that a genuine economic activity is being pursued.[16]

However, the CJEU seemingly does not delve into these questions in any meaningful manner. The Court simply refers to the *National Grid Indus*-case[17] where it concluded that when a company incorporated under the law of a Member State transfers its seat of effective management to another Member State, without that transfer affecting its status of a company of the former Member State, it may rely on the freedom

11. 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. See also: Kokott Opinion (n 5) s 40.
12. Appermont (n 6) 1154–58.
13. Kokott Opinion (n 5) s 39.
14. Appermont (n 6) 1155.
15. Kokott Opinion (n 5) ss 38–39.
16. Kokott Opinion (n 5) ss 40–42.
17. CJEU, 29 November 2011, C-372/10, *National Grid Indus BV*, *Jur.* 2011, I-12273.

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of establishment for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State on the occasion of that transfer of the seat of effective management. The Court further observes that the transfer of the place of residence of the trustees has, in essence, the same effect. Therefore, the Court concludes that its case law relating to the taxation of gains in the value of assets of a company or firm on the occasion of the transfer of its seat of effective management, also applies in a situation where a Member State taxes capital gains of assets held in trust by reason of the transfer of the 'place of effective management of the trust' to another Member State.

By simply referring to its existing case law and by applying it in an analogous manner, the Court effectively skirts around the difficult question of establishing whether the trust in question was, in effect, carrying on genuine economic activities. Again, the CJEU did so on the basis of the (apparent) comparability between the facts underlying the *Grid Indus*-case and the *Panayi*-case. The narrow approach taken by the Court again seems to imply that it is not possible to deduce many general rules from Court's judgment in itself. The fact that the CJEU did not conduct a more thorough investigation on the question of whether the trust engaged in genuine economic activities seemingly cannot be extrapolated to future cases. The Court restricts its analysis and its findings to the case where 'a Member State taxes gains in the value of assets held in trust by reason of the transfer of the place of management to another Member State'.[18] The analogy that exists between these facts and the Court's settled case law was enough for the Court to decide that the freedom of establishment was applicable to the case at hand. However, the other side of the coin is that the judgment does not provide much guidance for other trust-related cases where the freedom of establishment may be relevant.

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Whether there is a restriction on the freedom of establishment and whether such a restriction can be justified

Once it has been determined that the trust can come under the personal scope of the freedom of establishment and that the freedom is establishment is applicable in the case at hand, the question of whether there exists a restriction of said freedom becomes relatively easy to answer. It is settled case law that all measures which prohibit, impede, or render less attractive the exercise of the freedom of establishment must be considered as restrictions on that freedom.[19] The Court noted that the taxation of unrealized capital gains in the value of the assets held on trust would not occur when the trust's place of effective management would have been relocated within the national territory of the UK. Should the newly appointed trustees have been resident in the UK, the unrealized capital gain would not have been liable to tax. This difference in treatment therefore constitutes a restriction on the freedom of establishment.[20]

The Court noted that the taxation of unrealized capital gains in the value of the assets held on trust would not occur when the trust's place of effective management would have been relocated within the national territory of the UK

The only question remaining then was whether the restriction at hand could be justified by overriding

18. *Panayi Trust* (n 1) s 39.
19. Both the CJEU and the AG refer to: CJEU, 21 May 2015, C-657/13, *Verder LabTec*, *Jur.* 2015, ss 32–34. See also: CJEU, 16 April 2015, C-591/13, *Commission v Germany*, *Jur.* 2015, s 56; CJEU, 18 July 2013, C-261/11, *Commission v Denmark*, *Jur.* 2013, ss 26–27; *National Grid Indus* (n 17) s 35.
20. *Panayi Trust* (n 1) s 47.

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reasons in the public interest that are recognized by EU law, whether such a restriction is appropriate for ensuring the attainment of the objective pursuant, and whether the restriction goes beyond what is necessary to attain that objective.

The only question remaining then was whether the restriction at hand could be justified by overriding reasons in the public interest that are recognized by EU law, whether such a restriction is appropriate for ensuring the attainment of the objective pursuant, and whether the restriction goes beyond what is necessary to attain that objective

In the case at hand, the UK argued that the capital gains tax constituted a necessary restriction on the freedom of establishment with the goal of preserving a balanced allocation of taxing powers between the Member States of the Union. Such is indeed a legitimate objective, recognized by the Court.[21] In effect, the CJEU noted that the transfer of the trust's place of effective management from one Member States to another should not imply that the Member State of origin loses its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer took place.[22] Moreover, the Court also accepted that taxing unrealized capital gains on the occasion of transferring the trust's place of effective management to another Member State is a suitable means of preserving the allocation of taxation powers between the Member States, since the former Member State loses its power to tax those capital gains following the transfer. The Panayi trustees had argued that, even if there would not have been an immediate taxation of the relevant capital gains, the UK would not have been prevented from taxing those gains because, under Section 87 TCGA, capital gains made by non-resident trustees which are attributed to resident beneficiaries, in the form of capital payments, could be taxed as gains accruing to those beneficiaries. However, both the AG and the CJEU rejected this argument.[23] In such a case, the question of whether effective taxation of the relevant capital gains could take place, would be wholly dependent on a decision made by the trustees and/or beneficiaries. If no capital payments are made of or if the beneficiaries themselves should decide to move, no taxation would occur. Any form of effective taxation would then be the result of decisions made by the trustees and/or beneficiaries, and not the UK.

Moreover, the Court also accepted that taxing unrealized capital gains on the occasion of transferring the trust's place of effective management to another Member State is a suitable means of preserving the allocation of taxation powers between the Member States, since the former Member State loses its power to tax those capital gains following the transfer

The foregoing does not mean, however, that the Court concluded that the capital gains tax was also a proportional measure. In the case at hand, HMRC argued that, due to the specific circumstances of the case, the tax measure was indeed proportionate. It did not dispute the fact that the tax should be paid immediately, that UK tax law did not provide for the possibility of paying the tax by installments and that UK tax law did not provide for the possibility to take into account a subsequent decrease in the value of the assets. However, HMRC based its argument on the special circumstance that the taxable person realized the value of the assets by selling them before the due date of the payment of the tax debt. HMRC maintained that the profit from that sale was sufficient to pay the tax debt that which arose on account of the previous deemed disposal and reacquisition. Nevertheless, it is also settled case law that the immediate collection of

21. See eg: CJEU, 13 December 2005, C446/03, *Marks & Spencer plc v Her Majesty's Inspector of Taxes*, *Jur.* 2005, s 35; CJEU, 12 September 2006, C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, *Jur.* 2006, s 47; CJEU, 13 March 2007, C-524/04, *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue*, *Jur.* 2007, s 64, *Panayi Trust* (n 1) 51.
See also: M Lang and others (eds), *CJEU – Recent Developments in Direct Taxation 2016* (Linde 2017) 205.
22. *Panayi Trust* (n 1) s 52.
23. *Panayi trust* (n 1) s 55; Kokott Opinion (n 5) s 50.

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such a tax, without the possibility of deferred payment (including, if applicable, interest), is considered to be a disproportionate measure.[24] Interestingly, the EU's new and much-discussed 'Tax Avoidance Directive', which should be transposed into national law by 31 December 2018, also contains the obligation for Member States to introduce an exit tax in their corporate tax legislation, while indeed allowing for the possibility to defer the payment of the tax concerned.[25] The Court therefore concluded that the factual circumstances of the case could not call into question its finding that the legislation at issue goes beyond what is necessary to achieve the objective of preserving the allocation of powers of taxation between the Member States. The UK tax legislation at issue therefore constitutes an unjustified restriction on the freedom of establishment.

Lost in translation? Some additional reflections on the Payani Trust judgment, including the upcoming rules on Belgian insolvency law

Apart from specifics of the Panayi case, the different language versions of the CJEU's judgment make for interesting reading. In effect, the different language versions show how the CJEU employs functional terminology in each language version, which can lead to different interpretations of the legal concepts employed, depending on the language version consulted. For example, in the English language version, the Court makes the innocuous statement that:

> Assets compromised in the trust are not part of the property of the trustee. The trustee must deal with those assets as separate property, distinct from his own property.

However, in the French language version, this becomes:

> Ainsi, les biens qui constituent le trust ne rentrent pas dans le patrimoine du trustee. Ce dernier doit gérer ces biens en tant que patrimoine séparé, distinct de son propre patrimoine.

In German:

> So wird das Vermögen, das den Trust bildet, nicht Teil des Vermögens des Treuhänders. Der Treuhänder muss dieses Vermögen als Sondervermögen getrennt von seinem eigenen Vermögen verwalten.

This is interesting, because the different language versions employ different civil law building blocks, derived from their own legal orders, to explain an English trust relationship. Even though it does not make much sense to try and explain an English legal relationship, which has deep roots in equity and the common law in terms of concepts unknown in another legal system this is exactly what the different language versions of the CJEU judgment are trying to do. The English common law never developed a concept of 'patrimony' like civil law-systems have.[26] Therefore, it does not make sense to describe an English trust as a 'separate patrimony'. To make matters even worse, an English trust cannot, in fact, be regarded as a 'separate patrimony' or as a '*Sondervermögen*'.[27] The main reason for this finding

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24. *Verder LabTec* (n 19); *National Grid Indus* (n 17); CJEU, 21 Januari 2013, C-301/11, *Commission v Netherlands*, *Jur.* 2011; CJEU, 11 March 2004, C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de L'Économie, des Finances et de l'Industrie*, *Jur.* 2004; CJEU, 7 September 2006, C-470/04, *N v Inspecteur van de Belastingdienst Oost/Kantoor Almelo*, *Jur.* 2006.

25. See art 5, para 2 of the 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.

26. P Matthews, 'Square Peg, Round Hole? Patrimony and the Common Law Trust' in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press 2015) 69; A Popocivi and L Smith, 'Lepaulle Appropriated' in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press 2015) 16; D Clarry, 'Fiduciary Ownership and Trusts in a Comparative Perspective' (2014) 64 Int Comp L Quart 907; P Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in L Smith (ed), *Worlds of the Trust* (CUP 2013) 327; A Popovici, 'Trust in Quebec and Czech Law: Autonomous Patrimonies? (2016) 24 Eur Rev Private L 936.

27. L Smith, 'Trust and Patrimony' (2008) 38 Revue Générale de Droit 379–403.

is that, while a separate patrimony consists of both assets and liabilities attributed to that patrimony, a trust consists solely of assets. All liabilities are considered to be personal liabilities of the trustee.[28] A common law trust therefore entails a partitioning of assets, but not a corresponding partitioning of liabilities. Only assets can be held on trust and never liabilities. Of course, when acting *intra vires*, the trustee does enjoy the power to pay creditors with funds deriving from the trust assets or to take any such funds to repay himself.[29] However, this does not mean that an English trust can be regarded, according to English law, as a separate patrimony or *Sondervermögen*. Therefore, any lawyer consulting the judgment in her or his own language, should be careful not to draw the wrong conclusions about the essence of a trust relationship under English law.

Even though the trust, as far as English law is concerned, cannot be regarded as a separate patrimony or as an 'entity,' several civil law systems seem to do just that. In itself, this is not surprising, as civil law systems cannot reason outside of legal paradigms such as the patrimony concept. For civil lawyers, it should come as no surprise that influential scholars such as ZENATI go so far as affording transcendental value to the concept of patrimony.[30] It is also not uncommon for mixed jurisdictions and civil law jurisdictions which know or introduce a trust or a similar legal institution into their own legal system, to opt for a structure characterized by the fact that it entails a form of separate patrimony.[31] Moreover, Article 2 of the (authentic) French language version of the 1985 Hague Trust Convention exemplifies this as it requires the parties to the convention to recognize that 'les biens de trust constituent une masse distincte'. These exact wordings were retained in Article 122 of the 2004 Belgian Private International Law Code. The Dutch language version of Article 122 states that the trust assets constitute an 'afgescheiden vermogen', which translates as a separate patrimony.

In effect, by considering that a trust should be understood as a separate patrimony, civil law jurisdictions afford strong entity-like aspects to a common law trust. This is quite clearly the case in Swiss insolvency legislation, which expressly allows for a foreign trust to be subjected to bankruptcy proceedings.[32] This means that a common law trust can be subjected, in Switzerland, to a collective and general form of debt enforcement, the proceedings remaining limited to the trust 'patrimony'. This implies that bankruptcy proceedings should be brought against the trustee in a representative capacity. The personal assets of the trustee remain outside of these collective proceedings.[33] Swiss bankruptcy proceedings can be launched before a Swiss court if it has jurisdiction. According to the Swiss insolvency law, proceedings can be brought at the trust's seat.[34] Interestingly, the Swiss insolvency law expressly refers to Swiss private international law to

28. Smith (n 27) 387; B Shah, 'Trustee's Indemnity and Creditor's Rights' (2013) 19 T&T 79; A Peyrot, *Le trust de common law et l'exécution forcée en Suisse* (Schulthess 2011) 117–31; Appermont (n 6) 1139–40.

29. N Le Poidevin, 'Going Bust: Insolvency and Trusts' (2010) 16 T&T 306.

30. F Zenati, 'Mise en perspective et perspectives de la théorie du patrimoine' (2003) Revue trimestrielle de droit civil 667.

31. For the case of the French *fiducie*, see: F Barrière, 'The Frenc *fiducie*, or the Chaotic Awakening of a Sleeping Beauty' in L Smith (ed), *Re-imagining the Trust* (CUP 2012) 238–41; B Mallet-Bricout, 'The Trustee: Mainspring or Only a Cog, in the French *Fiducie*?' in L Smith (ed), *Worlds of the Trust* (CUP 2013) 120–23; A Denizot, 'L'étonnant destin de la théorie du patrimoine' (2014) Revue trimestrielle de droit civil 547–66.

For the Scottish trust, see: G Gretton, 'Trusts without Equity' (2000) 49 Int Comp L Quar 619–20; KGC Reid, 'Patrimony Not Equity: the Trust in Scotland' (2000) 8 Eur Rev Private L 427–37; R Valsan, 'The Trust as Patrimony: An Introduction' in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press 2015) 7. See also: *Akers and others v Samba Financial Group* [2017] UKSC 6, s 35.

For the Romanian *fiducia*, see: D Moreanu, 'The trust under Romanian Law. Form of Patrimony Split for Natural and Legal Persons' (2015) 8 Persp Bus L J 79–87.

For the Liechtenstein trust, see: M Raczynska, 'Parallels between Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund' in L Smith (ed), *Worlds of the Trust* (CUP 2013) 454. However, see: P Matthews, 'Square Peg. Round Hole? Patrimony and the Common Law Trust' in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press 2015) 80.

For the Czech Republic, see: A Popovici, 'Trust in Quebec and Czech Law: Autonomous Patrimonies?' (2016) 24 Eur Rev Private L 929–50; I Sandór, 'Different Types of Trust from an Ownership Aspect' (2016) 24 Eur Rev Private L 1212–13; W Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24 Eur Rev Private L 969–72.

32. See art 284a, para 3 Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et de la faillite.

33. See further on the Swiss insolvency legislation and the possibility of bankruptcy proceedings being brought against the trust: Panico (n 6) 424–27; A Peyrot, 'How to Square the Circle? The Challenge Met by Swiss Insolvency Law in Dealing with Common Law Trusts' in L Smith (ed), *Worlds of the Trust* (CUP 2013) 62–64; Peyrot (n 27) 173–80.

34. See art 284a, para 2 Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et de la faillite.

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determine where the 'trust's seat' may be located.[35] The 'trust's seat' is in principle understood ('deemed to be') as the place of administration of the trust assets as specified in writing in the trust instrument or in any other form that can be evidenced in writing. In the absence of such a specification, the trust's seat is where the trust assets are effectively managed.[36]

It is very interesting to note that in the new Belgian insolvency law, which was published in the Official Gazette on 11 September 2017[37] arguably allows for Belgian bankruptcy proceedings to be brought against (some) foreign trusts. Under the new law, which will enter into force in May 2018, different types of organizational forms without legal personality will be able to be declared bankrupt. This is an important novelty of the new Belgian law. In essence, any natural person who is engaged in economic activities on a self-employed basis, any legal person and organizational forms without legal personal personality will fall, in principle, under the personal scope of the new law. However, organizational forms without legal personality which do not aim to engage in profit distribution to their members and which do not, in fact, distribute profits to their members or persons with a decisive influence on the management of the organizational form, remain outside the scope of the new law.[38] Interestingly, the explanatory memorandum accompanying the bill of the new law mentions that foreign organizational forms without legal personality are included in this definition:

> D'autres organisations sans personnalité juridique peuvent être des formes étrangères ayant leurs propres droits et obligations et participant en tant que telles au commerce juridique. Il peut s'agir, par exemple, d'un trust ou d'un commerce à patrimoine séparé et/ou à responsabilité limitée, mais sans personnalité juridique. Si une telle forme a, par exemple, le centre de ses principaux intérêts en Belgique, il est justifié qu'elle soit soumise au droit d'insolvabilité belge.[39]

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The former passage may be unofficially be translated as follows:

> Other organisational forms without legal personality can be foreign organisational forms which are the bearer of their own rights and obligations and participate as such in legal life. Examples of these are trusts or *fonds de commerce* with a separate patrimony and/or limited liability, but lacking legal personality. If such an organisational form has its centre of main interests in Belgium, it is justified to subject this organisational form to Belgian insolvency law.

Note that the 'connecting factor' in the new Belgian law corresponds to the COMI-concept, which also employed by the European Insolvency Regulation.[40] Unfortunately, neither instrument expressly indicates how a trust's COMI should be determined. However, the preamble of the Insolvency Regulation does include a rebuttable presumption that a company's COMI is located on the place where the company has its registered office or its principal place of business. However, in the case where the actual central place of administration is located in another Member State, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other

35. To this effect, art 284a, para 2 of the Swiss insolvency law refers to art 21, para 3 of the Swiss Loi fédérale du 18 décembre 1987 sur le droit international privé.
36. P Panico (n 6) 426; Peyrot (n 27) 167–68.
37. Loi de 11 août 2017 portant insertion du Livre XX 'Insolvabilité des entreprises', dans le Code de droit économique, et portant insertion des définitions propres au Livre XX, et des dispositions d'application au Livre XX, dans le Livre I du Code de droit économique, *Moniteur belge* 11 September 2017, 83100.
38. See art 3 of the new insolvency law.
39. Projet de loi portant insertion du Livre XX 'Insolvabilité des entreprises', dans le Code de droit économique, et portant insertion des définitions propres au Livre XX, et des dispositions d'application au Livre XX, dans le Livre I du Code de droit économique, Chamber of Representatives, 2016–17, nr 54-2407/011, 29.
40. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

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Member State, the COMI will be situated in that other Member State. The Belgian law defines the centre of main interests as 'the place where the debtor usually administers his affairs and which is ascertainable by third parties'.[41] It remains to be seen whether these principles can or should be extended to (business) trusts.

The fact remains that none of these definitions are written to specifically suit trusts. For example, in the case of a common law trust, it is clear that 'the debtor' in question will normally be the trustee, and not 'the trust'. Moreover, it *prima facie* not very clear which trust can be brought under the personal scope of the new Belgian law. Can beneficiaries who receive distributions be considered as 'members' of the trust? On first sight, the inclusion of foreign trusts under the new Belgian insolvency law seems like forcing a square peg in a round hole.

The fact remains that none of these definitions are written to specifically suit trusts

Finally, we can wonder about the actual effects of Belgian (of Swiss) bankruptcy judgment against a trust. Even in the (exceptional) case where 'a trust' is confronted with a multitude of creditors and a situation of excessive debt, it is not clear what will happen with the 'bankrupt trust' when the collective proceedings are to be closed. Normally, the entity in question will be liquidated and be removed from the legal order. Can this outcome be achieved in the case of a trust? Is it up to Belgian or Swiss insolvency law to decide? And if not, can the application of the law applicable to the trust lead to the same result? Moreover, what should happen is trust assets are situated in foreign (common law) jurisdictions? Common law jurisdictions normally do not allow for the bankruptcy of trusts, precisely because trusts are not considered to be entities and do not have liabilities attributed to them as such. These principles are illustrated by a case decided by the Jersey Royal Court in 2015.[42] In this case, the Jersey Royal Court effectively held that a trust as such cannot be 'insolvent', because it is not a legal entity. According to the Court, a trust can only be 'insolvent', when the trustees are not able to satisfy the liabilities incurred in their 'capacity' as trustees out of the trust fund. It remains to be seen whether any judgment secured against a 'bankrupt' trust can and will be recognized in common law jurisdictions in the eventuality that certain trust assets are located in such jurisdictions.

We can conclude by pointing to the fact that these problems are reminiscent of the so-called 'hybrid mismatches', which are prevalent in international tax law.[43] Hybrid mismatches in international tax law occur, *inter alia*, when different jurisdictions characterize entities in different manners for tax purposes (eg tax transparent v non-tax transparent).[44] This may lead to cases of double (non-)taxation. In the case of trusts, one could argue we may be dealing with a similar problem when certain jurisdictions consider a common law trust as an entity which can be declared bankrupt, whereas other jurisdictions do not consider the trust to be a separate entity; 'a hybrid mismatch' in insolvency law, so to say.

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Conclusion

Even though the Payani Trust Case seems to have been decided by the European Court of Justice in a

41. See art 2 of the new insolvency law.
42. *Re Z Trust* [2015] JRC 196C.
43. These tax-related problems explain why the EU aims to introduce uniform rules on hybrid mismatches, both as regards between Member States and *vis-à-vis* third countries, see: See art 9 of the 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. See also: Council Directive EU (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.
44. For an overview and discussion of the relevant EU Directives, see: GK Fibbe and AJA Stevens, 'Hybrid Mismatches under the ATAD I and II' (2017) 26 EC Tax Rev 153–66.

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very narrow manner, the judgment allows the drawing of preliminary conclusions. First, it reaffirms the main principle underlying the EFTA Court's judgment in the Olsen-case, namely that trusts are, as far as European law in concerned, to be considered to be 'entities' or 'other legal persons' which can come under the personal scope of the freedom of establishment. Furthermore, the CJEU seems to have been quick to accept that the freedom of establishment was indeed applicable to the Payani Trust case, even though it did not expressly delve into the question on whether the relevant trust was engaging in 'genuine economic activities'. However, as the rephrasing of the preliminary question and the operative part of the judgment show, we should be cautious not to award a wider meaning to the judgment than it actually has. All in all, the question on which the CJEU ruled was phrased in a narrow manner and much of the answer hinged on the analogy between the facts underlying the Panayi case and the facts underlying the Grid Indus case. Finally, we argued that one should be equally cautious when consulting different language versions of the Panayi judgment, as the CJEU often employs a functional terminology, which can have misleading effects as to the way in which certain legal concepts can be understood. This, in turn, can have far-reaching effects, as the case of the Swiss and new Belgian insolvency laws show. In effect, by considering that common law trusts should be considered as entities (entailing a separate patrimony) which can be declared bankrupt, a sort of 'hybrid mismatch' may arise.

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