

## JUDGMENT OF THE COURT (First Chamber)

14 September 2017 ([\\*1](#))

(Reference for a preliminary ruling — Direct taxation — Freedom of establishment — Freedom to provide services — Free movement of capital — Trust — Trustees — Other legal persons — Meaning — Tax on gains in value of assets held in trust by reason of the trustees' place of residence for tax purposes being transferred to another Member State— Determination of the amount of tax due at the time of that transfer — Tax payable immediately — Justification — Proportionality)

In Case C-646/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber), made by decision of 30 November 2015, received at the Court on 3 December 2015, in the proceedings

**Trustees of the P Panayi Accumulation & Maintenance Settlements**

v

**Commissioners for Her Majesty's Revenue and Customs,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot, C.G. Fernlund (Rapporteur) and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: R. Schiano, administrator,

having regard to the written procedure and further to the hearing on 20 October 2016,

after considering the observations submitted on behalf of:

- The Trustees of the P Panayi Accumulation & Maintenance Settlements, by M. Lemos, Barrister, and P. Baker QC,
- the United Kingdom Government, by M. Holt, D. Robertson and S. Simmons, acting as Agents, and by R. Hill and J. Bremner, Barristers,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Norwegian Government, by K.B. Moen, K.E.B. Kloster and J.T. Kaasin, acting as Agents,
- the European Commission, by W. Roels and J. Samnadda, acting as Agents,
- the EFTA Surveillance Authority, by C. Zatschler, Ø. Bø and A. Steinarsdóttir, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016,

gives the following

Judgment

<sup>1</sup>This request for a preliminary ruling concerns the interpretation of Articles 49, 54, 56 and 63 TFEU.

<sup>2</sup>The request has been made in proceedings between the Trustees of the P Panayi Accumulation & Maintenance Settlements ('the Panayi trustees') and the Commissioners for Her Majesty's Revenue and Customs ('the tax authority') on the taxation of unrealised gains in value of the assets comprised in a trust on the transfer of its trustees' place of residence to a Member State other than the Member State of origin.

## **United Kingdom law**

### *Trusts*

<sup>3</sup>It is apparent from the documents submitted to the Court that, in common law jurisdictions, the concept of a 'trust' involves a triangular transaction, whereby the creator of the trust ('the settlor') transfers assets to a person, the *trustee*, who is required to deal with those assets in accordance with the instrument creating the trust ('the trust instrument') for the benefit of a third person, the beneficiary. Trusts established for the benefit of specific individuals are sometimes called *settlements*.

<sup>4</sup>The distinguishing feature of a trust is that ownership of the assets comprised in the trust is divided into legal ownership and economic ownership, the former held by the trustee, the latter held by the beneficiary.

<sup>5</sup>Although a trust is legally recognised and has legal effects, it has no separate legal personality and must act through the intermediary of its trustee. Assets comprised 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. The fundamental duty of the trustee is to comply with the conditions and obligations stipulated in the trust instrument and by the law in general.

### *Taxation of capital gains*

<sup>6</sup>Section 2(1) of the Taxation of Chargeable Gains Act 1992 ('TCGA'), in the version applicable at the material time, provides that a person is chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom or during which he is habitually resident in the United Kingdom.

<sup>7</sup>Under Section 69 TCGA, 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. That article further provides that 'that body shall be treated as being resident and [habitually] resident in the [United Kingdom] unless the general administration of the trusts is ordinarily carried on outside the [United Kingdom] and the trustees or the majority of them for the time being are not resident or [habitually] resident in the [United Kingdom]'.

<sup>8</sup>Section 80(1) to (4) TCGA provides:

### **'Trustees ceasing to be resident in [the United Kingdom]**

- (1) This section applies if the trustees of a settlement become at any time ("the relevant time") neither resident nor [habitually] resident in the United Kingdom.
- (2) The trustees shall be deemed for all purposes of this Act—

- (a) to have disposed of the defined assets immediately before the relevant time, and
  - (b) immediately to have reacquired them, at their market value at that time.
- (3) Subject to subsections (4) and (5) below, the defined assets are all assets constituting settled property of the settlement immediately before the relevant time.
- (4) If immediately after the relevant time—
- (a) the trustees carry on a trade in the United Kingdom through a branch or agency, and
  - (b) any assets are situated in the United Kingdom and either used in or for the purposes of the trade or used or held for the purposes of the branch or agency,
- the assets falling within paragraph (b) above shall not be defined assets.’

<sup>9</sup>It is stated in the request for a preliminary ruling that, under Section 87 TCGA, capital gains realised by trustees who are not resident or habitually resident in the United Kingdom are attributed to beneficiaries to the extent that the trustees make capital payments to the beneficiaries. That section provides that 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 the beneficiaries who receive capital payments from the trustees. Capital payments are broadly defined, so as to include the receipt of most benefits from the trust. If a beneficiary is resident and domiciled in the United Kingdom, he or she is liable to pay capital gains tax on the gains categorised as capital payments attributed to them.

<sup>10</sup>Further, Section 91 TCGA provides for an increase in the amount of tax if there is a delay between the realisation of the gains by the trustees and the receipt of capital payments by the beneficiary.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

<sup>11</sup>The four trusts (‘the Panayi trusts’) which are the subject of the main proceedings were created in 1992 by Mr Panico Panayi, a Cypriot national, for the benefit of his children and other family members. He transferred to those trusts 40% of the shares of Cambos Entreprises Limited, the holding company of the businesses established by him.

<sup>12</sup>It is apparent from the relevant trust instruments that neither Mr Panayi nor Mrs Panayi, in the former’s lifetime, may be beneficiaries. However, Mr Panayi retains the power, as a protector, to appoint new trustees or additional trustees. On the other hand, the beneficiaries of those trusts do not have such a right.

<sup>13</sup>When the Panayi trusts were created, Mr Panayi, his wife and their children resided in the United Kingdom. The initial trustees of the Panayi trusts were Mr Panayi and KSL Trustees Limited, a ‘trust company’ established in the United Kingdom. In 2003 Mrs Panayi was added as an additional trustee.

<sup>14</sup>Early in 2004, Mr and Mrs Panayi decided to leave the United Kingdom to return to Cyprus permanently. Before their departure, on 19 August 2004, they both resigned as trustees. As replacements, Mr Panayi appointed on the same date three new trustees, all resident in Cyprus. However, KSL Trustees Limited, a company resident in the United Kingdom, retained its position as a trustee until 14 December 2005. Accordingly, on 19 August 2004, the majority of the trustees of the Panayi trusts no longer resided in the United Kingdom.

<sup>15</sup>On 19 December 2005 the Panayi trustees sold the shares held in the Panayi trusts and reinvested the proceeds of that sale. On 31 January 2006 those trustees filed tax returns, including self-assessments, for the tax year 2004/2005, in respect of each of the Panayi trusts. An accompanying letter provided the tax authority with details of the change of Panayi trustees and the subsequent disposal of shares by those trustees.

<sup>16</sup>Because those returns did not include the relevant self-assessments to a liability under Section 80 TCGA, the tax authority opened enquiries. In September 2010 the tax authority issued a decision to the trustees, re-assessing tax on the basis that there was a charge to tax under Section 80. The tax authority considered that a charge to tax was triggered by the appointment, on 19 August 2004, of new trustees, since the majority of the Panayi trustees were no longer resident on that date in the United Kingdom and, consequently, the administration of the Panayi trusts was to be deemed to have moved to Cyprus in the 2004/2005 tax year. The deadline for accounting for that tax was therefore 31 January 2006.

<sup>17</sup>The Panayi trustees brought proceedings before the First-tier Tribunal (Tax Chamber), challenging the compatibility of the exit taxation and its immediate payment, as provided for by Section 80 TCGA, with the fundamental freedoms of movement under EU law.

<sup>18</sup>The tax authority, for its part, considers that, because of the status in law of a trust under the law of England & Wales, none of the freedoms of movement is applicable to this case. If any of those freedoms were to be held to be applicable, the tax authority accepts that the immediate payment of the exit taxation would constitute a priori a restriction, but one that would however be justified and proportionate.

<sup>19</sup>The referring court states that if the trustees had retained their status as resident in the United Kingdom, the sale effected by them on 19 December 2005 of the shares held in trust would have triggered a charge to tax on the gains in value of those shares. That tax would have become payable on 31 January 2007.

<sup>20</sup>The referring court states that the Court, in cases relating to exit charges, has not had occasion to examine the issue of whether a trust, its settlor, its trustees or its beneficiaries could rely on one or other of the fundamental freedoms of movement. If any of those freedoms were to be applicable, that court questions whether a restriction may be justified by the overriding reason in the public interest linked to the balanced allocation of powers of taxation between the Member States and, if so, whether that restriction is proportionate.

<sup>21</sup>In those circumstances, the First-tier Tribunal (Tax Chamber) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘<sup>(1)</sup>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 [TCGA] 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 [habitually] resident in the Member State?’

<sup>(2)</sup>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 [habitually] 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?

### **Consideration of the questions referred**

<sup>22</sup>By its questions, which can be examined together, the referring court seeks to ascertain, in essence, whether 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, and fails to permit deferred payment of the tax thus payable.

<sup>23</sup>In order to answer the questions referred, it is necessary, first, to determine whether trusts, such as those in the main proceedings, fall within the scope of freedom of establishment and, if so, whether that freedom is applicable to a situation such as that at issue in the main proceedings.

### *The application to the trusts of freedom of establishment*

<sup>24</sup>Article 49 TFEU requires the elimination of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Under the first paragraph of Article 54 TFEU, 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 are, for the purposes of the Treaty provisions relating to freedom of establishment, to be treated in the same way as natural persons who are nationals of Member States.

<sup>25</sup>Under the second paragraph 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, save for those which are non-profit-making.

<sup>26</sup>In that regard, it is clear that freedom of establishment, which is one of the fundamental provisions of EU law (judgment of 24 May 2011, *Commission v Belgium*, [C-47/08](#), [EU:C:2011:334](#), paragraph [77](#) and the case-law cited), which contributes

to the objective of completing the internal market (see, to that effect, judgment of 13 December 2005, *SEVIC Systems*, [C-411/03](#), [EU:C:2005:762](#), paragraph 19), is a very broad concept.

<sup>27</sup>It accordingly follows from the Court's case-law that, first, exceptions to that freedom must be interpreted strictly (see, to that effect, judgments of 21 June 1974, *Reyners*, [2/74](#), [EU:C:1974:68](#), paragraphs 43 to 55, and of 1 February 2017, *Commission v Hungary*, [C-392/15](#), [EU:C:2017:73](#), paragraph 106 and the case-law cited), second, while the provisions of the Treaty relating to that freedom are aimed at ensuring the benefit of national treatment in the host Member 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 in accordance with its legislation (judgments of 27 September 1988, *Daily Mail and General Trust*, [81/87](#), [EU:C:1988:456](#), paragraph 16, and of 21 May 2015, *Verder LabTec*, [C-657/13](#), [EU:C:2015:331](#), paragraph 33 and the case-law cited) and, third, the concept of establishment within the meaning of the Treaty is a very broad one, allowing an EU national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Union (see, to that effect, judgment of 30 November 1995, *Gebhard*, [C-55/94](#), [EU:C:1995:411](#), paragraph 25).

<sup>28</sup>In this case, it is common ground, on the one hand, that the trusts in the main proceedings have been established in accordance with United Kingdom law and, on the other, that they are not, under that law, deemed to be companies or firms constituted under civil or commercial law, including cooperative societies. It is necessary, therefore, to determine whether those trusts can be covered by the concept of 'other legal persons', which are governed by public or private law and which are profit-making, within the meaning of the second paragraph of Article 54 TFEU.

<sup>29</sup>In that regard, as the Advocate General stated, in essence, in points 33 and 34 of her Opinion, that concept of 'other legal persons' extends to an entity which, under national law, possesses rights and obligations that enable it to act in its own right within the legal order concerned, notwithstanding the absence of a particular legal form, and which is profit-making.

<sup>30</sup>In this case, it is apparent from the documents submitted to the Court that, in the first place, under the national law concerned, the assets placed in trust form a separate fund of property, 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.

<sup>31</sup>In the second place, as stated in paragraphs 7 and 8 of this judgment, on the one hand, under Section 69 TCGA, the trustees are regarded under national law as a single and continuing body of persons, distinct from the persons who may from time to time be the trustees. Section 69 also provides that that body is to be treated as being resident or habitually resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or the majority of them are not resident or habitually resident in the United Kingdom. On the other hand, under Section 80 TCGA, when the trustees of a trust cease at any time to reside or habitually reside in the United Kingdom, they are deemed immediately before that time to have disposed of the assets comprised in the trust and to have immediately reacquired them at market value.

<sup>32</sup>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.

<sup>33</sup>As regards whether the trusts at issue in the main proceedings are profit-making, suffice it to state that it is clear from the documents submitted to the Court that those trusts have no charitable or social purpose and that they were created in order that the beneficiaries might enjoy the profits generated from the assets of those trusts.

<sup>34</sup>It follows 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.

<sup>35</sup>The question then arises whether that freedom is applicable in a situation, such as that at issue in the main proceedings, where the transfer of the trustees' place of residence to a Member State other than the United Kingdom is an event that triggers the taxation of the gains in value of the assets held in trust.

#### *The applicability of freedom of establishment*

<sup>36</sup>The Court has previously held that a company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status as a company of the former Member State, may rely on freedom 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 place of effective management (judgment of 29 November 2011, *National Grid Indus*, [C-371/10](#), [EU:C:2011:785](#), paragraph 33).

<sup>37</sup>In the main proceedings, it is clear, in the first place, that, since the trustees have the right and the obligation to manage the assets held in trust and that the event which triggers the taxation of gains in the value of the assets of a trust is the transfer of the place of residence of those trustees outside the United Kingdom, that transfer of place of residence also entails, under the national law, a transfer of the place of management of that trust.

<sup>38</sup>In the second place, it is apparent from the documents submitted to Court that the transfer of the place of management in the main proceedings does not appear, under the national law concerned, to have affected the status as trusts of the trusts at issue in the main proceedings.

<sup>39</sup>That being the case, the Court's 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 the place of effective management of that company or firm to another Member State also applies in a situation where a Member State taxes gains in the value of assets held in trust by reason of the transfer of the place of management of the trust to another Member State. It follows that freedom of establishment is applicable to a situation such as that at issue in the main proceedings.

<sup>40</sup>Consequently, it is necessary to determine whether legislation of a Member State, such as that at issue in the main proceedings, which, in the event that the place of management of a trust is transferred to another Member State, provides, first, for the taxation of gains in value of assets held in trust on the occasion of that transfer and, second, for the immediate payment of the tax payable in relation to those gains, constitutes a restriction on that freedom.

#### *Whether there is a restriction on freedom of establishment*

- <sup>41</sup>Under settled case-law, Article 49 TFEU requires the elimination of restrictions on freedom of establishment. That freedom includes, for companies established in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency (judgment of 21 May 2015, *Verder LabTec*, [C-657/13](#), [EU:C:2015:331](#), paragraph [32](#) and the case-law cited).
- <sup>42</sup>As stated above in paragraph 27 of the present judgment, even though, according to their wording, the provisions of the FEU Treaty concerning freedom of establishment are aimed at ensuring 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.
- <sup>43</sup>All measures which prohibit, impede or render less attractive the exercise of the freedom must be considered to be restrictions on freedom of establishment (judgment of 21 May 2015, *Verder LabTec*, [C-657/13](#), [EU:C:2015:331](#), paragraph [34](#) and the case-law cited).
- <sup>44</sup>In this case, it is apparent from the documents submitted to the Court that it is solely in the event of a transfer of the place of management of a trust to a Member State other than the United Kingdom that the legislation at issue in the main proceedings provides, first, for the taxation of unrealised gains in value of the assets held in trust on the occasion of that transfer and, second, for the immediate payment of the tax payable in relation to those gains. In contrast, that does not apply when there is a similar transfer within the national territory.
- <sup>45</sup>It follows that, as is acknowledged by the United Kingdom government, the unrealised capital gains at issue in the main proceedings would not have been liable to taxation in the United Kingdom if the newly appointed trustees had been resident in that Member State.
- <sup>46</sup>Consequently, it is clear that the effect of the legislation at issue in the main proceedings is that a trust which retains its place of management in the United Kingdom and a trust whose place of management is transferred to another Member State, because the place of residence of its new trustees is in that other Member State, are treated differently.
- <sup>47</sup>That difference in treatment is liable, first, to discourage the trustees, who manage the trust, from transferring the place of management of the trust to another Member State and, second, to deter the settlor, in so far as the trust instrument permits, from appointing new non-resident trustees. That difference constitutes, therefore, a restriction on freedom of establishment.
- <sup>48</sup>That restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by overriding reasons in the public interest that are recognised by EU law. It is further necessary, in such a case, that the restriction is appropriate for ensuring the attainment of the objective that it pursues and that it does not go beyond what is necessary to attain it (judgment of 17 December 2015, *Timac Agro Deutschland*, [C-388/14](#), [EU:C:2015:829](#), paragraphs [26](#) and [29](#) and the case-law cited).
- <sup>49</sup>As regards, first, the issue of whether the situations concerned are comparable, suffice it to state that, with respect to the legislation of a Member State that is designed to tax capital gains accruing within its territory, the situation of a trust which transfers its place of management to another Member State is, in relation to the taxation of gains in the value of trust assets which accrued in the former Member State prior to that transfer, comparable to that of a trust which retains its place of management in the former Member State (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, [C-371/10](#), [EU:C:2011:785](#), paragraph [38](#)).



<sup>50</sup>Second, the United Kingdom considers that such a restriction is justified by the public interest reason linked to the preservation of a balanced allocation of powers of taxation between the Member States.

<sup>51</sup>In that context, it should be borne in mind that preservation of a balanced allocation of powers of taxation between Member States is a legitimate objective recognised by the Court. Further, in the absence of any unifying or harmonising measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, with a view to eliminating double taxation (judgment of 21 May 2015, *Verder LabTec*, [C-657/13](#), [EU:C:2015:331](#), paragraph [42](#) and the case-law cited).

<sup>52</sup>In this case, it follows from the Court's case-law that the transfer of the place of management of a trust from one Member State to another Member State 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 that transfer. In that regard, the Court has held that, in accordance with the principle of fiscal territoriality linked to a temporal consideration, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when that taxpayer leaves the country. Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on within its territory, and can therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States (judgment of 29 November 2011, *National Grid Indus*, [C-371/10](#), [EU:C:2011:785](#), paragraph [46](#) and the case-law cited).

<sup>53</sup>However, the Court has made it clear that the objective of preserving the allocation of powers of taxation between the Member States can justify a national measure only where the Member State in whose territory income was generated is actually prevented from exercising its power of taxation in respect of such income (judgment of 23 January 2014, *DMC*, [C-164/12](#), [EU:C:2014:20](#), paragraph [56](#)).

<sup>54</sup>In the main proceedings, however, the Panayi trustees claim that, even if there were no immediate taxation of the capital gains concerned on the occasion of the transfer of the place of management of the trusts at issue in the main proceedings, the United Kingdom would not have been prevented from taxing those gains in the value of assets held in the Panayi trusts, because, under Section 87 TCGA, capital gains made by non-resident trustees and attributed to resident beneficiaries, in the form of capital payments, could be taxed as gains accruing to those beneficiaries.

<sup>55</sup>As stated by the Advocate General in point 50 of her Opinion, national legislation, such as that at issue in the main proceedings, in so far as it causes the powers of taxation retained by the Member State concerned to be entirely dependent on the discretion of the trustees and the beneficiaries, cannot be regarded as sufficient to preserve the powers of that Member State to tax capital gains accruing within its territory.

<sup>56</sup>Consequently, it must be held that legislation of a Member State which provides, in a situation such as that at issue in the main proceedings, for the taxation of unrealised gains in the value of assets held in trust on the occasion of the transfer of the place of management of that trust to another Member State, notwithstanding the fact that the former Member State has the possibility of retaining some power to tax those capital gains, is a suitable means of ensuring the preservation of the allocation of powers of taxation between the Member States, since the former Member State loses its power to tax those capital gains following that transfer.

<sup>57</sup>As regards, last, the proportionality of the measure at issue, it follows from the Court's case-law that the fact that the Member State of origin, for the purpose of safeguarding the exercise of its powers of taxation, determines the amount of tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of those capital gains ceases to exist, in this case at the time when the place of management of the trust is transferred to another Member State, is compatible with the principle of proportionality (judgment of 29 November 2011, *National Grid Indus*, [C-371/10](#), [EU:C:2011:785](#), paragraph 52). Further, legislation of a Member State which provides that a trust which transfers its place of management to another Member State may choose between immediate payment of the tax due on those capital gains or deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the immediate payment of the tax due (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, [C-657/13](#), [EU:C:2015:331](#), paragraph 49 and the case-law cited).

<sup>58</sup>Further, in that context, it must be made clear that deferred payment cannot result in the Member state of origin being obliged to take into account losses that occur after the transfer of the place of management of a trust to another Member State (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, [C-371/10](#), [EU:C:2011:785](#), paragraph 61).

<sup>59</sup>It is apparent from the documents submitted to the Court that the legislation at issue in the main proceedings provides only for the immediate payment of the tax concerned. It follows that such legislation goes beyond what is necessary to achieve the objective of preserving the allocation of powers of taxation between the Member States and constitutes, therefore, an unjustified restriction on freedom of establishment.

<sup>60</sup>That finding cannot be called into question by the fact that, in the circumstances of the main proceedings, the gains were made after the establishment of the amount of the tax, but before that tax became payable, given that the disproportionality of the legislation at issue in the main proceedings is due to the fact that that legislation makes no provision for the taxpayer being able to defer the time when the tax payable is paid.

<sup>61</sup>In the light of all the foregoing, the answer to the questions referred is that 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.

### Costs

<sup>62</sup>Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**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.**

Silva de Lapuerta

Regan

Bonichot

Fernlund

Rodin

Delivered in open court in Luxembourg on 14 September 2017.

A. Calot Escobar

Registrar

R. Silva de Lapuerta  
President of the First Chamber