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Case Notes

Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC: UK trustees protected by the Court of Justice

There was a time when the common law trust was seen as marking a significant division between, on the one hand, the common law which apparently could not live without it and, on the other hand, the civil law which apparently could not live with it. Now, people on both sides of the divide are more familiar with each other's systems. The trust is recognised in international conventions, frequently accommodated in civil law systems including those of EU Member States and was described simply and clearly by the Court of Justice of the European Union (the Court) in *Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC* (*Panayi*).[1] Its description was largely consistent with an earlier description of trusts in *Fred. Olsen and Others and Petter Olsen and Others v The Norwegian State represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes* (*Fred Olsen*), a judgment of the European Free Trade Association (EFTA) Court in 2014.[2]

For all that, even the most enthusiastic supporter of the legitimately used trust has to accept that its reputation has not been enhanced by recent events such as the disclosure of the Panama Papers.[3] Some of the debates over the requirement, in the EU's Fourth Money-laundering Directive, for registration of information on trusts and other types of legal arrangements have also put the trust in unattractive company.[4] Bearing in mind that the facts in *Panayi* concerned the replacement of UK trustees with trustees in Cyprus, the conclusions of the draft report of the European Parliament's Committee of Inquiry into Money Laundering, Tax Evasion and Tax Avoidance are also worth noting. Issued a few weeks before the Court's judgment in *Panayi*, they state that: "most of the offshore constructions revealed in the Panama Papers were set up from Luxembourg, the United Kingdom and Cyprus"[5] and that "trusts could become an even bigger instrument for misuse in the future".[6]

[1] *Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC* (C-646/15) EU:C:2017:682 (14 September 2017) at [1]–[3].

[2] *Fred. Olsen and Others and Petter Olsen and Others v The Norwegian State represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes* (Joined Cases E-3/13 and E-20/13) [2014] EFTA Ct. Rep. 400 at [42].

[3] For further details on the Panama Papers see the website of The International Consortium of Investigative Journalists, available at: *https://panamapapers.icij.org/* [Accessed 6 November 2017].

[4] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73 Art.31.

[5] European Parliament 2014–2019, *Draft Report on the inquiry on money laundering, tax avoidance and tax evasion: Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion* (Draft Report) (2017/2013(INI)), available at: *http://www.europarl.europa.eu/cmsdata/122782/2017-06-30%20Draft%20report.pdf* [Accessed 6 November 2017], para.25.

[6] Draft Report, above fn.5, para.113.

To note these draft conclusions is not to suggest that there was the slightest impropriety by anyone connected with, or advising on, the trusts in *Panayi*. On the contrary, what happened in the case was unexceptional. The draft conclusions are, nevertheless, an interesting detail in the background to the Court's task in *Panayi*. That task was to determine whether or not EU free movement rules could be relied upon to resist a UK tax charge imposed by virtue of the replacement of UK trustees with Cypriot ones.

The facts of *Panayi*

Mr Panico Panayi was a Cypriot national who was resident in the UK along with his wife and children. In 1992 he created four trusts. Into these he placed 40 per cent of the shares of Cambos Enterprises Ltd which was the holding company for his business enterprises. The beneficiaries of the trusts were Mr Panayi's children and other family members. Mr Panayi and his wife could not be beneficiaries. Mr Panayi, however, was a protector and able in that capacity to appoint new or additional trustees. He was also a trustee of the trusts along with a trust company established in the UK. In 2003, Mrs Panayi was added as a trustee.

Early in 2004, Mr and Mrs Panayi decided to return to Cyprus. Before doing so they resigned as trustees. In their place, on 19 August 2004, Mr Panayi appointed three new trustees all resident in Cyprus. The UK trust company remained a trustee until 14 December 2005. On 19 December 2005 the trustees, now all resident outside the UK, sold the shares they held and reinvested the proceeds.

Following an enquiry, HMRC assessed the UK trustees to tax relying on section 80 of the Taxation of Chargeable Gains Act 1992 (TCGA). As is well known, this provision states that trustees who become not resident in the UK are deemed to have disposed of and reacquired the assets constituting the settled property immediately before becoming non-resident. The deadline for accounting for the tax was 31 January 2006. Had the trustees remained UK resident the deadline for accounting for the tax resulting from the sale of 19 December 2005 would have been 31 January 2007.

The question for the Court of Justice

The judgment records that the trustees brought proceedings

> "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".[7]

One may have hoped, therefore, that the question for the Court would have been framed as a simple request to determine whether or not the exit charge imposed on the trustees by section 80 TCGA, in all the circumstances of the case, was compatible with the fundamental freedoms of EU law. A broad request would have given the Court ample room to consider all aspects of the matter. In a somewhat traditional English style, however, the referring court sought the answer to five questions with the fifth one having two parts.[8] As may be expected, the Court

[7] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [17].

[8] The first part of the fifth question referred to the fact that the UK legislation made no provision for deferment of payment or payment in instalments or for account to be taken for any fall in value of the trust assets after exit. Austria

declined to sit this examination paper. Instead, as it does so often, it reformulated the questions. The referring court was seeking, it said, to ascertain

> "… in essence whether the provisions of the FEU Treaty relating to freedom of establishment preclude, …, 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, …, 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".[9]

Freedom for trusts?

The freedom of establishment and the freedoms in relation to services and capital were all raised before the Court. That was understandable. The distinct opportunities for the application of each of the freedoms were not insignificant. In the event, the Court did not deal with the issue of which particular freedom should be dominant. It did not need to. As Kokott AG had said:

> "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."[10]

The Court was able, therefore, to go straight to the fundamental issue underlying any answer it may give to the question it had to address. That issue was whether trusts like the *Panayi* trusts fell within the scope of the freedom of establishment and, if so, whether that freedom applied to situations such as those before it.[11] Such an issue, clearly, is of great importance to both the EU and the UK. On the one hand, one of the fundamental activities of the EU is the establishment of a single market facilitating economic activity. On the other hand, a legitimate vehicle for facilitating economic activity in the UK and certain other Member States is the trust. That may suggest to some an identity of interest between the EU and the UK. It is no surprise that, in the context of taxation, a Member State should see things differently.

Who benefits from the freedom of establishment?

The relationship between the freedom of establishment and trusts had concerned the UK before *Panayi*. In 2014 it had made submissions to the EFTA Court in *Fred Olsen* when it said that: "The trust itself cannot be regarded as a secondary establishment of the trustees."[12] The EFTA Court, however, confirmed that the right of establishment "must not be interpreted narrowly" and that "any person or entity, such as a trust, that pursues economic activities that are real and

submitted that no fall in value had been reported and that the question was, therefore, hypothetical. Kokott AG rejected that contention: Opinion of Advocate General Kokott in *Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC* (Opinion of Advocate General Kokott in *Panayi*) (C-646/15) EU:C:2016:1000 at [19]–[21] and the Court had no need to mention it.

[9] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [22].

[10] Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [41].

[11] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [23].

[12] *Fred Olsen* (Joined Cases E-3/13 and E-20/13), above fn.2, [2014] EFTA Ct. Rep. 400 at [83]. See also [81].

genuine must be regarded as taking advantage of its right …".[13] If the UK could not persuade the EFTA Court it was unlikely to succeed before the Court of Justice. That did not, of course, stop it trying.

So far as the Treaty on the Functioning of the European Union (TFEU) is concerned, Article 54 says that companies or firms are to be treated in the same way as natural persons for the purposes of the right of establishment. The definition in Article 54 of "companies or firms" is, of necessity, broad. It encompasses "other legal persons governed by public or private law, save for those which are non-profit making".

One way of narrowing the scope of the right of establishment and, therefore, of the effectiveness of the single market would be to give a narrow interpretation to the phrase "other legal persons" so that it referred only to those who were given legal personality under the domestic law of a Member State. Apparently, that approach was supported by the UK. Unsurprisingly, it was not met with any enthusiasm. As Kokott AG said:

> "The distinction which national law occasionally draws between organisational structures according to whether they do or do not have legal personality cannot …—contrary to the view expressed by the United Kingdom at the hearing—be transposed to EU law."[14]

The justification for the Advocate General's view is plain. It would allow the domestic law of a Member State to define the scope of the fundamental freedoms. It is, however, the fundamental freedoms which set the limits of national law. Were it to be otherwise a Member State could limit the scope of the fundamental freedoms by the simple expedient of limiting the availability of legal personality, as Kokott AG also acknowledged.[15]

The Advocate General noted the definition of "companies or firms" in Article 54 TFEU and its inclusion of "other legal persons governed by public or private law" except those which are non-profit making. She took the view that in order to be entitled to freedom of establishment and to be part of the class of "other legal persons" the trust must be an organisational unit which enjoys

> "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."[16]

She thought the national court should determine whether the trust engaged in business in its own right or whether the trustees were exercising their own rights and obligations.

The Advocate General's Opinion proved to be very helpful to the five judges of the Court when it came to consider the issue. It retained the approach she recommended to the concept of "other legal persons" and confirmed that the concept

[13] *Fred Olsen* (Joined Cases E-3/13 and E-20/13), above fn.2, [2014] EFTA Ct. Rep. 400 at [96].
[14] Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [29].
[15] Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [28].
[16] Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [33]. The italics are in the original text.

> "… 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".[17]

Having settled the issue of principle, the practical problem arose of what role, if any, the national court should have.

A role for the national court?

One can see that Advocate General Kokott may have been attracted to involving the national court for practical reasons. Nevertheless, it is not hard to imagine that the Court would have been sceptical about giving the national court the role she had suggested. In a typically stimulating Opinion she had, for very good reasons, rejected the possibility that the applicability of the freedom of establishment should depend upon the national law governing organisational structures. If it is unacceptable for the national law of legal personality to govern the availability of the freedom of establishment in one context then one may think it ought to be equally unacceptable in another, namely, the determination of whether or not the trust acted, for EU law purposes, in "its own right". That too may be altered by national law.

In the event, the Court avoided giving the national court a role. It decided that the *Panayi* trusts were to be classed as "other legal persons" for the purposes of Article 54 TFEU. In doing so it pointed to a number of factors. First, the assets placed in trust formed a separate fund of property distinct from the property of the trustees. Secondly, the trustees had 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.[18] Then, bearing in mind that what was in issue in the case was whether or not section 80 TCGA was compatible with the fundamental freedoms, the Court turned to the scheme of provisions in which that section operated.[19] It noted that TCGA treated the trustees as "a single and continuing body of persons, distinct from the persons who may from time to time be the trustees",[20] that it gave them a residence and deemed them to dispose and reacquire assets if they became non-resident. The legislation itself treated the trustees as a body, as a unit and not as individuals. The result was that:

> "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."[21]

It is well settled that deeming provisions in UK tax law, such as those of section 69 TCGA are to be construed subject to certain principles.[22] The Court, though, did not construe section

[17] *Panayi* (C-646/15), above fn.1 EU:C:2017:682 at [29].
[18] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [30].
[19] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [31] and [32].
[20] See TCGA s.69.
[21] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [32].
[22] See for a recent statement of the principles: *Barclays Wealth Trustees (Jersey) Ltd and another v HMRC* (*Barclays Wealth*) [2017] EWCA Civ 1512 at [47].

69 TCGA. It used the provisions of the section more generally as an indication of the approach of the national legislature to the treatment of trusts. Having ascertained that approach, it drew on it for the purposes of applying the freedom of establishment to trustees. If the UK is prepared to establish deeming provisions to subject trusts to effective taxation, which it has done to a considerable extent,[23] it will no doubt appreciate the need to do something similar to ensure that trustees are fully subject to the freedom of establishment.

Was the trust non-profit making?

There was only one issue left to be dealt with in relation to the availability of the freedom of establishment. Granted that the trust could act as an entity in its own right, was it to be regarded as non-profit making within the meaning of Article 54 TFEU? The Court had shown no appetite for narrowing the freedom of establishment so far in its judgment and it was not about to change in relation to this issue. Of course the trust was profit making. In the slightly longer formulation adopted by the Court

> "… 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".[24]

Did the Court misunderstand the trust?

The treatment by the Court of the scope of the freedom of establishment in relation to trusts may attract attention in certain quarters. It is worth emphasising, therefore, that the Court's reasoning did not rest on any misunderstanding of the nature of a trust in the common law. In the first three paragraphs of the judgment it set out the basic principles of the trust. Purists may dislike its reference to legal ownership and economic ownership instead of equitable ownership, but the division of ownership was recognised.[25] So too was the fact that the trust has no separate legal personality.[26] In treating the *Panayi* trusts as it did, the Court was interpreting the freedom of establishment not giving a master class in trust law.

It is also worth bearing in mind that EU legislation has found it necessary to give an extended definition of "person" in other situations. The Council Directive of 2011 on administrative cooperation in the field of taxation provides an example. It includes within the definition of "person": "… a legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets …".[27] By treating something that does not have legal personality in national law as a person for the purposes of EU law the Court, like the

[23] The use of deeming provisions in UK trust taxation is not confined to capital gains tax as shown in *Barclays Wealth*, above fn.22, [2017] EWCA Civ 1512.
[24] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [33].
[25] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [1]–[3]. So far as concerns the reference to "economic ownership", it does no harm in this context to be reminded that while lawyers may find equitable ownership satisfyingly abstract, beneficiaries are satisfied only with something more concrete.
[26] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [3].
[27] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1 Art.3.11.

legislator is enabled to advance the single market.[28] In doing that they further one of the fundamental purposes of the EU and, indeed of the UK. As the UK's Prime Minister made clear in her Lancaster House speech of 17 January 2017: "… we do not want to undermine the Single Market".[29]

Was the freedom of establishment applicable?

Having decided that the Panayi trusts could in principle rely on the freedom of establishment the Court moved on to consider the much easier question of whether the freedom was in fact engaged in the circumstances before it. As may be expected, it said it was. The transfer of the residence of the trustees entailed a transfer in the place of effective management of the trust. Furthermore, the transfer in the place of effective management did not affect the status of the trust in national law. They remained trusts. In those circumstances the Court could apply to trusts its case law established in relation to the transfer of the effective management of companies and cited *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (*National Grid Indus*).[30]

From the perspective of the EU, the scope of the freedom of establishment and its availability to the Panayi trusts were probably the most important issues in the case. From the perspective of the UK, however, the important issues were still to come. The Court had now to decide whether the capital gains tax legislation restricted the freedom of establishment and whether that restriction was justifiable.

Restrictions: existence and justification

Whether or not the freedom of establishment was restricted was easily determined. The UK itself acknowledged that

> "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".[31]

Consequently, a difference in treatment was clear. Furthermore, the difference in treatment was liable to discourage trustees from transferring the trusts' place of management. It was also liable to deter the settlor from appointing new trustees not resident in the UK. Plainly, the measures establishing the difference in treatment were "measures which prohibit, impede or

[28] Recital (1) of Council Directive 2011/16/EU, above fn.27, justifies the need for mutual assistance between Member States by reference to the jeopardy caused to the internal market by malfunctioning tax systems.
[29] The Rt Hon Theresa May MP, speech, *The government's negotiating objectives for exiting the EU: PM speech* (17 January 2017), available at: *https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech* [Accessed 6 November 2017].
[30] See *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [36] which refers to *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (C-371/10) [2011] ECR I-12273 (ECJ) at [33]. So far as concerns the transferability of companies see the judgment in *Polbud—Wykonawstwo sp. z o.o., in liquidation* (C-106/16) EU:C:2017:804 (25 October 2017). The Court concluded that the freedom of establishment precluded national legislation which made subject to liquidation a company which wished to transfer its registered office to another Member State so as to become incorporated under the law of that state.
[31] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [45].

render less attractive the exercise of the freedom"[32] and had, therefore, to be considered restrictions on freedom of establishment.[33]

In considering whether or not the restriction was justified the Court began with two basic propositions. First, the restriction could be justified if the situations under consideration were not objectively comparable. Secondly, it could be justified by overriding reasons in the public interest that are recognised under EU law. In the second case, however, the restriction must be appropriate for ensuring the attainment of its objective. It must also not go beyond what is necessary to attain it.[34]

The Court dealt with the issue of objective comparability in a single paragraph. It concluded that the situation of a trust which transfers its place of management to another Member State is comparable to one which does not do so, so far as concerns the taxation of gains in the value of trust assets accrued prior to the transfer. It relied again on its decision in *National Grid Indus*[35] as it had done in relation to the issue of whether or not the freedom of establishment was applicable to the case.[36]

So far as concerned the justification by reason of overriding reasons in the public interest, the UK relied upon the preservation of a balanced allocation of powers between Member States. That was certainly a consideration that the legislature never had in mind in constructing the capital gains tax provisions in question. Nevertheless it is, as the Court has often confirmed, a legitimate justification. Furthermore, the Member States retain the power to define the criteria for allocating their powers of taxation with a view to eliminating double taxation and may do so unilaterally or by treaty.[37] The Court also affirmed that Member States may tax gains which have arisen prior to the transfer of the place of effective management at the time of the transfer. The power to tax such gains preserves a Member State's right to exercise taxation powers in respect of activities carried on within its territory. The power of taxation in this case, therefore, could be justified on grounds connected with the preservation of a balanced allocation of powers of taxation between Member States.[38]

Furthermore, the ability to rely on this justification was not lost by reason of the existence of a provision permitting the taxation of the beneficiaries of the *Panayi* trusts in respect of capital payments from non-resident trustees. The reason was that, such a provision

> "causes the powers of taxation retained by the Member State concerned to be entirely dependent on the discretion of the trustees and the beneficiaries".[39]

The Advocate General expanded on this. She said:

[32] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [43]. In stating this well-known definition of a restriction the Court relied upon *Verder LabTec GmbH & Co KG v Finanzamt Hilden* (C-657/13) EU:C:2015:331 (ECJ) at [34] and the case law cited there.
[33] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [47].
[34] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [48].
[35] *National Grid Indus* (C-371/10), above fn.30, [2011] ECR I-12273 (ECJ).
[36] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [49].
[37] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [51].
[38] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [52]. The Court relied upon *National Grid Indus* (C-371/10), above fn.30, [2011] ECR I-12273 (ECJ). See [46] and the case law cited there.
[39] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [55].

> "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."[40]

The UK was to be regarded as prevented from exercising its power of taxation once the place of effective management of the trusts had ceased to be in the UK. It could, therefore, rely on the justification of preserving the balance of the allocation of taxing powers.[41]

There is nothing in this reasoning that is particularly surprising. The real test for the UK, though, was whether it could establish that its provisions did not go beyond what was necessary to secure the balanced allocation of taxing powers, that is to say that its taxing provisions satisfied the test of proportionality. This is the ground on which justifications of restrictions so often fail. Given that the provisions in question were not introduced with a view to satisfying the test of proportionality it would have been a happy coincidence for the UK if the Court had found that they did so. It is not unheard of for tax legislation to miss the target at which it aimed. For legislation to hit a target at which it did not aim is, perhaps, rather less likely. It did not happen on this occasion.

The reason for the lack of proportionality was that the legislation in question provided only for the immediate payment of the tax concerned.[42] The legislature could have introduced a measure less harmful to the freedom of establishment by giving the taxpayer a choice: pay the full tax on the gains immediately; or defer payment with appropriate provision for the payment of interest.[43] In making no provision for deferral, the UK legislation went beyond what was necessary to achieve its aim and therefore gave rise to an unjustified restriction on the freedom of establishment.[44]

On the particular facts concerning the *Panayi* trusts, the actual gains on a sale were made in December 2005. They arose, therefore, after the gains had been deemed to arise on the transfer of the place of effective management in August 2004 and before payment of the tax was due in January 2006. Consequently, the trustees could be said to have obtained the resources to pay the tax charge arising on the transfer of effective management before the charge was due. That did not, though, prevent the absence of a power to defer payment resulting in disproportionality. The requirement that there be a power to defer payment was not linked to any need to ensure that a person was in a position to pay tax. It was linked to the need to ensure that the right of establishment was not impeded or rendered less attractive. The Court did not spell that out but said simply that its conclusions were not called into question by the fact that the gains were made before the tax became due:

[40] See Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [50] referred to by the Court in *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [55].
[41] See *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [53] where the Court relied upon *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* (C-164/12) EU:C:2014:20 (ECJ) at [56].
[42] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [59].
[43] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [57].
[44] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [59].

> "[G]iven 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".[45]

The Advocate General dealt with the particular facts of the *Panayi* case more fully. She pointed out that had the sale been made without any change in the place of effective management the tax would have fallen due in January 2007 not January 2006. The legislation would, for that reason, have remained disproportionate despite the sale.[46] She also looked at the fact of the sale from a more principled point of view. A taxpayer who responded to a demand for tax made in contravention of the right of establishment and realised assets would then be able to pay the improperly demanded tax. The taxpayer, though, could not be said, in those circumstances, to have lost the right to object to non-compliant legislation.[47] That would allow a Member State to benefit from making an improper demand. It would also tend to indicate some confusion over the nature of the restriction of the freedom of establishment. It was the demand for tax that was the restriction not the need to pay it, as the Advocate General had pointed out earlier in her Opinion.[48]

Conclusion

The Court in *Panayi* followed its existing case law and set about its legitimate task of defending the scope of the freedom of establishment, testing potential restrictions by reference to established rules rather than more general ill-defined criteria which were, apparently, urged upon it. Popular prejudices about the trust, quite properly, had no place in its reasoning.

That the UK's submissions were rejected in *Panayi* was no surprise. Had they been accepted they would have dealt a not insignificant blow to the single market. The UK is not, of course, the first Member State to advance contentions inimical to the single market. It is, however, the first Member State which, at least for the future, may be able to advance contentions without regard to the long-term consequences of their success or failure. One may wonder to what extent, it at all, that will affect its approach to litigation in Luxembourg.

A judgment concerning the taxation of trustees at this stage in the history of the UK as an EU Member State prompts the reflection that, while litigation in the UK in relation to the fundamental freedoms and taxation is something that corporations have become used to, individuals appear to have asserted their EU rights somewhat less aggressively. No doubt there are good economic reasons for that. Nevertheless, as *Panayi* shows, EU law can have a profound impact in the private client field. That impact is set to increase as the recent judgment in *Kubicka* on the Succession Regulation shows.[49]

[45] *Panayi* (C-646/15), above fn.1, EU:C:2017:682 at [60].
[46] See Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [56].
[47] See Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [57].
[48] See Opinion of Advocate General Kokott in *Panayi* (C-646/15), above fn.8, EU:C:2016:1000 at [44].
[49] See *Proceedings brought by Aleksandra Kubicka* (C-218/16) EU:C:2017:755 (ECJ), judgment given on 12 October 2017. The case concerned Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

Some may have been tempted to think that the impact of EU law on UK law in general and tax law in particular would be a matter of historical interest once the UK ceased to be an EU Member State. The provisions of the European Union (Withdrawal) Bill make clear that is not so. Clause 5, for example, says

> "… the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day".[50]

Then there are concepts such as "retained EU law", "retained EU case law" and "retained general principles of EU law"[51] to grapple with. The UK has, it seems, chosen to reject the arguments of the "remainer" and accept the position of the "retainer". ☞

Timothy Lyons

[50] European Union (Withdrawal) Bill cl.5(2).
[51] See European Union (Withdrawal) Bill cl.6(7).

☞ Capital gains tax; EU law; Exit charge; Freedom of establishment; Trusts