JUDGMENT OF THE COURT
9 July 2014*

(Taxation of controlled foreign companies – Right of establishment – Free movement of capital – Circumvention of national law – Justification – Proportionality)

In Joined Cases E-3/13 and E-20/13,

REQUESTS to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Skatteklagenemnda ved Sentralskattekontoret for storbedrifter (the Tax Appeals Board for the Central Tax Office for Large Enterprises) and Oslo tingrett (Oslo District Court), in cases pending before them between

Fred. Olsen and Others and Petter Olsen and Others

and

The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes,

concerning the interpretation of the rules on freedom of establishment and the free movement of capital, in particular the interpretation of Articles 31 and 40 of the EEA Agreement, in relation to the Norwegian controlled foreign company tax legislation ("CFC rules") which permits national taxation of capital placed in a low-tax country,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

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* Language of the request: Norwegian

having considered the written observations submitted on behalf of:

– Fred. Olsen and ten other plaintiffs ("Fred. Olsen and Others"), represented by counsel Thor Leegaard and Dr Bettina Banoun;

– Petter Olsen and six other plaintiffs ("Petter Olsen and Others"), represented by counsel Geir Even Asplin;

– the Norwegian Government, on behalf of the Defendant, represented by Ketil Bøe Moen and Ida Thue, advocates, Office of the Attorney General, and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents;

– the French Government, represented by Diégo Colas and Natacha Rouam, Ministry of Foreign Affairs, acting as Agents;

– the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Dr Mario Frick, acting as Agents;

– the United Kingdom Government, represented by Jane Beeko, Cabinet Office European Law Division, Treasury Solicitor's Department, acting as Agent, and Raymond Hill, barrister;

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Gjermund Mathisen, Auður Ýr Steinarsdóttir and Clémence Perrin, Officers, Department of Legal and Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Richard Lyal and Wim Roels, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiffs, represented by Thor Leegaard and Dr Bettina Banoun (Fred. Olsen and Others) and by Geir Even Asplin (Petter Olsen and Others); the defendant, represented by Ketil Bøe Moen; the French Government, represented by Diégo Colas; the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Dr Mario Frick; the Government of the United Kingdom, represented by Raymond Hill; ESA, represented by Gjermund Mathisen; and the Commission, represented by Richard Lyal, at the hearing on 5 February 2014,

gives the following

Judgment

I Legal context

EEA law

1 Article 31 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads as follows:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
>
> *2. Annexes VIII to XI contain specific provisions on the right of establishment.*

2 Article 34 EEA reads as follows:

> *Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.*
>
> *Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*

3 Article 40 EEA reads as follows:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.*

National law

4 The Norwegian controlled foreign company ("CFC") rules were introduced in 1992 and are found in sections 10-60 to 10-68 of the 1999 Taxation Act ("the Tax Act").

5 Under Norwegian tax legislation, in relation to Norwegian limited liability companies and foundations, Norwegian owners and beneficiaries are not taxed on an ongoing basis on their share of the profits made by such entities. The tax is levied directly on the companies and foundations, being taxable entities under Norwegian law. Tax is only levied on the owners and beneficiaries when the Norwegian company or foundation distributes a profit to the owners, typically in the form of a dividend or distribution. Participants in partnerships are, however, taxed on an ongoing basis on their share in the surplus.

6 The CFC rules entail that Norwegian owners and beneficiaries are taxed on an ongoing basis on their share of the profits achieved by companies, independent undertakings and asset funds that they own or control and that are domiciled in low-tax countries, whether or not the foreign entities distribute their profit to their Norwegian owners or beneficiaries.

7 Tax is also levied on the owners in connection with distributions. Since 2006, Norwegian personal owners have been subject to taxation on 72 % of distributions received from CFCs.

8 In 2007, a rule was introduced specifying that taxation pursuant to the CFC rules cannot be levied if the foreign company is established in an EEA State and pursues genuine economic activity there.

9 The scope of the CFC rules is set out in section 10-60 of the Tax Act. These cover limited liability companies and other equivalent companies or cooperatives and, in addition, independent establishments and asset funds from which the taxpayer directly or indirectly benefits. Where at least one of the participants has unlimited tax liability, the CFC rules do not apply. In addition, section 10-60 of the Tax Act states the following:

> *Furthermore, the rules apply to taxpayers who, alone or together with others, directly or indirectly control other independent undertakings or capital assets domiciled in low-tax countries, and which the taxpayer benefits from, directly or indirectly.*

10 In practice, trusts are the most important form of capital assets to which the Norwegian CFC rules have been applied. That trusts are included under the rules is clear from the preparatory work to the Act (see Proposition to the Odelsting No 16 (1991-92) p. 74).

11 According to section 10-61 of the Tax Act, the party who owns or controls a CFC such as mentioned in section 10-60 is liable to pay tax on his or her pro rata share of the profit in the CFC whether or not funds have been distributed from the undertaking or the facility to the beneficiaries. Continuous taxation must consequently be levied on the income in a Norwegian-controlled foreign trust. Section 10-62 of the Tax Act states that a company is deemed to be under Norwegian control if at least 50 % of the shares are owned or controlled by Norwegian taxpayers. Under section 10-60 of the Tax Act, a trust is deemed to be under Norwegian control if at least half of the beneficiaries are Norwegian taxpayers and they benefit from the trust directly or indirectly.

12 It follows from section 10-63 of the Tax Act that low-tax countries are countries in which the ordinary income tax levied on the company's or the undertaking's total profit amounts to less than two thirds of the tax that would have been levied on the company or the undertaking had it been domiciled in Norway.

13 For the purposes of CFC taxation, the income arising in foreign undertakings must be calculated in accordance with Norwegian tax rules as if the undertaking was a Norwegian taxpayer. This follows from section 10-65(1) of the Tax Act, which states the following:

> *The owner's income shall be set at his/her share of the enterprise's or undertaking's profit or loss, stipulated in accordance with the rules in Norwegian tax legislation as if the enterprise or undertaking was the taxpayer.*

14 The income thus calculated is distributed amongst the Norwegian taxpayers regarded as controlling the undertaking in accordance with the taxpayer's ownership interest. For beneficiaries of a trust, the income is distributed according to a mathematical fraction, depending on the number of the beneficiaries under the trust.

15 Pursuant to sections 10-11, 10-12 and 10-42 of the Tax Act, dividends received by personal shareholders (i.e. natural persons) from Norwegian companies, as well as distributions to personal participants from businesses assessed as partnerships, are

taxed at a rate of 28 %. Correspondingly, in accordance with sections 10-67(1) and 10-67(2) of the Tax Act, tax is also levied on 72 % of the amounts distributed by a CFC to personal participants. Norwegian companies with Norwegian owners are, in total, taxed on the same income and at the same tax levels as participants in a CFC.

16 With effect from 2004, dividends and capital gains arising from shares in companies domiciled within the EEA have been exempt from ordinary income tax in accordance with the "exemption method". The main intention behind the exemption method was to avoid economic double taxation and chain taxation of corporate income distributed to corporate participants.

17 The following income is covered by the exemption method, see section 2-38(2) of the Tax Act:

> *(2) Income and loss covered by (1) are:*
>
> *a. gain or loss on sale or transfer of ownership interest in a company, etc. as mentioned in (1)(a) to (c) or a corresponding company, etc. domiciled abroad, as well as legally distributed dividends as mentioned in Section 10-11)(2), see (3), on such ownership interest,*
>
> *b. gain or loss on sale or transfer of ownership interest in a company as mentioned in Section 10-40(1),*
>
> *c. gain or loss on sale or transfer of a financial instrument with a ownership interest in a company, etc. as mentioned in the present (2)(a) as the underlying object.*

18 The exemption method applies, *inter alia*, to limited liability companies, foundations and associations, see section 2-38 of the Tax Act:

> *(1) The following taxpayers are exempt from taxation of income and are not entitled to a deduction for losses pursuant to the provisions of this Section:*
>
> *a. companies, etc. as mentioned in Section 2-2(1)(a) to (d) and corresponding enterprises established abroad that are domiciled in Norway,*
>
> *b. unit trusts,*
>
> *c. inter-municipal companies,*
>
> *d. companies, etc. that are fully owned by the State,*
>
> *e. associations,*

f. foundations,

g. municipalities and counties,

h. estates of deceased and bankrupt debtors that fall within the scope of this paragraph,

i. companies, etc. domiciled abroad that correspond to companies, etc. that fall within the scope of this paragraph,

19 The exemption method applies without limitation to dividends and gains from both Norwegian enterprises and enterprises domiciled in the EEA. For enterprises domiciled in low-tax countries in the EEA, there is an additional requirement that the enterprise has actually been established and pursues genuine economic activity there. In section 2-38, the following is stated:

(3) The following income and losses are nevertheless not covered by (1).

a. Income or loss on ownership interests in companies, etc. domiciled in a low-tax country outside the EEA, see Section 10-63, and income on ownership interest in companies, etc. domiciled in a low-tax country within the EEA, see section 10-63, and that have not been established and do not pursue genuine economic activity in an EEA State on corresponding conditions to those laid down in Section 10-64 (b)…

20 Section 10-64(b) of the Tax Act establishes a statutory documentation requirement that must also be fulfilled:

Taxation pursuant to the provisions of Sections 10-61 to 10-68 is not carried out when

b) The participant documents that the company or undertaking is actually established in an EEA State and pursues genuine financial activity there, and Norway, pursuant to a tax agreement or other international agreement, can demand to obtain data from the State of establishment. If no such agreement exists, the same applies where the participant presents a declaration from the tax authorities of the State of establishment that confirms the correctness of the documentation.

21 If the participant fails to present such a declaration, it is presumed that CFC taxation will apply.

22 During the tax years at issue in the present case, Norway had no traditional tax agreement with Liechtenstein. However, on 31 March 2012, an agreement for the

exchange of information entered into force between Norway and Liechtenstein, with effect from 1 January 2011, which means that it can be applied from the 2011 income year.

23 As regards the calculation of CFC income, the Norwegian Ministry of Finance has found that the exemption method is not applicable to the calculation of CFC income if the beneficiary is a natural person. Consequently, until recently, only corporate participants in CFCs came within the scope of the exemption method, while personal participants, i.e. natural persons, did not. An amendment, effective from the income year 2013, has made the exemption method applicable also in relation to personal participants in a CFC.

Wealth taxation

24 It follows from section 2-1(7) of the Tax Act that a person residing in Norway is liable to wealth tax:

> *The liability to pay wealth tax is subject to the taxpayer residing in Norway on 1 January in the assessment year.*

25 Taxpayers in Norway are liable to wealth tax on their assets, as provided for in section 4-1 of the Tax Act:

> *The taxable property is fixed at the market value, as at 1 January in the assessment year, of the taxpayer's assets that have a financial value less debt for which the taxpayer is liable.*

26 It follows from section 2-1 of the tax decision by the Storting ("Norwegian Parliament") that personal taxpayers shall pay wealth tax to the State at a rate of 0.4 %:

> *Personal tax payers and estates of deceased persons shall pay wealth tax to the State on that part of the taxpayer's total estimated property that exceeds NOK [x]. The tax rate shall be 0.4 per cent.*

27 It follows from section 2-3 of the Norwegian Parliament's tax decision that personal taxpayers shall pay wealth tax to municipalities at a rate of 0.7 %:

> *Wealth tax shall be paid to the municipality if the taxpayer is not exempt from such tax liability pursuant to Chapter 2 of the Tax Act. A taxpayer who is entitled to a personal tax allowance pursuant to Section 15-4 of the Tax Act shall have a deduction from his property of NOK [x]. ... The rate of wealth tax payable to the municipalities must not be higher than 0.7 per cent. The*

maximum rate applies where a lower rate has not been fixed by the municipality.

28 The beneficiaries have been taxed at a rate of up to 1.1 % (0.4 % to the State plus 0.7 % to the municipality). The assets in the trust have, for tax purposes, been distributed and allocated to the individual beneficiary by the tax authorities in accordance with a mathematical fraction, based on the number of beneficiaries in the trust.

29 It follows from section 4-2 of the Tax Act that there is no wealth tax liability for conditional rights:

In the calculation of taxable property, the following assets are exempt:

A right that depends on the occurrence of a condition

A fixed-term right of use

A fixed-term right to a periodic benefit.

30 A usufructuary is liable to pay tax pursuant to section 4-50 of the Tax Act:

If it has been decided by ... valid disposition that the beneficial enjoyment of income from capital ... is to accrue to a person for a short or long period of time, but that the capital itself ... shall accrue to another person, foundation or undertaking, wealth tax will be levied on the beneficiary or usufructuary for the capital ... while this right persists.

31 Beneficiaries in family foundations are subject to the same wealth taxation at the same rate provided the conditions set out in section 4-50 are complied with. For personal participants in partnerships, section 4-40 of the Tax Act specifies that the value of the participant's interest in the enterprise must be determined as a share of the enterprise's net assets as if the enterprise itself was a taxpayer:

For participants in an enterprise assessed as a partnership that is covered by Section 10-40, the value of the participant's interest in the enterprise is, in the wealth tax assessment, set at a share of the enterprise's net assets calculated as if the enterprise was a taxpayer.

32 Unlike the above persons, limited liability companies and corresponding entities are not liable to wealth tax, see section 2-36(1) of the Tax Act. Furthermore, companies, enterprises and undertakings that are separate taxable entities do not pay tax to the municipality even though they are liable to pay wealth tax to the Norwegian State, see section 2-36(2).

33 The liability to pay wealth tax applies even if the ownership interests are in foreign companies and enterprises.

34 Norwegian undertakings under independent management, foundations and family foundations are subject to wealth tax at a rate of 0.3 %, whereas beneficiaries in Norwegian foundations and asset funds are not subject to wealth tax themselves.

35 It follows from section 2-2(1)(h) of the Tax Act that foundations and undertakings under independent management are liable to pay wealth tax if they are domiciled in Norway:

> *The following companies, etc. are liable to pay tax if they are domiciled in Norway:*
>
> > *h. an undertaking or association under independent management, including*
> >
> > > *1. foundations*

36 It follows from section 2-32 of the Tax Act that asset funds with undivided shares that do not have business activity as an object shall also be subject to wealth tax if the return on the capital accrues primarily to members of a specific family:

> *(1) A charitable foundation, religious community, communion, enterprise or undertaking that does not have business activity as an object shall be exempt from wealth and income tax.*
>
> ...
>
> *(5) A family foundation and other asset funds in which the return on the capital primarily accrues to the members of a specific family shall be liable to pay wealth tax.*

37 It follows from section 2-36(2) of the Tax Act that Norwegian and foreign undertakings that are separate taxable entities, as specified in section 2-2(1), are exempt from tax to the municipality and county municipality:

> *Norwegian and foreign enterprises and undertakings that are separate taxable entities, see Section 2-2 (1), shall be exempt from tax to municipality and county municipality.*

38 In accordance with section 3-3 of the Norwegian Parliament's tax decision, the tax rate is 0.3 %:

> *Enterprises and undertakings that are mentioned in Section 2-36 of the Tax Act and that are not exempt from the liability to pay wealth tax pursuant to Chapter 2 of the Tax Act shall pay wealth tax to the State at a rate of 0.3 per cent. Assets below NOK 10,000 shall be free of tax.*

39 Section 2 of the Norwegian Foundations Act 2001 No 59 (stiftelsesloven) defines a foundation as an independent estate which is transferred to benefit a purpose:

> *A foundation is an estate which by will, gift or other act is independently placed at the disposal for a specific purpose of charitable, humanitarian, cultural, social, educational, economical or other kind. An instrument fulfilling the criteria in the previous sentence is a foundation under this Act, regardless of whether it is called a legacy, institution, fund or anything else.*

Protocol 1 to the European Convention on Human Rights

40 Article 1 of Protocol No 1 of 20 March 1952 to the European Convention on Human Rights ("ECHR") is worded as follows:

> *Article 1 Protection of property*
>
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

II Facts and procedure

41 Ptarmigan Trust was established in Liechtenstein on 13 October 1980 as a discretionary, irrevocable and perpetual trust. The trust was set up in order to hold the interests of the Norwegian Olsen family in certain companies.

42 In a prototypical trust, there are three categories of persons involved: settlor, trustee and beneficiary. The settlor transfers property to the trustee, who is charged with the duty to administer the property for the benefit of the beneficiary. The trustee is the legal owner of the property, but he must use it according to the terms of the trust. The beneficiary is the beneficial owner (that is to say, he has certain property rights recognised by the rules of equity) and has the right to enforce the terms of the trust.

43 In a discretionary trust such as Ptarmigan Trust, the trustees exercise the ownership functions in accordance with the trust agreement and, at their own discretion, make decisions concerning the distribution of assets to the beneficiaries. Thus, the beneficiaries have no unconditional right to claim payments from the trust.

44 From its establishment, Ptarmigan Trust, which is registered in Liechtenstein and governed by Liechtenstein law, has been registered by the Liechtenstein tax authorities as an "asset management" trust, exempt from ordinary wealth tax, income tax and capital gains tax. The tax exemption was conditional on the trust not engaging in business or commercial activities on the Liechtenstein market.

45 From the date of its creation in 1980, the assets held by Ptarmigan Trust have been divided into two funds, Fund A and Fund B, with separate private individuals as beneficiaries of each fund. The beneficiaries of Ptarmigan Trust are members of the Olsen family. As such, Fred. Olsen and his descendants are the beneficiaries of Fund A, while Petter Olsen and his descendants are the beneficiaries of Fund B. In addition, widows and widowers of the above-mentioned are beneficiaries of both funds.

46 Ptarmigan Trust holds shares in Eagleville Group BV ("Eagleville"), a Dutch company. The latter is the parent company of a large group structure comprising many limited liability companies all over the world and carries out the most important management functions on behalf of the whole group. Eagleville has a Dutch subsidiary, which acts as a management company for four holding companies, each of which, in turn, heads a group of subsidiaries.

47 The CFC rules were voluntarily applicable in 1992 and 1993 but made mandatory from 1994. The purpose of the CFC rules is to prevent tax avoidance and to give the same tax treatment to Norwegian capital whether the investment takes place in Norway or in a low-tax country (capital export neutrality).

48 The CFC rules entail that Norwegian participants in a CFC are taxed on an ongoing basis on their share of the profit in companies, capital assets or independent undertakings that they own or control and which are domiciled in low-tax countries.

49 The scope of the CFC rules is laid down in the Tax Act and is considered to cover trusts, as a form of "independent undertaking or asset fund".

50 Following the establishment of the CFC rules in 1992, the Norwegian tax authorities found that the participants in Ptarmigan Trust were liable to domestic CFC taxation on their share of the profit achieved by the trust.

51 In 1993, some of the Norwegian beneficiaries queried with the Norwegian tax authorities the application of the CFC rules to the trust. After a hearing before the

Tax Administration, a number of the taxpayers brought a case before the national courts concerning the tax assessment decision for the year 1994, which was based on domestic CFC rules.

52 Before the Norwegian courts, the taxpayers and the beneficiaries of Ptarmigan Trust principally argued that the trust was not under Norwegian control, that they had not benefitted from the trust and that Liechtenstein was not a low-tax country. The Supreme Court rejected all these arguments in a ruling of 10 June 2002.

53 In the proceedings before the Supreme Court, the taxpayers and the beneficiaries of Ptarmigan Trust did not argue that the CFC taxation was incompatible with EEA law and, consequently, this issue was not assessed by the Supreme Court.

54 Following the Supreme Court's ruling, the beneficiaries have argued that taxation based on the CFC rules violates Article 31 EEA, on freedom of establishment, and Article 40 EEA, on free movement of capital. Consequently, the beneficiaries have filed two separate complaints against the Norwegian State. The tax assessment for the years 2001-2003 and 2010-2011 has been brought before Oslo District Court. The tax assessment for the years 2004-2006 has been brought before the Tax Appeals Board.

55 On 13 March 2013, the Tax Appeals Board for the Central Tax Office for Large Enterprises and later, on 30 August 2013, Oslo District Court referred the cases to the Court seeking an Advisory Opinion.

56 The following questions were referred to the Court by the Tax Appeals Board and Oslo District Court. The Tax Appeals Board submitted five questions, to which Oslo District Court later also requested answers. In addition, Oslo District Court asked two further questions, which will be referred to here as Questions 6 and 7. The questions referred read as follows:

> *(1) Do trusts as a form of establishment fall within the scope of the freedom of establishment provided for in Article 31 EEA? Supplementary question: If so, who holds rights pursuant to the provisions of the EEA Agreement?*
>
> *(2) If the first main question is answered in the affirmative: Does a trust meet the requirement of economic activity provided for in Article 31 EEA?*
>
> *(3) If the first main question is answered in the negative: Does a trust fall within the scope of the right to free movement of capital provided for in Article 40 EEA?*

(4) *If the first or third main question is answered in the affirmative: Do the Norwegian CFC rules involve one or more restrictions on the freedom of establishment or the right to free movement of capital?*

(5) *If the fourth main question is answered in the affirmative: Can the restriction be deemed to be justified on the grounds of overriding public interests, and is the restriction proportionate?*

(6) *Does the continuous wealth taxation of the beneficiaries for the trust's assets and taxation at a rate of 1.1% constitute a restriction pursuant to Article 31 and/or Article 40 of the EEA Agreement – and can this be invoked by the beneficiaries in a trust as described in section 2 of the request for an advisory opinion?*

(7) *If the question is answered in the affirmative: Can the restriction be regarded as justified by overriding reasons of public interest, and is the restriction proportionate? Is the taxation contrary to the requirement of respect for fundamental rights in the EEA Agreement? Will it be of importance whether the agreement on the exchange of information between Norway and Liechtenstein has entered into force?*

57 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Admissibility

58 According to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers it necessary to enable it to give judgment.

59 The purpose of this procedure is to establish co-operation between the Court and the national courts and tribunals, as a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25). It follows that a strict interpretation of the terms "court" and "tribunal" is not required under Article 34 SCA (see Case E-23/13 *Hellenic Capital Market Commission*, judgment of 9 May 2014, not yet reported, paragraph 34, and case law cited).

60 Thus, in order to determine whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent and, as the case may be, whether its procedure is *inter partes* and similar to the procedure in court (see Case E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraphs 34 to 35, and case law cited).

61 The Norwegian Government has contested the qualification of the Tax Appeals Board as a court or tribunal for the purposes of Article 34 SCA and, consequently, whether the request for an Advisory Opinion is admissible. Similar doubts were expressed by the Commission, in particular with regard to the independence of the Tax Appeals Board and the nature of the proceedings before it.

62 The Norwegian Government claims that the Tax Appeals Board lacks compulsory jurisdiction, since the applicants in the national proceedings could have challenged the tax assessment for the years 2004-2006 directly before the national courts and that they were not obliged to exhaust rights of administrative appeal prior to doing so. The Government argues that the Tax Appeals Board is only the first administrative body of appeal in national law, as its decisions may subsequently be contested before the National Tax Appeals Board, if the Norwegian Directorate of Taxes demands that a case be re-examined.

63 Second, the Norwegian Government asserts that the process before the Tax Appeals Board is not *inter partes*, in a manner comparable to adversarial court proceedings. According to the Government, the process before the Tax Appeals Board consists of a written procedure, where the taxpayer receives a draft decision, submitted by the Central Tax Office for Large Enterprises – which functions as the Secretariat to the Tax Appeals Board. The taxpayer is then given the opportunity to comment upon the draft decision, but only in writing. In the third and final stage of the procedure, the Secretariat presents the case and answers questions before the Tax Appeals Board.

64 In the view of the Government, this procedure fails, from the taxpayer's perspective, to meet the adversarial standards of a court.

65 The Government also contends that the Tax Appeals Board lacks the independence to qualify as a court or tribunal under Article 34 SCA, as it is not sufficiently protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. Moreover, the Government essentially submits that there are no adequate safeguards in place to ensure the impartiality of the Tax Appeals Board's members, since it does not have an independent secretariat with responsibility for preparing its cases and that it has those cases prepared by a case officer working at the Central Tax Office for Large Enterprises.

66 At the outset, it must be held that the Tax Appeals Board is of permanent character, established by law and applies rules of law and exercises binding jurisdiction in the form of board decisions that entail a mandatory determination of the legal claims at hand, as long as those are not overturned by the National Tax Appeals Board, upon request, or annulled by the national courts.

67 As regards the claim of the Norwegian Government that the Tax Appeals Board does not meet the necessary requirements of independence to qualify as a court or tribunal under Article 34 SCA, the Court recalls that the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision.

68 The concept of independence has both an external and internal aspect. The external aspect entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The internal aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (see, to that effect, *Dr A*, cited above, paragraphs 38 to 40, and case law cited).

69 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (see *Dr A*, cited above, paragraph 40, and case law cited).

70 In its request, the Tax Appeals Board has stated that its chairperson and members are appointed by the Norwegian Ministry of Finance for a fixed term of four years, with the possibility of extension subject to the Ministry's assessment. Its members cannot be dismissed, but there is the option of not extending their term of office.

71 The request notes that being a member of the Board is not a full-time occupation and that all members have separate professional careers. For instance, current members receive an income from practising as e.g. lawyers or State authorised accountants and regard themselves as being financially independent of their position as board member. Moreover, the request states that the Tax Appeals Board does not take instructions from any other authority, meaning that the Board has professional, independent decision-making authority corresponding to that of a court.

72 According to this description, which has not been contested by any party submitting written observations to the Court or participating in the oral hearing, the Tax Appeals Board has a status that is sufficiently separate and independent from the

Central Tax Office which adopted the decision under appeal. Thus, the Court holds that the Tax Appeals Board exercises a judicial or quasi-judicial function and as such qualifies as a court or tribunal within the meaning of Article 34 SCA.

73 The Government also claims that an Advisory Opinion is not necessary to resolve the dispute pending before the Tax Appeals Board. The background to that request was an appeal by the Central Tax Office against a decision by the Tax Office of 18 December 2007 to the effect that the beneficiaries of Ptarmigan Trust would not be subject to CFC taxation for their part of the income and deficit of the trust in 2004-2006. This was in line with the submissions of the beneficiaries. The Government claims that the appeal was withdrawn by the Tax Directorate on 15 April 2013 for practical purposes, which entailed the final conclusion that the beneficiaries would not be subject to CFC taxation for 2004-2006.

74 The Government maintains that, since the decision of the Tax Office concerning the application of the CFC rules is no longer challenged before the Tax Appeals Board, it is not necessary to answer the questions referred in order to resolve a dispute, as the answers do not have any bearing on the outcome of any remaining questions regarding the years 2004-2006.

75 However, it is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, to that effect, Case E-19/11 *Vín Tríó* [2012] EFTA Ct. Rep. 974, paragraph 26, and case law cited).

76 Accordingly, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 21, and case law cited).

77 It follows that a request submitted to the Court under Article 34 SCA, must, in principle, be seen as validly brought before it, so long as the request has not been withdrawn from the court from which it emanates or quashed on an appeal by a superior court.

78 Taking these considerations into account, it must be noted that at the hearing of 5 February 2014 the parties to the main proceedings, in answering questions of the Court, confirmed that the case continued to remain pending before the Tax Appeals Board more than nine months after the Norwegian Tax Directorate withdrew the appeal and asked the Tax Appeals Board to withdraw its request to the Court.

79 It follows that the Tax Appeals Board still considers it necessary to obtain the Court's Opinion. In these circumstances, the request must be held admissible.

IV The first and second questions

80 By their first and second questions the Tax Appeals Board and Oslo District Court wish to establish, in essence, whether a trust, such as the one whose beneficiaries have been made subject to CFC taxation in the manner described in the references, falls within the scope of Article 31 EEA as a form of establishment and, if so, who holds the rights pursuant to the relevant provisions of the EEA Agreement. Moreover, the national bodies question whether a trust meets the requirement of economic activity provided for in Article 31 EEA.

81 The plaintiffs submit that the freedom of establishment applies to Ptarmigan Trust. In their view, it would be untenable to claim that the trust is not covered by the freedom of establishment simply because it is not regarded as a legal person. The plaintiffs submit further that the concept of establishment is very broad. This argument is supported by the French Government, which contends that, as a result, the freedom of establishment is not limited to the setting up of companies with legal personality, but also covers the setting up of entities which have no legal personality.

82 In contrast, the Norwegian Government argues that entities which do not have legal personality and which are not an integral part of another company or firm fall outside the scope of the freedom of establishment. This view is essentially supported by the United Kingdom Government. The Norwegian Government adds further that Ptarmigan Trust was neither set up by the beneficiaries themselves nor is it used by the beneficiaries as a means of exercising their right to take up and pursue activities as self-employed persons or to set up and manage undertakings in Liechtenstein. Furthermore, the beneficiaries of a trust have not acquired shares in the trust allowing them to exert "a definite influence" over the decisions taken in the trust, within the meaning given to this term in case law.

83 The United Kingdom Government adds that the settlor and the beneficiaries of a trust may only rely on the freedom of establishment if they have definitive influence on the activities of the trust and use it as a vehicle for actual pursuit of stable, continuing and indefinite economic activities in the host EEA State. On the other hand, trustees may rely on the freedom of establishment, but only in relation to their own economic activities of managing the trust property. The trust itself cannot be regarded as a secondary establishment of the trustees.

84 ESA observes that the freedom of establishment must be interpreted as covering the freedom to establish a trust, or to have a trust established, including trusts that are not legal persons. An EEA State, the home State, may not be allowed to hinder the

exercise by its residents of their right to have a trust established in another EEA State, the host State, under the conditions laid down by the law of the host State for its own nationals. Consequently, in its view, measures taken by the home State hindering such exercise are precluded by the second subparagraph of Article 31(1) EEA, according to which the freedom of establishment shall include the right "to set up and manage undertakings" including, but not limited to, "companies or firms".

85 In addition, ESA argues that when Norwegian taxpayers are considered to be participants in a CFC which is a trust, they should be able to rely on the freedom of establishment to challenge their CFC taxation to the extent that the CFC taxation restricts that freedom. In a similar vein, the Commission submits that national CFC legislation which treats beneficiaries of a trust as direct recipients of the income of the trust falls within the provisions of the EEA Agreement on freedom of establishment.

86 According to the Commission, in order to correctly analyse the applicable freedom, it is necessary to have regard not to the relationship of the beneficiaries with the trust or the trustee or the trust property today, but to the situation of the settlor at the time of the creation of the trust. That is to say, when a settlor creates a trust in another EEA State, it must be asked whether, in doing so, he exercises his freedom of establishment.

87 The Commission submits that the answer to that question must be in the affirmative to the extent that the trust is intended to carry on an economic activity. In those circumstances, the trust must be seen as a vehicle for carrying on business in the same way as a company or any other type of entity referred to in the second paragraph of Article 34 EEA.

88 As regards the second question, the Norwegian and United Kingdom Governments argue in essence that the concept of establishment actually requires an entity to have legal personality, as well as involving the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period. Consequently, only the actual establishment in the host State and the pursuit of genuine economic activity there falls within the realm of the provisions on freedom of establishment. As regards the issue of economic activity, this position is essentially supported by the French Government.

89 The plaintiffs assert that Ptarmigan Trust pursues a genuine economic activity that comes within the purview of Articles 31 and 34 EEA. They argue that Ptarmigan Trust is established in Liechtenstein and that all the management of the trust takes place there. Moreover, they state that the trustees have spent considerable resources on the management of the trust and that the trustees hold regular asset management meetings.

90 This position is supported by the Liechtenstein Government, which submits that the staff of the trust and one of the three trustees is located in Liechtenstein. This activity is pursued through a fixed establishment, with the trust being an independent entity, which, through the trustees, on a long-term basis, owns and manages several companies. As the owning and managing of companies is regarded an economic activity within the meaning of the EEA Agreement, and considering that Ptarmigan Trust is an irrevocable trust, the Liechtenstein Government submits that the trust pursues an economic activity for an indefinite period.

91 The Norwegian Government questions whether the trust fulfils the requirement of genuine economic activity inherent in Articles 31 and 34 EEA. The Government argues that the trust was registered by the tax authorities in Liechtenstein in 1980 as exempt from any ordinary taxes on condition that it did not engage in business or commercial activities in Liechtenstein. Moreover, under the trust agreement, the trustees are not expected to interfere in the management of the companies owned by the trust and, in fact, they have not done so. According to the Government, it therefore appears that Ptarmigan Trust is simply a means of accumulating income without any further tax charge.

92 The plaintiffs contest this interpretation of the trust agreement. They argue that it follows from the agreement and from case law that the trustees have a duty to ensure that the companies owned by the trust are properly managed, and, moreover, that the trustees take an active role in the selection and appointment of directors in the subsidiaries. They also take an active role in liaising with the management of the subsidiaries and discussing and resolving ongoing business matters.

Findings of the Court

93 The right of establishment, provided for in Articles 31 to 34 EEA, is granted both to natural persons who are nationals of an EEA State and to legal entities (“companies or firms”), no matter whether they have legal personality or not, provided they have been formed in accordance with the law of an EU State or an EFTA State and have their registered office, central administration or principal place of business within the territory of the Contracting Parties. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other EEA State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up. It follows that a person or entity may be established, within the meaning of the EEA Agreement, in more than one EEA State in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries (compare Article 31 EEA).

94 The concept of establishment within the meaning of the EEA Agreement is therefore a very broad one, allowing an EEA national to participate, on a stable and continuous basis, in the economic life of a EEA State other than his State of origin

and to profit therefrom, thus contributing to economic and social interpenetration within the EEA (see, to this effect, Case E-1/09 *ESA* v *Liechtenstein* [2009-2010] EFTA Ct. Rep. 46, paragraph 28, and case law cited).

95 Having regard to that objective of integration, the right of establishment covers all measures which permit or even merely facilitate access to other EEA States and the pursuit of an economic activity in those States by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators (see, for comparison, Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, paragraph 18).

96 Accordingly, the concept of establishment under Articles 31 and 34 EEA has a specific EEA meaning and must not be interpreted narrowly. Thus, any person or entity, such as a trust, that pursues economic activities that are real and genuine must be regarded as taking advantage of its right of establishment under Articles 31 and 34 EEA.

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

98 A fixed establishment may be gained and maintained by such activities as settling personally in the host State, establishing the seat of management there and/or recruiting staff to perform the services that may be required from the establishment there. In contrast, an entity not carrying out any business in another EEA State, due to the extent it exists in terms of premises, staff and equipment, and whose incorporation may thus not reflect economic reality cannot invoke Articles 31 and 34 EEA due to its lack of actual economic activity (compare, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 67 to 68, and case law cited).

99 Whether the entity in question conducts a real and genuine economic activity cannot be answered in the abstract. It depends on the actual terms of the entity's statutes, such as, in the case at hand, the trust's deed, and the actual activities of that entity and its management. If a specific assessment reveals, for example, that the trust is involved in the management of a group's companies or other activities for a group, such as managing a pool of resources, and its actual incorporation reflected its actual activities, it has to be regarded as a real and genuine economic activity, which constitutes establishment. As the Commission stated in response to a question from the bench, it is not required that the economic activities take effect in the EEA State of establishment. It suffices that they take effect in the EEA.

100 Provided that those conditions are fulfilled, neither the status under national law of the legal entity employed to that end, the income level of the establishment nor the origin of its funds can have any consequence as to whether or not there is an establishment for the purposes of EEA law.

101 For the plaintiffs in the main proceedings to be able to invoke Articles 31 and 34 EEA, the national courts, in the assessment of the facts which is within their exclusive jurisdiction, would need to establish that the activities in question are real and genuine. The national courts must thereby base their examination on the objective and verifiable elements set out in paragraphs 96 to 99 of this judgment and make an overall assessment of all the circumstances of the case relating to the activities concerned.

102 As regards the question submitted to the Court in relation to who holds the rights pursuant to the provisions of the EEA Agreement, it is of no relevance whether the national rules may affect parties other than the plaintiffs, in their capacity as beneficiaries of the trust. In order to be effective, the right of establishment must also entail, in a situation such as that in the main proceedings, that the beneficiaries are entitled to rely on Articles 31 and 34 EEA to the extent the application of national rules contrary to those provisions affects their legal position (compare, to that effect, Case C-18/11 *Philips Electronics UK*, judgment of 6 September 2012, published electronically, paragraphs 38 and 39).

103 In light of the preceding considerations, the answer to the first two questions must be that a trust such as Ptarmigan Trust falls within the scope of Article 31 EEA provided that the trust pursues a real and genuine economic activity within the EEA for an indefinite period and through a fixed establishment. Whether this is the case is for the national court to assess. All interested parties, that is to say the trust's settlors, trustees and beneficiaries hold the rights under Articles 31 and 34 EEA.

V The third question

104 The third question posed by the Tax Appeals Board and Oslo District Court is based on the presumption that the answer of the Court to their first question is negative and that Articles 31 and 34 EEA are not engaged for the purposes of the cases pending before them. It follows from the considerations set out in paragraphs 96 to 99 of this judgment that this determination depends essentially on the assessment of the facts in the national proceedings, which under Article 34 SCA is a matter for the national court.

105 Should the Tax Appeals Board and Oslo District Court find that the activities of the plaintiffs are not such as to engage Articles 31 and 34 EEA, the Court will, in order to give as useful a reply as possible in the framework of the cooperation procedure

under Article 34 SCA, also examine the issue raised by the third question of the Tax Appeals Board and Oslo District Court.

106 The plaintiffs argue that the income from the trust, in particular, the dividends that flow from a Dutch company through a trust in Liechtenstein to beneficiaries in Norway, must be covered by Article 40 EEA and Annex XII to that Agreement. This view is shared by the Liechtenstein Government, which argues that Article 40 EEA must focus on and protect the different forms of participation in a trust such as Ptarmigan Trust.

107 The Norwegian Government contends that the relationship between the beneficiaries and Ptarmigan Trust cannot be regarded as an "investment" within the meaning of Article 40 EEA. The beneficiaries have neither made any capital available to the trust nor have they acquired "shares" enabling them to participate effectively in the management of the trust. In contrast, the Government asserts, investments for the purposes of Article 40 EEA serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which the capital is made available in order to carry out economic activity.

Findings of the Court

108 According to consistent case law, Article 40 EEA generally prohibits restrictions on movements of capital between EEA States (see Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 25). The provisions necessary for the application of that Article are listed in Annex XII to the EEA Agreement. Annex XII states that Directive 88/361 of 24 June 1988 ("Directive 88/361") and Annex I to that Directive are applicable to the EEA.

109 While the EEA Agreement does not define the concept of "movement of capital" in Article 40 EEA, it is common ground that Directive 88/361, together with the nomenclature annexed to it, has indicative value for defining that term (see, to that effect, Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 80), subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive.

110 It follows that restrictions on the free movement of capital between nationals of States party to the EEA Agreement must be assessed in the light of Article 40 EEA and Annex XII to that Agreement. Those provisions have the same legal scope as the substantially identical provisions of Article 63 of the Treaty on the Functioning of the European Union (see Case E-1/00 *Íslandsbanki-FBA* [2000-2001] EFTA Ct. Rep. 8, paragraph 16; Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 28; and in a similar vein the Opinion of Advocate General Geelhoed in the same case, points 72 and 73; and Case C-284/09 *Commission* v *Germany* [2011] ECR I-9879, paragraph 96, and case law cited).

111 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case law that the purpose of the legislation concerned must be taken into consideration (compare, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22; and Case C-168/11 *Beker*, judgment of 28 February 2013, published electronically, paragraph 24).

112 Moreover, it is also clear from case law that, in principle, a measure in dispute will be examined only in relation to one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it (compare Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 37, and case law cited).

113 In that respect, the Court has previously held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities falls within the scope of the freedom of establishment (see Case E-14/13 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 924, paragraph 27, and case law cited).

114 On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (see *ESA* v *Iceland*, cited above, paragraph 28; and, for comparison, Case C-35/11 *Test Claimants in the FII Group Litigation*, judgment of 13 November 2012, published electronically, paragraph 92, and case law cited; and *Beker*, cited above, paragraph 26).

115 The Court notes that, unlike the situations in *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited above (paragraphs 31 and 32), and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107 (paragraphs 28 to 33), the Norwegian legislation at issue in the main proceedings applies not only to independent undertakings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities, but also to capital assets domiciled in low-tax countries, which the taxpayer controls, directly or indirectly, and benefits from.

116 Consequently, in so far as the Norwegian legislation relates to income which originates in an EEA State, it cannot be determined from its purpose whether it falls predominantly within the scope of Article 31 or Article 40 EEA.

117 In such circumstances, the Court takes account of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or another of those provisions

(compare *Test Claimants in the FII Group Litigation*, cited above, paragraphs 93 and 94, and case law cited, and *Beker*, cited above, paragraphs 27 and 28).

118 However, it appears from the requests that the factual circumstances in the main proceedings are contested between the parties. As already stated in paragraph 101 of this judgment, disputes relating to the facts are a matter for national courts.

119 In the absence of further information in the requests submitted to the Court, it is therefore for the national courts to determine whether the application of the Norwegian CFC legislation comes under the scope of Articles 31 and 34 EEA, or, in the alternative, Article 40 EEA. In this determination, the national courts must have regard to the facts of the cases and the considerations set out in paragraphs 96 and 99 regarding the right of establishment.

120 If the result of this assessment is that the plaintiffs are not found to have taken advantages of the rights inherent in Articles 31 and 34 EEA, such as by reason of having demonstrated that they exercise definite influence on an independent undertaking in another EEA State or are engaged in genuine business activities in another EEA State to the degree necessary for Articles 31 and 34 EEA to apply, the national courts must assess separately whether the tax measures come under the scope of Article 40 EEA.

121 When assessing whether the circumstances in the main proceedings are such as to engage Article 40 EEA, it must be kept in mind that for the purpose of that provision "movement of capital" must, in principle, be construed as encompassing those financial operations essentially concerned with the investment of the funds in question rather than remuneration for goods and services (compare, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 21 to 23).

122 Insofar as activities of the plaintiffs that come within the purview of Article 40 EEA concern "direct investments", within the meaning of Directive 88/361 and Annex XII to the EEA Agreement, it is apparent from the list in heading I of the Directive and the explanatory notes to it that the concept of direct investment concerns investments by natural or legal persons which serve to establish or maintain lasting and direct links between the person providing the capital and the company to which that capital is made available in order to carry out an economic activity (see, to that effect, *Holböck*, cited above, paragraphs 34 and 35, and case law cited).

123 Accordingly, if the national courts find that the plaintiffs have not engaged in an economic activity, they will not be able to invoke Article 40 EEA insofar as their capital movement consists of direct investment within the meaning of the Directive.

124 However, national measures affecting movements of capital of a "personal" nature, whose constituent elements are not confined within a single EEA State may come within the scope of Article 40 EEA in accordance with the nomenclature annexed to Directive 88/361, see Heading XI of Annex I to the Directive, whether or not the plaintiffs have engaged in economic activity (compare, in particular, Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 42; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 39; Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 30; Case C-67/08 *Block* [2009] ECR I-883, paragraph 20; and Case C-35/08 *Busley and Cibrian Fernandez* [2009] ECR I-9807, paragraph 18). The determination thereof depends on the factual assessment of each case and is thus the prerogative of the national courts.

125 In light of the preceding considerations, the answer to the third question must be that beneficiaries of capital assets set up in the form of a trust that are subject to national tax measures such as those at issue in the main proceedings may be able to invoke Article 40 EEA in the event that they are not found to have exercised definite influence over an independent undertaking in another EEA State or engaged in an economic activity that comes within the scope of the right of establishment. It is for the national courts to make the final assessment in that regard, based on the factual circumstances of the case.

VI The fourth question

126 By their fourth question the Tax Appeals Board and Oslo District Court ask whether the Norwegian CFC rules involve one or more restrictions on the freedom of establishment or the right to free movement of capital.

127 The plaintiffs and the Government of Liechtenstein submit that the rule on ongoing taxation of nationals residing in an EEA State in relation to income in a trust established in another EEA State entails a restriction on the freedom of establishment and on the free movement of capital. They contend that the potential beneficiaries of Ptarmigan Trust are taxed at a much higher rate, pursuant to section 10-60 of the Tax Act, than they would be were the trust not subject to the CFC rules. Furthermore, they are taxed at a much earlier point in time than they would be if only Norwegian companies were involved. ESA supports this position, pointing out that the Norwegian CFC rules are discriminatory as taxpayers who are beneficiaries of a trust to which the CFC rules apply are placed in a less favourable position than resident taxpayers who are beneficiaries of a trust to which the CFC rules do not apply.

128 The Norwegian, French and United Kingdom Governments submit that, in order to determine whether there is a restriction, it is necessary to decide whether an individual investor making similar investments in Norway is in an objectively comparable situation to the beneficiaries of Ptarmigan Trust. Furthermore, it is

necessary to establish that such an investor would be treated more favourably than the beneficiaries. It is pointed out that as discretionary trusts are not recognised in Norwegian law, it is not possible to compare the treatment of one of the Norwegian resident beneficiaries of the trust with a Norwegian resident beneficiary of a discretionary trust registered in Norway. Moreover, a discretionary trust is also different from a partnership, the latter requiring that at least one of the partners has unlimited liability, whereas a partnership lacks the trust's character of an independent capital asset.

129 The Commission concedes that a trust is indeed not a separate legal person from the trustee. However, at the same time, the beneficiaries are not the same legal person as the trustee. That a trustee resident in Norway might be liable for tax on trust property held elsewhere has no relevance for the taxation of trust beneficiaries. More precisely, the fact that a member of a partnership is taxable immediately on his share of the partnerships' earnings merely reflects the fact that the partnership is not a separate person from him and, as a result, he is the recipient (pro rata) of those earnings. The Commission concludes that this provides no basis on which to deduce that trust beneficiaries may be taxed on income received by an entirely different person. Since no example has been given of taxation of that kind in a purely domestic situation, the Commission submits that the attribution to trust beneficiaries of the income of a non-resident trust thus constitutes a restriction.

130 Furthermore, the Commission submits that the absence of an entity in Norwegian law identical to a Liechtenstein trust does not mean that there is no domestic comparator with the consequence that Norway has complete freedom of action.

131 The plaintiffs also argue that the CFC rules at issue for the income years 2004-2006 amount to a separate restriction on the freedom of establishment to the extent that they entail economic double taxation of share income, including dividends, as received by a CFC that is a trust and subsequently distributed by the trust to its beneficiaries.

132 This argument is supported in essence by ESA and the Commission. They submit that the economic double taxation arises as a result of the Norwegian CFC taxation of share income, including dividends, received by the trust when the funds distributed as dividends have already been taxed in the hands of the distributing companies (e.g. by means of corporation tax on Ptarmigan's subsidiaries). Moreover, this international economic double taxation is effectively continued, and added to, with the additional taxation of distributions made from the trust to the personal beneficiaries.

133 The Commission also observes that the Norwegian CFC rules do not appear to make any allowance for tax paid on the underlying income of companies in which the trust holds shares. It suggests that such taxation may be less favourable than the regime

which applies in purely domestic situations. If so, the Commission contends that it results in a restriction.

134 ESA argues that there may be a difference in treatment as regards economic double taxation, when the situation of personal participants in a CFC is compared with the situation of personal participants in a partnership. Unlike the latter, personal participants in a CFC are not afforded any opportunity to undo the economic double taxation that the CFC taxation entails. Thus, they are left in a less favourable tax position than the participants in a partnership.

135 The Norwegian Government submits that taxation of distributions to the beneficiaries is compatible with the EEA Agreement. For such distributions, the beneficiaries are assessed in the same way as other personal taxpayers, for example shareholders in limited liability companies and participants in enterprises assessed as partnerships. It cannot make any difference whether the distributed funds have previously been taxed in underlying companies or enterprises.

Findings of the Court

136 At the outset it must be recalled that although Article 31 EEA is, according to its wording, intended in particular to secure the benefit of national treatment in a host State, it also prohibits the home State from hindering the establishment in other EEA States of its own nationals or companies incorporated under its legislation.

137 The prohibition on discrimination, whether it has its basis in Articles 4, 31 or 40 EEA, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraphs 59 and 60, and case law cited).

138 In order to determine whether a difference in tax treatment such as that resulting from section 10-60 of the Tax Act is discriminatory, it is necessary to ascertain whether, for the purposes of the taxation of benefits, a taxpayer resident in Norway who receives benefits from another domestic entity is in an objectively comparable situation to a taxpayer earning benefits from an entity located in another EEA State.

139 According to section 10-61 of the Tax Act, the party who owns or controls a CFC is liable to pay tax on the pro rata share of the profit in the CFC whether or not funds have been distributed from the CFC to the beneficiaries. Continuous taxation must consequently be levied on the income in a Norwegian-controlled foreign trust.

140 It is not contested that a rule such as that specified in section 10-61 of the Tax Act, which provides that those who hold an interest in a legal entity, such as the beneficiaries of Ptarmigan Trust, are made liable to tax whether or not any funds

have been distributed to them, does not have an equivalent in any domestic situation where the beneficiary is a separate taxable individual or legal person from the party which holds the profits and both parties are resident in Norway. Thus, it follows from section 10-60 of the same Act that this rule only applies to taxpayers who benefit from independent undertakings or capital assets domiciled in low-tax countries in the manner described in the provision.

141 That difference in treatment creates a tax disadvantage for the resident taxpayers who are subject to the legislation on CFCs. They are hindered in exercising their right of establishment because they are dissuaded from establishing, acquiring or maintaining an undertaking in another EEA State in which the latter is subject to low levels of taxation. That differential treatment constitutes a restriction on the freedom of establishment, amounting to discrimination, within the meaning of Articles 31 and 34 EEA.

142 The circumstance that trusts are not recognised as separate taxable entities under Norwegian law cannot itself justify a difference in treatment, since, as the company law of the EEA States has not been fully harmonised at EEA level, that would deprive the freedom of establishment of all effectiveness (compare Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-5145, paragraph 50).

143 Furthermore, it is not relevant for the purposes of finding a restriction that taxpayers in Norway do not pay more tax on the profit of a CFC under the Tax Act than would be due were the trust or legal entity established in Norway. The fact remains that the taxpayers subject to section 10-61 of the Tax Act are taxed on the profits of another legal person, which is not the case for resident taxpayers in Norway who hold interests in separate domestic legal entities (see, for comparison, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited above, paragraph 45).

144 If the tax disadvantage resulting from the differential treatment of resident taxpayers under the Tax Act is such as to hinder the beneficiaries from investing funds in another EEA State, without any intention to influence the control or the management of an undertaking, or from engaging in the movement of capital of a personal nature, it constitutes a restriction on the free movement of capital within the meaning of Article 40 EEA and Annex XII to the EEA Agreement.

145 As regards the argument that the national CFC rules at issue for the income years 2004-2006 entail economic double taxation, the Court notes that a rule of national law entailing that, in contrast to participants in comparable domestic entities, personal participants in a CFC in another EEA State are not afforded any opportunity to undo the economic double taxation that follows from the CFC taxation puts them at a disadvantage in relation to those who participate in domestic companies.

146 In such a situation, the Norwegian legislation has the effect of deterring residents in Norway from investing in another EEA State.

147 Such taxation also has a restrictive effect as regards economic operators resident in other EEA States, in that it constitutes an obstacle to their raising capital in Norway. If revenue from capital of non-Norwegian origin receives less favourable tax treatment than revenue distributed by entities resident in Norway, the shares of economic entities established in other EEA States are less attractive to investors residing in Norway than shares in companies which have their seat in that EEA State (compare, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 35; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 24; and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 23).

148 It is for the national court to determine whether the application of national law is such as to entail a disadvantage for residents investing in another EEA State or that it constitutes an obstacle for economic operators resident in those States, based on the considerations set forth in paragraphs 143 and 145 above. If that is the case, economic double taxation such as that at issue in the main proceedings constitutes a restriction on the right of establishment, prohibited by Articles 31 and 34 EEA, or, depending upon the assessment of the national court in light of the considerations set out in paragraphs 96 to 99 and 120 to 124 of this judgment, the free movement of capital which is, in principle, prohibited by Article 40 EEA.

149 The answer to the fourth question must therefore be that the difference in treatment entailed by section 10-60 of the Tax Act creates a tax disadvantage for resident taxpayers to whom the legislation on CFCs applies, which is such as to hinder the exercise of their right of establishment, dissuading them from establishing, acquiring or maintaining a subsidiary in an EEA State in which the latter is subject to low levels of taxation. It therefore constitutes a restriction on the right of establishment within the meaning of Articles 31 and 34 EEA.

150 If the tax disadvantage resulting from the differential treatment of resident taxpayers under section 10-60 of the Tax Act is such as to hinder the beneficiaries from investing funds in another EEA State, without any intention to influence the control or the management of an undertaking, and from engaging in the movement of capital of a personal nature, it constitutes a restriction on the free movement of capital within the meaning of Article 40 EEA and Annex XII to the EEA Agreement.

151 Moreover, a rule of national law entailing that, in contrast to participants in comparable domestic entities, personal participants in a CFC in another EEA State are not afforded any opportunity to undo the economic double taxation that the CFC rules entail constitutes a restriction on the right of establishment under Articles 31 and 34 EEA, or, depending upon the assessment of the national court, the free movement of capital which is, in principle, prohibited by Article 40 EEA.

VII The fifth question

152 By their fifth question, the Tax Appeals Board and the Oslo District Court seek in essence to establish, in the event that the third and fourth questions are answered in the affirmative, whether restrictions on the freedom of establishment or the free movement of capital resulting from the national CFC legislation may be justified on grounds of overriding public interest and, in that case, whether such restrictions are proportionate.

153 The Norwegian Government argues that CFC legislation such as that at issue in the main proceedings must be regarded as justified in relation to a country which is a party to the EEA Agreement for overriding reasons relating to the general interest in combating tax evasion and the need to safeguard the effectiveness of fiscal supervision. Briefly, these requirements state that CFC rules may be regarded as legitimate if the company or cooperation being examined does not perform a genuine economic activity in the State concerned.

154 In the view of the Government, the CFC legislation is appropriate to ensuring the attainment of the objective pursued, without going beyond what is necessary to attain that objective. Specifically, the Government submits that it is legitimate for the taxpayer's home State to demand verifiable documentation of whether activity of a CFC meets the requirements of genuine economic activity. This position is essentially supported by the French and United Kingdom Governments, with the latter adding that the national legislation is also capable of being justified by the need to maintain a balanced allocation of taxing powers.

155 In contrast, the plaintiffs contend that the establishment of Ptarmigan Trust was not based on tax considerations and has not resulted in any erosion of the Norwegian tax base. In any event, it is clear that preventing the circumvention of national rules cannot justify taxation that is more burdensome than what would be the case for national investments. Moreover the Norwegian CFC rules go beyond what is necessary to prevent abusive practices that circumvent national tax legislation. These submissions are, in essence, supported by the Liechtenstein Government.

156 As regards the CFC taxation of the trust as such, ESA submits that Norway is justified in applying CFC rules to tax the income of a Liechtenstein trust which does not constitute an actual establishment pursuing a genuine economic activity in Liechtenstein when, in fact, the trust serves as a means to escape the tax normally due on the profits generated by activities carried out on Norwegian territory. In addition, in ESA's view, the CFC participants must be given an opportunity to produce evidence that the CFC is actually established and its activities are genuine, evidence which must be accepted by the competent national authorities, subject to appropriate verification or documentation.

157 The Commission contends that while the scope of the Norwegian CFC rules is potentially wide, it is limited, as regards EEA States, by the provisions of section 10-64 of the Tax Act, which essentially confines their scope to real situations of tax avoidance. In the Commission's view, it is legitimate to have recourse to presumptions of tax evasion or avoidance when activities are apparently being carried out in a low-tax country. It must, however, be open to the taxpayer to provide evidence to the contrary, as provided for in section 10-64 of the Tax Act.

158 The Commission submits further that, in line with case law, the Norwegian CFC legislation requires, first, that the beneficiaries of a trust demonstrate that a trust is actually established in an EEA State and pursues genuine financial activities there and, second, that Norway can verify such information by means of a tax agreement or other arrangement, including a declaration from the tax authorities of the State of establishment that confirms the correctness of the documentation.

159 As regards the extent to which the Norwegian CFC rules entail international economic double taxation of share income, including dividends, paid to a CFC that is a trust domiciled in a low-tax country in the EEA in so far as the double taxation is avoided or undone in comparable internal situations, ESA considers that a justification is difficult. In ESA's view, this appears to be an issue for natural persons that are taxed as participants in a controlled foreign entity in the form of a trust.

160 The Commission contends that trust beneficiaries may not be taxed more heavily than they would be were they themselves shareholders in the companies whose shares are held by the trust. If the beneficiaries of Ptarmigan Trust were shareholders in Eagleville they would be taxed at the rate of 28 % on dividends received from that company. They would not suffer an additional tax charge of the kind that apparently results from the application of the Norwegian CFC rules in this case. Therefore, in the Commission's view, the additional tax charge is disproportionate.

Findings of the Court

161 As noted above, the separate tax treatment under the legislation on CFCs and the resulting disadvantage for the domestic participants in such entities who come under the scope of that legislation may be such as to hinder the exercise of the right of establishment or the free movement of capital by such individuals and entities, dissuading them from taking advantage of their rights under Articles 31 and 34 or 40 EEA. If so, the national legislation constitutes a restriction on these rights.

162 According to settled case law, a restriction on the right of establishment or on the free movement of capital is permissible if it is justified by overriding reasons in the public interest (to that effect, see, for example, *Arcade Drilling*, cited above, paragraph 82, and case law cited).

163 Moreover, the restriction must be appropriate to ensuring the attainment of the objective in question and it must not go beyond what is necessary to attain that objective (see *ESA* v *Norway*, cited above, paragraph 83, and case law cited, and *Arcade Drilling*, cited above, paragraph 83).

164 The Court recalls that an EEA State is entitled to take measures designed to prevent economic operators established in that State from attempting, under cover of the rights created by the EEA Agreement, from improperly circumventing their national legislation, or to prevent these companies from improperly or fraudulently taking advantage of provisions of EEA law (see *Arcade Drilling*, cited above, paragraph 87).

165 In such circumstances, national courts may in each case take account of objective evidence of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of EEA law on which they seek to rely. However, national courts must assess such conduct in light of the objectives pursued by those provisions (see *Arcade Drilling*, cited above, paragraph 88).

166 The need to prevent loss of tax revenue is not a matter of overriding general interest that would justify a restriction on a freedom guaranteed by the EEA Agreement (compare *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited above, paragraph 49). For the purposes of preventing tax avoidance, a national measure restricting the right of establishment or the free movement of capital may be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax normally payable on the profits generated by activities carried out on the national territory (compare Case C-282/12 *Itelcar*, judgment of 3 October 2013, published electronically, paragraph 34, and case law cited).

167 It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.

168 That type of conduct must be considered such as to undermine the right of the EEA States to exercise their tax jurisdiction in relation to the activities carried out in their territory and thus to jeopardise a balanced allocation between EEA States of the power to impose taxes (compare *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited above, paragraph 56, and case law cited).

169 In the light of those considerations, it must be determined whether the restriction on the right of establishment or, in the alternative, the free movement of capital, arising from the CFC legislation may be justified on the ground of prevention of wholly artificial arrangements and, if so, whether it is proportionate in relation to that objective.

170 It is clear from the references that the Norwegian CFC legislation covers situations where taxpayers, either as individuals or legal entities, alone or together with others, directly or indirectly control other independent undertakings or capital assets domiciled in low-taxed countries and from which the taxpayers benefit, directly or indirectly. According to the legislation, low-tax countries are those in which the ordinary income tax levied on the company's or the undertaking's total profit amounts to less than two thirds of the tax that would have been levied on the company or the undertaking had it been domiciled in Norway.

171 From 2007 onwards, according to section 10-60(b) of the Tax Act, taxation pursuant to the Norwegian CFC rules cannot be levied if the foreign company is established in an EEA State and pursues genuine economic activity there.

172 In providing for the taxation in the tax base of the resident taxpayer of benefits such taxpayers receive from a CFC not pursuing genuine economic activities and subject to a very favourable tax regime in another EEA State, the CFC legislation makes it possible to thwart practices which have no other purpose than to escape the tax normally due on the benefits generated by activities carried on in the national territory. Such legislation is therefore suitable to achieve the objective for which it was adopted.

173 In order to comply with the principle of proportionality, a measure pursuing the objective of preventing wholly artificial arrangements which do not reflect economic reality and whose only purpose is unduly to obtain a tax advantage must enable the national court to carry out a case-by-case examination, taking into account the particular features of each case, based on objective elements, in order to assess the abusive or fraudulent conduct of the persons concerned (see, for comparison, *Glaxo Wellcome*, cited above, paragraph 99).

174 In order to find that there is such an arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by EEA law, the objective pursued by freedom of establishment has not been achieved (compare *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited above, paragraph 64).

175 The intention to benefit from a tax advantage is not in itself sufficient to constitute an artificial arrangement and neither is the fact that the activities of the foreign entity

could have been carried out by an entity established in the home State. The artificial nature of certain events or transactions must be determined on the basis of a set of objective circumstances verified in each individual case. Accordingly, the intentions to improperly obtain an advantage from EEA law are to be inferred from the artificial character of the situation to be assessed in the light of the objective circumstances. What is decisive is the fact that the activity, from an objective perspective, has no other reasonable explanation but to secure a tax advantage. If this is the case, the arrangement is purely artificial (compare, to that effect, Opinion of Advocate General Poiares Maduro in Case C-255/02 *Halifax and Others* [2006] ECR I-1609, points 70 and 71).

176 The objective pursued by the right of establishment is to achieve a real and genuine economic activity within the EEA for the purpose of economic interpenetration. Therefore, an arrangement is not wholly artificial if the legal construction reflects economic reality in the State of establishment that can be certified on the basis of objective and verifiable elements set out in paragraphs 96 to 99 of this judgment.

177 If the assessment of those factors leads to the finding that the entity is a fictitious establishment not carrying out any genuine economic activity in the territory of the State of establishment, the creation of that entity must be regarded as having the characteristics of a wholly artificial arrangement there. That could be so in particular in the case of a "letterbox" or "front" subsidiary (compare Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraphs 34 and 35).

178 A type of arrangement described in the preceding paragraph is capable to undermine the right of the EEA States to exercise their tax jurisdiction in relation to the activities carried out in their territory and thus to jeopardise a balanced allocation of taxing powers between EEA States (compare, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 56, and case law cited).

179 In those circumstances, in order for the legislation on CFCs to comply with EEA law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC or the holding of assets that constitutes capital movement reflects economic reality, based on the considerations, as regards the right of establishment, set out in paragraphs 96 to 99 of this judgment and, as regards the free movement of capital, set out in paragraphs 120 to 124 of this judgment.

180 To the extent that the application of CFC legislation such as that at issue in the main proceedings cannot be limited to wholly artificial arrangements, established on the basis of objective elements, but covers all cases in which a resident taxpayer has acquired direct or indirect control in other independent undertakings or capital assets domiciled in low-taxed EEA countries and from which the taxpayers benefit, directly or indirectly, the effects of such legislation exceed what is necessary in

order to attain the objective of preventing wholly artificial arrangements, which do not reflect economic reality and whose only purpose is unduly to obtain a tax advantage (compare, *mutatis mutandis*, *Glaxo Wellcome*, cited above, paragraph 100).

181 In light of the preceding considerations, the answer to the fifth question must be that a restriction on the freedom of establishment or, where applicable, the free movement of capital resulting from national CFC legislation such as that applicable in the main proceedings may be justified on grounds of overriding public interest, in particular on considerations of preventing tax avoidance or maintaining the balanced allocation of taxing powers between EEA States. The restriction is proportionate if it relates only to wholly artificial arrangements which seek to escape the national tax payable in comparable situations. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives a CFC is actually established in the host EEA State and carries on genuine economic activities, which take effect in the EEA.

VIII The sixth question

182 Fred. Olsen and the 10 other plaintiffs joining his action in the case pending before Oslo District Court argue that the charge of wealth tax amounts to a restriction contrary to the EEA Agreement.

183 Fred. Olsen and Others take the view that the assessment of wealth tax amounts to a restriction on the freedoms guaranteed by Articles 31 and 40 EEA because, for the purposes of levying wealth taxation, the plaintiffs are taxed in respect of assets held by the trust. In effect, the plaintiffs are taxed as if they held shares in an unlisted limited company, while their position is not comparable to the position of a shareholder. The plaintiffs contend that they are not in a comparable situation to shareholders or personal participants in transparent entities, as they do not have the right to carry out typical ownership functions in the same manner as shareholders or personal participants.

184 The plaintiffs contend moreover that they are taxed in respect of assets they do not own and that such taxation does not take place in a purely domestic context. They argue that, in contrast to the beneficiaries of Ptarmigan Trust, beneficiaries in Norwegian undertakings under independent management and family foundations are generally not subject to wealth tax themselves. Instead, wealth tax is payable by the foundation, to the extent that it is taxable.

185 In this regard, the plaintiffs point out that Norwegian family foundations and asset funds are subject to wealth tax at a rate of 0.3 % and not at the general rate of 1.1 %. Fred. Olsen and Others contend that, in any event, they cannot be subject to tax at a

higher rate than that which would have applied had Ptarmigan Trust been a family foundation in Norway. These arguments are essentially supported by Petter Olsen and the six plaintiffs joining his action before Oslo District Court.

186 According to Fred. Olsen and Others, when the two situations are comparable, the less favourable treatment of beneficiaries in the cross-border situation constitutes a restriction on the freedom of establishment and/or free movement of capital. Moreover, they contend that, in purely domestic situations, the fact that a taxpayer is "potentially" in a position to receive a distribution in the future has not been seen as sufficient to levy wealth tax.

187 Finally, Fred. Olsen and his co-plaintiffs argue that the assessed taxable value of the interest of the plaintiffs is determined at more than the fair market value and, in addition, that such tax valuation does not take place in a comparable domestic context.

188 The Norwegian Government submits that the beneficiaries of Ptarmigan Trust are treated in the same way as both shareholders in a limited liability company and participants in a partnership. These shareholders/participants are all levied a wealth tax at a rate of 1.1 %. Moreover, the wealth tax is levied whether or not the shareholders/participants have received any distributions and irrespective of their legal or de facto possibility to affect decisions on whether to make distributions.

189 The Government contends that the position is different in relation to foundations, explaining that foundations are regarded as self-owned entities, whereas the beneficiaries of a foundation are not regarded as owning the foundation assets. Hence, wealth tax is only levied in relation to the foundation and not the beneficiaries. This also implies that the level of taxation is lower, as, under Norwegian law, foundations, as is the case with other legal and taxable entities, are subject to wealth tax only in relation to the State and not to the municipalities.

190 The Government further submits that there are objective differences between a trust such as Ptarmigan Trust and all forms of entities legally established in Norway. Foundations are regarded as self-owned entities, whereas the beneficiaries in a foundation are not regarded as owning the foundation assets, implying *inter alia* that assets in the foundations are not distributed to the beneficiaries when the foundation is dissolved. Hence wealth tax is only levied in relation to the foundation and not the beneficiaries. In addition, foundations are strictly regulated under Norwegian law and a trust such as Ptarmigan Trust would not comply with those regulatory requirements.

191 In the view of the Government, it is more appropriate to compare the beneficiaries with shareholders in a limited liability company or with participants in a partnership than with beneficiaries under a foundation. On that basis, the relevant legislation on

wealth tax does not constitute a restriction for the purposes of Articles 31 or 40 EEA when applied in the circumstances of the case at hand.

192 The United Kingdom Government considers that, on the facts underlying the present request, it is not clear whether the beneficiaries are in fact treated less favourably than comparable taxpayers. It is for the national court to determine any factual disputes, including an assessment of whether, on the facts, the beneficiaries of the trust are in a comparable situation with other groups of Norwegian taxpayers who are treated more favourably.

193 Both ESA and the Commission contend that the absence of an entity in Norwegian law identical to a Liechtenstein trust does not mean that there is no domestic comparator whatsoever and that Norway therefore has complete freedom of action as to how it treats the beneficiaries. ESA submits that if the wealth tax rules applied to the beneficiaries result in a tax treatment different to that accorded to beneficiaries in a comparable entity established under Norwegian law and, consequently, in discrimination to the detriment of the beneficiaries, the right of establishment is restricted.

194 ESA takes the view that it is for the national court to determine which is the most appropriate comparator under Norwegian tax law to beneficiaries of a trust established in another EEA State, taking account of the fact that the chosen comparator should be the one which is closest to the situation of the beneficiaries, imposes the least restriction on the exercise of the freedom of establishment and which is the most conducive for legal certainty.

195 The Commission argues that the comparison must be made with other types of entity in which a Norwegian resident has a financial interest and which constitute a separate legal person. In the view of the Commission, the closest Norwegian equivalent to a family trust is a family foundation or asset fund, irrespective of the approach to be taken to the taxation of income.

196 ESA notes that if the beneficiaries of Ptarmigan Trust are considered to be in a comparable situation to the beneficiaries of a Norwegian family foundation, they should be treated equally since the wealth tax rules may not be applied in a discriminatory manner. Noting the differences in tax treatment of a Norwegian family foundation and the beneficiaries of Ptarmigan Trust, ESA submits that such differences may discourage residents from establishing a trust in another EEA State and give them an incentive to keep their funds in Norway instead.

197 The Commission submits that the simple fact of taxing individual beneficiaries in circumstances where the wealth tax would, in a domestic situation, be paid by the foundation or fund does not in itself constitute a restriction. On the other hand, noting that the tax rate for Norwegian family foundations and asset trusts is 0.3 %,

the Commission considers it discriminatory to tax a functionally equivalent cross-border arrangement at a much higher rate, namely at the aggregate rate of 1.1 % that appears in the challenged assessments. The Commission concludes that the application of an aggregate rate of 1.1 % wealth tax to the assets held by the trust in a case such as the present constitutes a restriction since it results in heavier taxation of beneficiaries under a Liechtenstein trust than of the beneficiaries of a comparable Norwegian entity.

Findings of the Court

198 The tax rate of 1.1 % applicable to the assets of the beneficiaries in their trust in Liechtenstein pursuant to section 2-1 and 2-3 of the Tax Act constitutes, generally speaking, unfavourable treatment in relation to the tax rate, reduced to 0.3 % pursuant to section 3-3 of the Norwegian Parliament's Tax Decision, applicable to assets of family foundations as defined in section 2 of the Norwegian Foundations Act, if the beneficiaries of such family foundations or comparable asset funds are not subject to wealth tax themselves.

199 However, in order to determine whether a difference in tax treatment such as that resulting from section 3-3 of the Norwegian Parliament's Tax Decision is discriminatory, it is necessary to ascertain whether, for the purposes of the taxation of a trust such as the one at issue in the main proceedings, the beneficiaries of a trust and those of a family foundation as defined in section 2 of the Norwegian Foundations Act are in an objectively comparable situation.

200 In this regard, it must be recalled that under section 2 of the Norwegian Foundations Act, a foundation is "an estate which by will, gift or other act is independently placed at the disposal for a specific purpose of charitable, humanitarian, cultural, social, educational, economical or other kind. An instrument fulfilling the criteria in the previous sentence is a foundation under this Act, regardless of whether it is called a legacy, institution, fund or anything else."

201 It follows that the determination of whether a trust such as Ptarmigan Trust is in an objectively comparable situation to a family foundation under Norwegian law has to be made in the light of the factual circumstances of the case in the main proceedings and of the interpretation of national legislation. As the Commission rightly submits, the comparison must be made with other types of entity in which a Norwegian resident has a financial interest and which constitute a separate legal person from him. The approach taken to the taxation of income cannot be decisive.

202 In proceedings under Article 34 SCA, any assessment of the facts in the case and how national law is applied is a matter for the national court. The Court notes, however, that the closest equivalent to a family trust in Norwegian law appears to be a family foundation or asset fund.

203 The answer to the sixth question must therefore be that it is for the national court to determine whether the plaintiffs as beneficiaries of Ptarmigan Trust are in a comparable situation to beneficiaries of family foundations or asset funds that are not subject to wealth taxation under Norwegian law. If so, the difference in tax rate constitutes a restriction under Article 31 EEA or, in the alternative, Article 40 EEA.

IX The seventh question

204 As regards possible justification, Petter Olsen and Others consider the purpose of wealth taxation to be exclusively to generate tax revenues on the basis that such taxpayers are regarded as having the ability to bear a certain amount of taxation on their assets.

205 Fred. Olsen and Others submit that the restriction cannot be justified by overriding reasons relating to the public interest. They argue that the need to ensure the cohesion of the tax system is not applicable in this case, as, for this reason to apply, it must be possible to prove that there is a link between a tax benefit that the taxpayer receives and the overall taxation applied. In their view, there is no link between the charge to wealth tax and other taxes payable by the plaintiffs. On the contrary, they consider themselves subject both to a more burdensome income tax and wealth tax than taxpayers in a comparable domestic situation.

206 According to Fred. Olsen and Others, the interest in a balanced distribution of taxing rights also cannot be cited as justification. Moreover, they contend that the prevention of abusive practices aimed at circumventing national tax legislation can only justify restrictions that concern “wholly artificial arrangements”. Thus, the risk of tax avoidance cannot justify the restrictive wealth tax rules. Finally, Fred. Olsen and Others argue that neither the effectiveness of fiscal supervision nor the effective recovery of tax debt can justify the restrictive rule in question.

207 The Norwegian Government submits that, in general, restrictive wealth tax may be compatible with EEA law if suitable and necessary to ensure social objectives such as those set out in relation to the CFC rules above, such as preventing tax evasion, ensuring efficient tax control and to maintain a balanced distribution of tax powers between EEA States. It contends that if trusts were exempt from ordinary wealth tax, whereas such tax had to be paid for investments in companies and partnerships under Norwegian law, this would discriminate in favour of trusts and give incentives to establish trusts in low-tax States for tax purposes. This would be contrary to the objectives set out above.

208 The United Kingdom Government submits that, in so far as the application of Norway’s wealth tax to the interests of the beneficiaries in the trust creates a restriction, it is justified by the need to prevent tax avoidance and the need to maintain a balanced allocation of taxing rights. It is also proportionate to those

objectives in so far as it prevents Norwegian residents from shifting assets to vehicles such as trusts in other States in order to escape the wealth tax normally due on the worldwide assets of Norwegian residents.

209 In the context of the wealth tax rules, ESA considers that the aim of preventing conduct involving the creation of wholly artificial arrangements which do not reflect economic reality with a view to escaping the tax normally due on the profits generated by activities carried out on national territory is irrelevant as a justification. This is because the wealth tax rules are not imposed to prevent the setting of wholly artificial tax arrangements with a view to escaping tax normally payable on the national territory but to ensure the redistribution and effective use of resources. ESA submits, therefore, that the Norwegian authorities do not appear to have provided any overriding reason in the public interest which could justify the restriction on the freedom of establishment constituted by the wealth tax rules.

210 In the Commission's view, an EEA State which applies a system of wealth taxation is entitled to ensure that all wealth to which its residents are beneficially entitled is brought within the scope of the tax. In so far as the taxation of individual beneficiaries and not the trust itself may be considered to constitute a restriction, it is justified on grounds of a balanced allocation of taxing rights. However, the Commission considers that, in doing so, the State concerned must respect the logic of its own system. There is no justification for taxing trust beneficiaries more heavily than they would be were the assets held in a comparable domestic entity such as a family foundation or an asset fund. The Commission considers any such additional tax charge to be contrary to Article 31 EEA.

211 Fred. Olsen and Others also contend that the income and wealth taxation is contrary to Article 1 of Protocol 1 to the ECHR. They argue that the total taxation is contrary to the EEA Agreement and that importance must be attached to the rights protected in this connection by the ECHR. Furthermore, in their view, the infringement of the right to property provided for in Article 1 of Protocol 1 to the ECHR lacks a sufficiently clear statutory basis and, therefore, the taxation contravenes that provision. Moreover, they consider the infringement disproportionate.

212 The Norwegian Government contends that the scope of fundamental rights is irrelevant to the case at hand as the case falls outside the scope of the EEA Agreement. Should, however, the Court find that fundamental rights are relevant when assessing EEA law issues in the case at hand, the taxation in the case at hand is fully compatible with such rights.

213 The United Kingdom Government submits that the counteraction of asset diversion to CFCs and the imposition of wealth tax on nationals who own assets in such companies do not impose excessive burdens on the taxpayer. Therefore, there is no breach of Article 1 of Protocol 1 to the ECHR.

214 The Commission considers that Article 1 of Protocol 1 to the ECHR neither adds to nor detracts from the reasoning leading to the conclusion that the charging of a tax rate higher than that applicable in a comparable domestic situation is contrary to Article 31 EEA. Equally, had the beneficiaries been charged tax at the rate of 0.3 %, there would be no incompatibility with Article 31 EEA and no basis for asserting that Article 1 of Protocol 1 to the ECHR should lead to a different conclusion. The Commission submits that the Court has no jurisdiction to answer the national court's question in this respect, since there is no question of EEA law to be decided.

215 As regards the question of whether the imposition of the wealth tax is contrary to the requirement to respect fundamental rights, ESA considers that it is for the national court to assess whether, in the specific circumstances of the beneficiaries, the application of the wealth tax rules places an excessive burden on the beneficiaries or fundamentally interferes with their financial position.

216 Fred. Olsen and Others argue that the case law of the Court of Justice of the European Union ("ECJ") does not constitute a legal basis on which to say that the exchange of information agreement has to meet the standard of EU directives on exchange of information and administrative cooperation. Should the Court disagree, Fred. Olsen and Others contend that the agreement between Norway and Liechtenstein is none the less as effective as the directives.

217 As regards the tax exchange agreement between Norway and Liechtenstein, the Commission notes that the ECJ has frequently held that the absence of an agreement on exchange of tax information may justify measures which treat cross-border situations less favourably than domestic situations. However, ESA and the Commission essentially agree that the absence of such an agreement does not justify the application of a higher rate of taxation to cross-border arrangements, since the availability or otherwise of information on income or assets in the other country normally has no bearing on the rate of tax. Accordingly, the Commission sees no reason to attribute any importance in the present case to the entry into force of an agreement with Liechtenstein on the exchange of tax information.

218 In this regard, however, the Norwegian Government argues that the assessment of whether the trust and a foundation are in a comparable situation may rest on factors concerning the trust in Liechtenstein that only the Liechtenstein authorities can verify. The lack of an efficient bilateral agreement on exchange of information in tax matters may therefore be equally applicable to wealth tax issues.

219 The United Kingdom Government considers that it is not clear on the facts whether the Norwegian tax authorities need any information from the Liechtenstein tax authorities before they are able to decide whether the beneficiaries are liable to wealth tax on their interests in Ptarmigan Trust. It notes, moreover, that even if the beneficiaries were to establish that Ptarmigan Trust does carry on genuine economic

activity in Liechtenstein, the beneficiaries are still liable to wealth tax on their interests in the trust to the extent that they are in fact the owners of the trust assets. However, insofar as the tax authorities do need such information in order to determine what the trust's activities are and who owns its assets, then it is proportionate for Norway to put the onus on the beneficiaries to establish the relevant facts and to require that the evidence produced by the taxpayer be verifiable. If any evidence produced by the beneficiaries is not verifiable because there is no cooperation agreement in force between Norway and Liechtenstein, Norway is entitled to refuse the beneficiaries any relevant tax advantage.

Findings of the Court

220 If the national court finds that the plaintiffs in the domestic proceedings are subject to unequal treatment in the imposition of wealth tax when compared to domestic family foundations or other similar legal entities, a measure which is liable to hinder in such manner the right of establishment or the free movement of capital guaranteed by Articles 31, 34 and 40 EEA may be permitted only if it pursues a legitimate objective compatible with the EEA Agreement and is justified by overriding requirements in the general interest. If this is the case, its application must further be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it (see, to that effect, *Arcade Drilling*, paragraphs 82 to 83, and case law cited).

221 As regards possible justification in the field of direct taxation, it is settled case law that the objectives of ensuring the effectiveness of fiscal supervision (Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31, and case law cited), the need to safeguard the cohesion of the national tax system, preserving the allocation of powers of taxation between the EEA States (*Fokus Bank*, cited above, paragraph 32, and case law cited), and preventing tax avoidance (*Arcade Drilling*, cited above, paragraph 87) constitute overriding requirements in the general interest, capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the EEA Agreement.

222 However, these justifications cannot be relied on, should the national court find that the plaintiffs, as beneficiaries of Ptarmigan Trust, are in a comparable situation to beneficiaries of Norwegian family foundations or other domestic entities, to justify heavier taxation that thus constitutes a restriction on freedom of establishment, or, in the alternative, free movement of capital.

223 In light of this finding, there is no need for the Court to address the issue raised by the national court in its seventh question, as regards the relevance of the agreement on the exchange of information between Norway and Liechtenstein entering into force.

224 On the question whether the imposition of the wealth tax is contrary to the requirement to respect the fundamental rights guaranteed under the EEA Agreement, it must be noted that the Court has found on earlier occasions that provisions of the EEA Agreement as well as procedural provisions of the SCA are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights (see Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 63, and case law cited).

225 In essence, the fundamental rights guaranteed in the legal order of the EEA Agreement are applicable in all situations governed by EEA law. The Court, when requested to give an Advisory Opinion, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.

226 Where an EEA State invokes overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the right of establishment or the free movement of capital, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights. Thus the national rules in question may fall under the exceptions provided for only if they are compatible with fundamental rights.

227 Where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the EEA Agreement, it may benefit from the exceptions provided for by EEA law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights manifestly comes within the scope of EEA law (compare, by analogy, Case C-390/12 *Pfleger*, judgment of 30 April 2014, reported electronically, paragraph 36).

228 As regards the imposition of wealth tax such as that at issue in the main proceedings, the Court notes that taxation, in principle, entails interference with the right to property, which comes within the scope of fundamental rights under the EEA Agreement (compare *Burden* v *the United Kingdom*, Case no 13378/05, judgment of the European Court of Human Rights of 29 April 2008, paragraph 59).

229 However, the right to property under EEA law does not enjoy absolute protection. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed (to that effect, compare Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 21; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v

Council and Commission [2008] ECR I-6351, paragraph 355; and Case C-548/09 P *Bank Melli Iran* v *Council* [2011] ECR I-11381, paragraphs 89, 113 and 114).

230 For such an interference to be compatible with fundamental rights under the EEA Agreement, it must be provided for by law and respect the essence of the right to property. Moreover, the interference can only be made if it is necessary and genuinely meets the objectives of general interest recognised by EEA law or the need to protect the rights and freedoms of others.

231 In circumstances such as those at issue in the main proceedings, as already noted in paragraph 220 of this judgment, an unjustified or disproportionate restriction on the freedom of establishment by the imposition of wealth tax is also precluded under Article 31 EEA, on freedom of establishment, or Article 40 EEA, on free movement of capital.

232 It follows that, in the present case, an examination of the alleged restriction represented by the national wealth taxation at issue in the main proceedings from the point of view of Articles 31 or 40 EEA also covers possible limitations on the exercise of the right to property as regards fundamental rights, so that a separate examination is not necessary.

233 Accordingly, the answer to the seventh question posed by Oslo District Court must be that the difference in tax rate cannot be justified if the beneficiaries of Ptarmigan Trust are in a comparable situation to beneficiaries of family foundations or asset funds not subject to wealth taxation under Norwegian law.

X Costs

234 The costs incurred by the plaintiffs, the United Kingdom, French, Liechtenstein and Norwegian Governments, ESA and the Commission, which have all submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Tax Appeals Board for the Central Tax Office for Large Enterprises and Oslo District Court, any decision on the costs of the parties to those proceedings is a matter for that board and that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tax Appeals Board for the Central Tax Office for Large Enterprises and by Oslo District Court hereby gives the following Advisory Opinion:

1. - 2. A trust such as Ptarmigan Trust falls within the scope of Article 31 EEA provided that the trust pursues a real and genuine economic activity within the EEA for an indefinite period and through a fixed establishment. Whether this is the case is for the national court to assess. All interested parties, that is to say the trust's settlors, trustees and beneficiaries hold the rights under Articles 31 and 34 EEA.

3. Beneficiaries of capital assets set up in the form of a trust that are subject to national tax measures such as those at issue in the main proceedings may be able to invoke Article 40 EEA in the event that they are not found to have exercised definite influence over an independent undertaking in another EEA State or engaged in economic activity that comes within the scope of the right of establishment. It is for the national courts to make the final assessment in that regard, based on the factual circumstances of the case.

4. The difference in treatment entailed by section 10-60 of the Tax Act creates a tax disadvantage for resident taxpayers to whom the legislation on controlled foreign companies applies, which is such as to hinder their exercise of freedom of establishment, dissuading them from establishing, acquiring or maintaining a subsidiary in an EEA State in which the latter is subject to low levels of taxation. It therefore constitutes a restriction on freedom of establishment within the meaning of Articles 31 and 34 EEA. If the tax disadvantage resulting from the differential treatment for resident taxpayers under section 10-60 is such as to hinder the beneficiaries from investing funds in another EEA State, without any intention to influence the control or the management of an undertaking, and from engaging in the movement of capital of a personal nature, it constitutes a restriction on the free movement of capital within the meaning of Article 40 EEA and Annex XII to the EEA Agreement.

Moreover, a rule of national law entailing that, in contrast to participants in comparable domestic entities, personal participants in a controlled foreign company in another EEA State are not afforded any opportunity to undo the economic double taxation that the Norwegian CFC rules entail

constitutes a restriction on the freedom of establishment under Articles 31 and 34 EEA, or, depending upon the assessment of the national court, the free movement of capital which is, in principle, prohibited by Article 40 EEA.

5. A restriction on the freedom of establishment or, where applicable, the free movement of capital resulting from national CFC legislation such as that applicable in the main proceedings may be justified on grounds of overriding public interest, in particular on considerations of preventing tax avoidance or maintaining the balanced allocation of taxing powers between EEA States. The restriction is proportionate if it relates only to wholly artificial arrangements which seek to escape the national tax payable in comparable situations. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives a controlled foreign company is actually established in the host EEA State and carries on genuine economic activities, which take effect in the EEA.

6. It is for the national court to determine whether the plaintiffs as beneficiaries of Ptarmigan Trust are in a comparable situation to beneficiaries of family foundations or asset funds that are not subject to wealth taxation under Norwegian law. If so, the difference in tax rate constitutes a restriction under Article 31 EEA or, in the alternative, Article 40 EEA.

7. The difference in tax rate cannot be justified if the beneficiaries of Ptarmigan Trust are in a comparable situation to beneficiaries of family foundations or asset funds not subject to wealth taxation under Norwegian law.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 9 July 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President