# REPORT FOR THE HEARING
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** (Case E-3/13 and Case E-20/13)

and

**The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes,** (Case E-3/13 and Case E-20/13)

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 which permits national taxation of capital placed in a low-tax country.

## I Introduction

1. By a letter of 13 March 2013, registered at the Court on 18 March 2013 as Case E-3/13, the Tax Appeals Board for the Central Tax Office for Large Enterprises ("the Tax Appeals Board") made a request for an Advisory Opinion in a case pending before it between Fred. Olsen and 14 other applicants ("the Plaintiffs") and the Norwegian State, represented by the Central Tax Office for Large Enterprises ("the Defendant").

2. By a letter of 30 August 2013, registered at the Court on 9 September 2013 as Case E-20/13, Oslo tingrett ("Oslo District Court") made a request for an Advisory Opinion in a case pending before it between Fred. Olsen and 19 other applicants ("the Plaintiffs") and the Norwegian State, represented by the Directorate of Taxes ("the Defendant").

3. The cases are connected in terms of the parties and legal issues involved. By a decision of 12 September 2013, pursuant to Article 39 of the Rules of Procedure and

after having received written observations regarding Case E-3/13, the Court joined the two cases for the purpose of the written and oral procedure.

4. The core issue in the joined cases is whether Norwegian controlled foreign company ("CFC") taxation, levied on Norwegian taxpayers, who also are the beneficiaries of Ptarmigan Trust in Liechtenstein, is contrary to Article 31 or Article 40 of the EEA Agreement. The Plaintiffs believe that they are subject to a more burdensome taxation than that which is levied in connection with investments in Norway.

## II Legal background

*EEA law*

5. 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.*
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> *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.*
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> *2. Annexes VIII to XI contain specific provisions on the right of establishment.*

6. 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.*
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> *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.*

7. 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*

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

9. 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 hands of the companies and foundations being taxable entities under Norwegian law. Tax is only levied on the owners and the beneficiaries when the Norwegian company or foundation distributes a profit to the owners, typically in form of a dividend or distribution. Participants of partnerships are, however, taxed on an ongoing basis for their share of the surplus.

10. The Norwegian 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.

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

12. In 2007, a rule was introduced specifying that 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.

13. The scope of the Norwegian 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 Norwegian 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.*

14. In practice, trusts are the most important form of capital assets to which the Norwegian CFC rules have been applied. That the rules' scope of application includes trusts is clear from the preparatory work to the Act (see Proposition to the Odelsting No 16 (1991-92) p. 74).[1]

15. 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.

16. 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.

17. 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.*

18. 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.

19. 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 sum, taxed for the same income and at the same tax levels as the participants of the CFC.

20. 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 the corporate participants.

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[1] In addition, this has been confirmed by the Norwegian Supreme Court, see Rt. 2002, p. 747.

21. 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.*

22. The exemption method applies, inter alia, to limited liability companies, foundation 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,*

23. 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, it is an additional requirement that the enterprise has actually been established and pursues genuine economic activity. 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)…*

24. 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 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.*

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

26. 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.

27. 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. As such, only corporate participants in CFCs would until recently come within the scope of the exemption method, while personal participants, i.e. natural persons, would not. An amendment, made effective from the income year 2013, has made the exemption method applicable also for personal participants of a CFC.

*Wealth taxation*

28. 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.*

29. 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.*

30. 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 percent.*

31. 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 Norwegian Taxation Act. A taxpayer who is entitled to a personal tax allowance pursuant to Section 15-4 of the Norwegian Taxation 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.*

32. 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.

33. 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.*

34. 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.*

35. The Norwegian State has stressed that the beneficiaries under the Ptarmigan Trust have been subject to wealth tax at the same tax rate that applies to, for example, shareholders in limited liability companies and personal participants in enterprises assessed as partnerships. Also 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 was itself 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.*

36. 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).

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

38. The taxpayers have mentioned the regulation of family foundations. 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.

39. 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*

40. 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.*

41. 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.*

42. 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 Norwegian Taxation Act and that are not exempt from the liability to pay wealth tax pursuant to Chapter 2 of the Norwegian Taxation 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.*

43. 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*

44. 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*
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> *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.*

## III Facts and procedure

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

46. There are three categories of persons in a trust: settlor, trustee and beneficiary. The settlor places property in the hands of the trustee 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.

47. In a discretionary trust such as Ptarmigan, 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.

48. 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 in Liechtenstein.

49. 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 are family members of the Norwegian 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.

50. Ptarmigan Trust holds shares in Eagleville Group BV ("Eagleville"), a Dutch company. It 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.

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

52. The Norwegian 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.

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

54. Following the establishment of the Norwegian 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.

55. In 1993, some of the Norwegian beneficiaries queried with the Norwegian tax authorities the application of the Norwegian CFC rules to the trust. After a hearing before the Norwegian Tax Administration, a number of the taxpayers brought a case before the Norwegian courts concerning the tax assessment decision for the year 1994, which was based on domestic CFC rules.

56. 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 Norwegian Supreme Court rejected all these arguments in a ruling of 10 June 2002.

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

58. 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.

59. 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.

## IV Questions

60. The following questions were referred to the Court by the Tax Appeals Board and Oslo District Court. The Tax Appeals Board submitted the first 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?**

## V Written observations

61. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received in both cases from:

– Fred. Olsen and 10 other Plaintiffs ("Fred. Olsen and Others"), represented by counsels Thor Leegaard and Dr Bettina Banoun;

– Petter Olsen and 6 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.

## VI Summary of the arguments submitted

*The first and second questions*

The Plaintiffs

62. In Case E-3/13 written observations were submitted by Fred. Olsen and 10 other plaintiffs in the case pending before the Tax Appeals Board. In Case E-20/13 written observations have also been submitted by Petter Olsen and 6 other plaintiffs in the case pending before Oslo District Court. In these observations it is stated that the latter group of plaintiffs essentially concurs with the statement of the case and the submissions made by the former group in Case E-3/13. Accordingly, both groups will be referred to jointly as "the Plaintiffs" for the purposes of this report, unless otherwise specified.

63. The Plaintiffs submit that the freedom of establishment applies to Ptarmigan Trust. In their view, it would be untenable to claim that Ptarmigan Trust is not covered by the freedom of establishment simply because the trust is not regarded as a legal person. In this regard, the Plaintiffs contend that it follows from the wording of Article 31 EEA and the case law of the Court of Justice of the European Union ("the ECJ")

that the freedom of establishment includes the establishment of branches, even though branches are not regarded as separate legal persons.[2]

64. Noting that a large industrial group is owned and managed through the trust, the Plaintiffs argue that the reason for the establishment of the trust was to protect the financial interests of the group. In those circumstances, the Plaintiffs contend that it would be a too narrow approach to deprive the beneficiaries of protection under the EEA Agreement against discriminatory taxation on the basis that a trust entails a form of establishment different to other entities.

65. As regards the question who holds rights pursuant to the provisions of the EEA Agreement if the first question is answered in the affirmative, the Plaintiffs submit that taxpayers who are nationals residing in an EEA Member State and who are exposed to discriminatory taxation hold rights pursuant to the EEA Agreement. In their view, the beneficiaries under the trust, who are nationals residing in an EEA State, may invoke the four freedoms, including the free movement of capital and freedom of establishment. It is irrelevant in this context, so the Plaintiffs argue, that the beneficiaries were not involved in the original cross-border establishment of the trust. The focus should be on the fact that, as regards the EEA Agreement, the beneficiaries are placed at a disadvantage as result of the application of rules that entail a difference in treatment between domestic and cross-border activities.[3]

66. As regards the second question, the Plaintiffs submit that a trust meets the requirement for economic activity in the context of Article 31 EEA and that more rigorous requirements cannot be imposed on the activities of a trust than on other entities. In the Plaintiffs' view, Ptarmigan Trust must be regarded as actually established in Liechtenstein and that the requirement for activity under Article 31 EEA has consequently been met. They contend that it follows from case law that CFC rules are applicable only to "wholly artificial arrangements" and the application of such rules must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality.[4]

67. According to the Plaintiffs, the requirement for establishment and pursuit of economic activity must be adjusted to the trade or industry in which the CFC actually operates and the requirement will be met if the CFC has the attachment to its State of establishment and pursues the type of activity that usually characterise a company in the trade or industry in question.

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2 Reference is made to Case C-270/83 *Commission* v *France* ("*Avoir Fiscal*") [1986] ECR I-273, paragraph 22.

3 Reference is made to Case C-18/11 *Philips Electronics*, judgment of 6 September 2012, not yet reported, paragraph 39.

4 Reference is made to Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995, paragraph 51 and also paragraphs 65 to 68.

68. The Plaintiffs submit that a trust cannot be subjected to more rigorous requirements than other entities. From the Plaintiffs' perspective, there is no doubt whether Ptarmigan Trust is pursuing genuine economic activity. In this regard, the Plaintiffs argue, *inter alia*, that Ptarmigan Trust is established in Liechtenstein, all the management of the trust takes place there, the trustees have spent considerable resources on the management of the trust and that the trustees hold regular asset management meetings.

The Defendant

69. The Norwegian Government submits that the questions referred to the Court by the Norwegian Tax Appeals Board in Case E-3/20 should be dismissed as inadmissible for two separate reasons. First, it argues that the Tax Appeals Board fails to meet the standards of a "court or tribunal" for the purposes of Article 34 SCA. Second, it submits that the questions the Court is invited to answer are without significance to the dispute before the Tax Appeals Board.

70. The Norwegian Government submits that, in the circumstances of the case before the Tax Appeals Board, the beneficiaries of a trust such as Ptarmigan Trust can rely neither on Article 31 nor Article 40 EEA and that it is not necessary to answer the other questions referred to the EFTA Court.

71. The Norwegian Government observes that the Norwegian beneficiaries argue that their situation is comparable to the *Cadbury Schweppes*[5] case, where the ECJ held that the rules on freedom of establishment applied to the CFC taxation of a UK company with a subsidiary in Ireland. In that case, the ECJ stated that taxation of the parent company on the profits of its subsidiary represented a disadvantage for resident companies with a subsidiary in low-tax countries dissuading them from establishing, acquiring or maintaining a subsidiary in a Member State with a low level of taxation.[6]

72. According to the Norwegian Government, trusts such as Ptarmigan Trust, cannot fall within the scope of Article 31 EEA. In this regard, a clear distinction must be made between the situation of a company, which seeks to establish itself in another EEA State by setting up an agency, branch or subsidiary there, and the situation of the beneficiaries of a discretionary trust such as Ptarmigan. The Norwegian Government does not consider Ptarmigan Trust a "legal person". In addition, trusts do not exist under Norwegian law as separate legal entities.

73. The Norwegian Government notes that, in the second paragraph of Article 34 EEA, "companies or firms" are defined as companies and firms constituted under civil or commercial law, including cooperative societies and other legal persons governed by public or private law, save those which are non-profit-making. Moreover, provisions of national law which apply to the possession of shares in a company

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[5] Reference is made to *Cadbury Schweppes*, cited above.

[6] Ibid., paragraph 31.

established in another EEA State, allowing a person to exert a definite influence on the company's decisions and determine its activities, fall within the ambit of the freedom of establishment.[7]

74. The Norwegian Government observes that the Norwegian beneficiaries of Ptarmigan Trust have argued that their situation is comparable to the *Cadbury Schweppes* case. However, according to the Norwegian Government, there are two fundamental differences between the situation of a company which seeks to establish itself in another EEA State by setting up an agency, branch or subsidiary there, and the situation of the beneficiaries of a discretionary trust such as Ptarmigan Trust.

75. First, Ptarmigan Trust was not set up by the beneficiaries themselves nor is the trust 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 Norwegian Government asserts, 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 the case law of the ECJ.

76. Second, according to the Norwegian Government, a trust is not a legal person, nor is it a part of another legal person, unlike a branch that is expressly mentioned in Article 31 EEA. The Norwegian Government contends 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 provided for in Article 31 EEA.

77. The Norwegian Government stresses that the freedom of establishment is intended to allow the nationals of the EEA States to participate, on a stable and continuing basis, in the economic life of another State, so contributing to economic and social interpenetration within the EEA Area.[8] Moreover, the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period.[9] 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. In contrast, wholly artificial arrangements which do not reflect economic reality are not protected under the rules on freedom of establishment.[10]

78. The Norwegian Government asserts that, according to case law, the assessment of whether an entity carries out genuine economic activity must be based on objective

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7 Reference is made to Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22, and *Cadbury Schweppes*, cited above, paragraph 31.

8 Reference is made to Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25.

9 Reference is made to Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 20.

10 Reference is made to *Cadbury Schweppes*, cited above, paragraphs 54 and 55.

factors which are ascertainable by third parties with regard, in particular, to the extent to which the entity has premises, staff and equipment.[11]

79. The Norwegian Government is of the view that Ptarmigan Trust does not fulfil the requirement of genuine economic activity. Ptarmigan Trust was registered by the tax authorities in Liechtenstein in 1980 as exempt from any ordinary taxes on condition that the trust does 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, according to the Norwegian Government, the trustees have not done so. It therefore appears that Ptarmigan Trust is simply a means of accumulating income without any further tax charge.

The French Government

80. The French Government notes that the concept of establishment is a very broad one and, as a result, freedom of establishment is not limited to the setting up of companies with legal personality.[12] Therefore, the freedom of establishment also covers the setting up of entities which have no legal personality.

81. However, according to the French Government, the concept of establishment within the meaning of Article 31 EEA involves the actual pursuit of economic activity through a fixed establishment in an EEA State for an indefinite period.[13] In its view, the mere exercise of the right of ownership by its holder and the mere management by a trust of the assets it holds, which mainly concerns the acquisition and sale of shares or other securities by a trustee, with a view to maximising dividends and capital yields, cannot, in themselves, be regarded as constituting economic activity.[14]

82. The French Government submits that Ptarmigan Trust does not exercise any economic activity in Liechtenstein and, therefore, the freedom of establishment does not apply to Ptarmigan Trust and to the taxation of the profits and dividends distributed by this trust. As a result, the freedom of establishment does not apply in the present case.

The Government of Liechtenstein

83. The Government of Liechtenstein submits that a Liechtenstein trust is an independent entity which is entitled to make use of all fundamental rights under the EEA Agreement, including the rights to freedom of establishment, freedom to provide services and the free movement of capital. The trust is represented by the trustee and it

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[11] Ibid., paragraph 67.

[12] Reference is made to Joined Cases C-316/07, C-358/07, C-359/07, C-409/07 and C-410/07 *Stoß* [2010] ECR I-8069, paragraph 59.

[13] Reference is made by way of comparison to *Cadbury Schweppes*, cited above, paragraph 54.

[14] Reference is made to Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraphs 32 to 41.

is the trustee to whom the rights pursuant to the provisions of the EEA Agreement primarily accrue.

84. In the view of the Liechtenstein Government, a trust established in Liechtenstein in accordance with the domestic Persons and Companies Act (PGR) finds itself in a comparable situation to a "company", and can therefore be seen as an independent entity which holds rights and obligations assumed by the trustee.

85. The Government of Liechtenstein argues that, where it can be seen and understood that a trust is an independent entity having very similar effects to entities such as foundations etc., it can be treated in the same way as a legal person. According to the Government of Liechtenstein, the wording of Article 31 EEA allows for such an interpretation, that is counting trusts as legal persons, as the second subparagraph of Article 31(1) EEA does not exclude trusts from profiting from the freedom of establishment.

86. The Government of Liechtenstein submits that Ptarmigan Trust engages in the actual pursuit of economic activity, as it has its premises in Liechtenstein, the management of the trust and its staff are also located there and, in addition, one of the three trustees as well. Moreover, this activity is pursued through a fixed establishment. Furthermore, Ptarmigan Trust is 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, the Government of Liechtenstein submits that Ptarmigan Trust pursues such economic activity.[15]

87. The Government of Liechtenstein notes, in addition, that Ptarmigan Trust is an irrevocable trust and, therefore, it constitutes an economic activity that is pursued for an indefinite period.

The United Kingdom Government

88. The United Kingdom Government argues that trusts themselves are incapable of benefitting from the freedom of establishment provided for in Article 31 EEA,[16] unless the Member State under whose laws they are created recognises them as having legal personality. The settlor and beneficiaries of a trust can only rely on 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 Member State. On the other hand, trustees can rely on the freedom of establishment, but only in relation to their own economic activities of managing trust

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[15] Reference is made to *Cadbury Schweppes*, cited above, paragraph 54, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 112, and *Wellcome Trust*, cited above, paragraphs 32 and 33. In addition, reference is made to the EFTA Surveillance Authority's Decision No 44/11/COL of 15 February 2011.

[16] Reference is made to *Cadbury Schweppes*, cited above, paragraph 41.

property. The trust itself cannot be regarded as a secondary establishment of the trustees.

89. The United Kingdom Government points out that both Article 34 EEA and Article 54 of the Treaty on the Functioning of the European Union ("TFEU") specify that it is companies or firms "established in accordance with the law of an EC Member State or an EFTA State" which benefit from the right of establishment.

90. In this regard, the United Kingdom Government notes that the Trust has no separate legal personality in either Norway or Liechtenstein. Neither is it a natural person nor is it a company, firm or co-operative society under the law of either State. In fact, it is a legal arrangement, consisting of a framework of rights and duties between the settlor, the trustees and the beneficiaries, which is used for holding assets. Therefore, to the extent that the trust is not recognised by the EEA Member State under whose laws it was created (Liechtenstein) as a "company or a firm" established under its laws, the Trust cannot itself rely on the freedom of establishment to move its primary establishment from one EEA State to another or to set up a secondary establishment in another EEA State.

91. The United Kingdom Government contends that, in order to enjoy the right to freedom of establishment, it would be necessary to establish that a trust pursued a genuine economic activity. That requirement is not satisfied where the trust simply purchases assets in another Member State as passive instruments.

92. According to the United Kingdom Government, it follows from case law that the purpose of freedom of establishment is to contribute "to economic and social interpenetration with the Community".[17] Thus, the freedom of establishment requires the performance of "genuine economic activity" in the host State on an indefinite basis.[18]

93. Conversely, the United Kingdom Government contends, freedom of establishment is not engaged where a national or a company simply purchases assets in another Member State as passive investments. In circumstances where a foundation purchases and holds property in another Member State as an investment, "that property should be actively managed" if the provisions relating to freedom of establishment are to apply.[19]

94. Applying those principles to the facts of the present case, the United Kingdom Government submits that, to the extent that the trustees merely hold the trust's investments and receive the income derived from them in Liechtenstein, without

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[17] Reference is made to Case 2/74 *Reyners* [1974] ECR 631, paragraph 21, and *Gebhard*, cited above, paragraph 25.

[18] Reference is made to *Cadbury Schweppes*, cited above, paragraphs 54 and 65 to 68.

[19] Reference is made to Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 64, and Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 38.

actively managing the trust from that country, neither the trust nor the trustees are engaged in economic activity in Liechtenstein such as to engage the freedom of establishment.

95. The United Kingdom Government notes that it was not clear on the facts put forward by the Tax Appeals Board in the first request for an Advisory Opinion whether any management functions were performed in Liechtenstein such as to engage the freedom of establishment, although it noted that the Tax Appeals Board had found that the most important management functions of the Olsen Group were conducted by a Dutch company, Eagleville Group BV and its subsidiary BV, in the Netherlands.

96. The United Kingdom Government notes that, in the request for an Advisory Opinion from Oslo District Court, the referring court states that “Eagleville handles the central management functions for the whole Group”. However, it then records what would appear to be an unresolved factual dispute between the Norwegian State and the beneficiaries of the Trust as to whether the trustees are actively involved in the management of the Trust’s assets. This reflects their opposing positions in Case E-3/13, in which the Norwegian State submitted that the trustees were not expected to interfere in the management of the companies owned by the Trust under the Trust agreement. By contrast, the beneficiaries submitted that the trustees do actively manage the Trust in Liechtenstein.

97. The United Kingdom Government submits that it is for the national court to resolve this factual dispute regarding the actual functions of Ptarmigan Trust and its trustees. However, it agrees with France that, insofar as the Trust simply holds assets and occasionally sells or purchases shares and securities, that is not in itself an economic activity. The requirement that assets must be actively managed if they are to constitute an economic activity is common both to the ECJ’s case law in relation to VAT[20] and the fundamental freedoms.

The EFTA Surveillance Authority

98. ESA observes that the freedom of establishment should cover the freedom to establish a trust, or to have a trust established, including trusts that are not legal persons. ESA points out that an EEA State, the home State, should 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. The hindrance by the home State of the exercise of this right must be prevented by the second subparagraph of Article 31(1) EEA, according to which freedom of establishment shall include the right “to set up and manage undertakings” including, but not limited to, “companies or firms”.

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[20] Reference is made to *Wellcome Trust*, cited above, paragraphs 32 to 41, and Case C-651/11 *X BV*, judgment of 30 May 2013, not yet reported, paragraphs 36 to 37.

99. In addition, ESA argues that when Norwegian taxpayers are considered to be participants in a CFC, and that CFC is a trust, they should be able to rely on the freedom of establishment to contest their Norwegian CFC taxation to the extent that the CFC taxation restricts that freedom.

The European Commission

100. 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.

101. 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 the freedom of establishment.

102. 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.

103. The Commission stresses that, in determining which freedom is applicable, regard should be had to the purpose of the relevant rules, not to the particular circumstances of the case.[21]

104. The Commission submits that the present case must therefore be examined from the perspective of the freedom of establishment.[22] As regards the supplementary question within the first question, the Commission submits that the beneficiaries of a trust are entitled to rely on Article 31 EEA to the extent that the application of rules of national law contrary to that provision affects their legal position. The fact that they are not the persons who have exercised their freedom of establishment is not relevant.[23]

*The third question*

105. On the question whether a trust falls within the scope of the free movement of capital provided for in Article 40 EEA, the Plaintiffs observe that the beneficiaries of Ptarmigan Trust, which is established in Liechtenstein, cannot make decisions on the

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[21] Reference is made to Joined Cases C-436/08 and C-437/08 *Haribo and Österreichische Salinen* [2011] ECR I-305, paragraph 34.

[22] Reference is made to *Cadbury Schweppes*, cited above, paragraphs 52 to 55.

[23] Reference is made to *Philips Electronics*, cited above, paragraphs 38 and 39.

operation of the trust. None the less, the Norwegian tax authorities have found the beneficiaries to control the trust.

106. The Plaintiffs submit that Article 40 EEA and Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty ("Directive 88/361/EEC") prohibit restrictions on movements of capital belonging to persons resident in EEA States. In the Plaintiffs' view, income from a trust must be covered by Article 40 EEA. In particular, dividends that flow from a Dutch company through a trust in Liechtenstein to beneficiaries in Norway must be covered.

107. The Norwegian Government observes that national legislation governing the holding of shares that do not allow the owner to exert a definite influence on a company's decisions may fall within the scope of Article 40 EEA, since such legislation may be liable to discourage residents from investing within the meaning of Article 40 EEA.[24]

108. However, 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. Namely, the beneficiaries have not made any capital available to Ptarmigan Trust nor have they acquired "shares" enabling them to participate effectively in the management of the trust.

109. In contrast, the Norwegian Government asserts, investments within the scope 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.[25]

110. The Norwegian Government submits that, in a case such as the present, it appears only natural that the scope of the free movement of capital should be determined according to criteria similar to those governing the scope of the freedom of establishment. In this connection, the Norwegian Government notes that there have been some distributions from Ptarmigan Trust to some of the beneficiaries during the years relevant to the case before Oslo District Court, these distributions do not seem to be part of the case before Oslo District Court. Such distributions are taxed in the same way as distributions from companies established in Norway. This taxation does not form a part of the CFC legislation subject to the administrative decisions in the case at hand nor have the Plaintiffs requested the District Court to judge on the matter. Even though the Plaintiffs submit that taxation of such distributions in combination with other elements of taxation is contrary to EEA law, the Norwegian Government questions whether the distribution of assets from the trust should be considered a capital movement of relevance to the present case.

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[24] Reference is made to Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 36, and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 34.

[25] Reference is made to Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 18.

111. The French Government shares the view of the Norwegian Government that Article 40 EEA does not apply in the present case. In support of this view, it contends that the Norwegian CFC rules apply only to the taxation of the share of the profit in a company, capital asset or independent undertaking that is owned or controlled by Norwegian participants.

112. The French Government submits that the Norwegian CFC rules apply only to shares which enable the holder, or several holders together, such as beneficiaries of a trust, to exert a definite influence on the decisions of a company, undertaking or capital asset and to determine its activity. Consequently, these rules do not come within the scope of Article 40 EEA. The mere fact that, in the present case, Article 31 EEA does not apply does not lead to the application of Article 40 EEA.[26]

113. Second, the French Government argues that trusts are not included in the list specified in Directive 88/361/EEC. Although conceding that the list is not exhaustive, it notes that while the list does not mention traditional trusts, such as Ptarmigan Trust, it does expressly include unit trusts. This could be interpreted to mean that any trust other than a unit trust, for example, a traditional trust, has been deliberately excluded from the list of Directive 88/361/EEC. In other words, one can argue that the EU legislature did not intend to include profits and dividends distributed by traditional trusts within the free movement of capital.

114. Thus, the French Government submits that profits and dividends distributed by traditional trusts are not covered by the free movement of capital and, as a result, Article 40 EEA does not apply in the present case.

115. The Government of Liechtenstein submits that a trust falls within the scope of free movement of capital provided for in Article 40 EEA. It argues that Article 40 EEA must focus on and protect the different forms of participation in a trust such as Ptarmigan Trust. The Government of Liechtenstein points out that a settlor must be free in his decision whether to put his assets or rights in a trust in Liechtenstein or somewhere else. Otherwise his freedom of choice would be jeopardised. In its view, the settlor established the trust to guarantee the management of certain companies but also to make sure that this would be done in the best interests of the discretionary beneficiaries.

116. The Government of Liechtenstein contends that, under current conditions, no Norwegian citizen would transfer or move his assets to a Liechtenstein trustee to establish a Liechtenstein trust were the existing CFC rules to be considered effective and valid.

117. The United Kingdom Government agrees with the Commission's submissions that, in determining which freedom is applicable, it is necessary to consider the

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[26] Reference is made to Case C-492/04 *Lasertec* [2007] ECR I-3775, paragraph 106.

purpose of the relevant rules. It is a separate question whether that freedom has been exercised on the facts of the particular case.

118. The United Kingdom Government notes that the purpose of the Norwegian CFC rules was “to prevent tax motivated investments and placement of capital in low-tax countries”.[27] The rules apply only to taxpayers “who, alone or together with others, directly or indirectly control other independent undertakings or asset-funds domiciled in low-tax countries”.[28]

119. Accordingly, the Norwegian rules are only designed to apply where Norwegian taxpayers have a definite influence over the relevant undertaking or fund. Therefore, they fall solely within the scope of freedom of establishment.[29]

120. ESA essentially agrees with this position. It notes that CFC rules, generally, determine the tax treatment of profits of foreign entities controlled by residents. Since such rules are directed at, and thus only affect, resident owners with definite influence over a foreign entity, their centre of gravity lies with the ability of residents to establish themselves, through subsidiaries, in other countries. Therefore, the application of CFC rules is generally to be examined solely from the perspective of the freedom of establishment and any restrictive effects on the free movement of capital are but an unavoidable consequence of any restriction on the freedom of establishment.[30]

121. ESA submits that this applies also in the case of CFC rules such as the Norwegian rules at issue in the present proceedings, providing for CFC taxation of a Liechtenstein trust in the hands of its resident Norwegian beneficiaries. The fact that Liechtenstein law does not regard the beneficiaries as owners of the trust nor as having a definite influence on it has no bearing on this. What is decisive is that under Norwegian tax legislation, and for the (sole) purpose of that legislation, the said beneficiaries are considered owners of (the capital assets in) the trust;[31] or, in other words, participants in a CFC that is a trust.

122. The Commission argues that in determining which freedom is applicable, regard should be had to the purpose of the relevant rules, not to the particular circumstances of the case.[32] Therefore, the present case must be examined from the perspective of the freedom of establishment.[33]

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[27] Reference is made to the Request for an Advisory Opinion in Case E-20/13, paragraph 5.2.1.

[28] Ibid., paragraph 5.2.2.

[29] Reference is made to *Cadbury Schweppes*, cited above, paragraph 31.

[30] Ibid., paragraphs 31 to 33.

[31] Reference is made to the order for reference, section 3.3., and the judgment of the Norwegian Supreme Court, Rt. 2002, p. 747.

[32] Reference is made to *Haribo and Österreichische Salinen*, cited above, paragraph 34.

[33] Reference is made to *Cadbury Schweppes*, cited above, paragraphs 52 to 55.

*The fourth question*

The Plaintiffs

123. The Plaintiffs 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. Moreover, they contend that taxation of nationals residing in an EEA State on a dividend that a trust established in another EEA State receives from a company established in a further EEA State is to be regarded as a restriction on the freedom of establishment and the right to free movement of capital.

124. The Plaintiffs submit that, in the present case, the Norwegian CFC rules may fall within Articles 31 and 40 EEA. Given that ongoing CFC taxation has been regarded a restriction on the freedoms established by the EU Treaty,[34] they consider the Norwegian CFC rules to constitute a restriction on the freedom of establishment provided for in Article 31 EEA. In addition, the Plaintiffs argue that the application of the CFC rules entails accelerated taxation compared with investments in or through Norwegian companies. In the case of Ptarmigan Trust, Norwegian CFC taxation is levied on the beneficiaries every year regardless of whether they receive any income in the year in question or in future years. In this context, the Plaintiffs stress the fact that the beneficiaries are not guaranteed any distribution from the trust nor do they have any formal possibilities of influencing the trust.

125. The Plaintiffs submit that the Norwegian CFC rules also entail a restriction on the free movement of capital in the EEA as provided for in Article 40 EEA. They contend that the investment of the trust in the underlying group structure must be regarded, in itself, as sufficient basis for the application of the provisions on free movement of capital. The Norwegian CFC rules have the effect that the group is hindered in raising new capital. Levying tax on the Norwegian beneficiaries in relation to income from the trust makes it more difficult for companies domiciled in other EEA States to raise capital from both Norway and Liechtenstein.

The Defendant

126. The Norwegian Government argues that, should the provisions on freedom of establishment or the free movement of capital in Articles 31 and 40 EEA apply to the taxpayers in their capacity as beneficiaries of Ptarmigan Trust, it must be assessed whether the CFC rules constitute a restriction. In that regard, it must be determined whether the Norwegian CFC legislation involves a difference in treatment in relation to the Norwegian taxpayer beneficiaries of Ptarmigan Trust.[35]

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[34] Reference is made to *Cadbury Schweppes*, cited above.

[35] Ibid., paragraphs 43 and 44.

127. The Norwegian Government notes that Norwegian legislation does not allow discretionary trusts to be established and that the Norwegian Supreme Court has stated that a trust such as Ptarmigan Trust would be contrary to the Norwegian Constitution.[36]

128. On this basis, the Norwegian Government points out that one could argue that there is no difference at all in the present case, since there are no Norwegian discretionary trusts with beneficiaries who can be treated differently to the Norwegian taxpayer beneficiaries of Ptarmigan Trust.

129. However, the Norwegian Government concedes that, in accordance with case law, it must be examined whether there are entities under Norwegian law which can be deemed comparable to trusts and which are taxed in a more favourable way.[37] In that regard, the Norwegian Government submits that, under Norwegian law, there are no companies which can be considered comparable to trusts, such as Ptarmigan Trust, and that are treated more favourably as regards taxation.

130. The Norwegian Government notes that Norwegian legislation does not allow discretionary trusts to be established and that the Norwegian Supreme Court has held that a trust such as Ptarmigan Trust would be contrary to the Norwegian Constitution. Whereas this does not automatically imply that there are no comparable entities, those entities that may be established under Norwegian law all differ from a trust of this kind in relevant respects. The Norwegian Government holds, for instance, that a limited liability company and a foundation are taxable entities with separate legal personalities, and, moreover, that a foundation is a self-owned entity. A trust lacks these characteristics. It is also different from a partnership, the latter requiring that at least one of the partners has unlimited liability, whereas the partnership lacks the trust’s character of an independent capital asset.

131. Despite such differences, the Norwegian Government holds that – regarding the current taxation – the beneficiaries of the trust are treated in the same manner as participants in a partnership. Moreover, they are also treated equally with a limited liability company, the only difference being that the current taxation in the latter company is levied on the hands of the company and not on the hands of the shareholder, a difference, it is submitted, that does not lead to the establishment of a restriction.[38] Neither does a difference between taxation of a company in a low-tax state compared with a company in a non-low-tax-state imply a relevant difference in treatment in the present case.[39]

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[36] Reference is made to the judgment of the Norwegian Supreme Court, Rt. 2002, p. 747.

[37] Reference is made to Case C-303/07 *Aberdeen* [2009] ECR I-5145, paragraph 50.

[38] Reference is made to Case C-446/04 *Test Claimants*, paragraphs 41 ff.

[39] Reference is made to Case C-298/05 *Columbus Container* [2007] ECR I-10451.

132. The exemption method is the Norwegian Government holds, irrelevant to the case before Oslo District Court as there has been no share income in the relevant income years. The Defendant further holds that as the exemption method would be introduced also to personal CFC participants taking effect from the income year 2013, there could not be any relevant interest based on future tax treatment. The defendant also questions whether there are relevant differences that could not be objectively justified between the personal beneficiaries of a trust like Ptarmigan Trust and shareholders and partners that could apply the exemption method also until 2013.

The French Government

133. The French Government contends that, were the Court to consider the EEA provisions on free movement to apply in the present case, the Norwegian rules on CFCs do not entail any discrimination and are, in any event, justified.

134. The French Government observes, as pointed out by the referring court, that what is decisive, in order to determine whether the Norwegian CFC rules entail discrimination, is whether the Norwegian beneficiaries of a trust, such as Ptarmigan Trust, are subject to less favourable taxation than the participants or shareholders in a comparable enterprise. This raises the question of which enterprise or undertaking is comparable to a traditional trust such as Ptarmigan Trust.

135. The French Government considers that a traditional trust governed by the law of Liechtenstein, such as Ptarmigan Trust, is not comparable to a limited liability company governed by Norwegian law. Under Norwegian legislation, limited liability companies are deemed to be separate taxable persons. As a result, the company itself is subject to taxation of its income on an ongoing basis. By contrast, a traditional trust governed by the law of Liechtenstein is not regarded as a separate taxable person, neither under Norwegian law, nor indeed under the law of Liechtenstein. That is why taxation of the income is not levied on the trust itself, but on the participants in the trust, and this is why participants in a trust which constitutes a CFC are taxed on an ongoing basis on their share of the profit, whether or not they actually receive any distributions from the trust. Furthermore, trusts should not be compared to partnerships, as unlike partnerships, trusts governed by the law of Liechtenstein do not constitute a separate legal person and do not carry out any economic activity. Moreover, according to the referring court, while partners in a partnership have unlimited liability, beneficiaries of a trust assume no liability.

136. Noting the differences between a trust and a partnership, the French Government submits that the beneficiaries under a trust should not be regarded as subject to the same tax treatment as the partners in a partnership. Consequently, in its view, the Norwegian rules on CFCs do not discriminate against the beneficiaries under a trust which constitutes a CFC.

The Government of Liechtenstein

137. The Liechtenstein Government argues that Article 31 EEA must be interpreted as precluding the inclusion of assets and profits of a trust based in one Member State in the income and assets of a person resident in another Member State through the application of CFC rules. In this regard, it submits that, based on the CFC rules, the beneficiaries of Ptarmigan Trust must pay more taxes than they would have been obliged to pay had they owned a holding company in Norway or had they owned the companies themselves that are owned and controlled by Ptarmigan Trust.

138. The Liechtenstein Government observes that the beneficiaries of Ptarmigan Trust are being subjected to double taxation, which, based on the CFC rules, takes place when the trust receives its dividend from its holdings, and then again, when the trust distributes a dividend to beneficiaries. In this connection, the Liechtenstein Government points out that such double taxation would not take place were the trust domiciled in Norway.

139. The Government of Liechtenstein submits that the Norwegian CFC rules involve restrictions on the freedom of establishment and the free movement of capital. Pursuant to section 10-60 of the Tax Act, the potential beneficiaries of Ptarmigan Trust are taxed at a much higher rate than they would be were the trust not subject to the CFC rules. And, furthermore, they are taxed much earlier than they would be if only Norwegian companies were involved.

The United Kingdom Government

140. The United Kingdom Government submits 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.[40] Furthermore, it is necessary to establish that such an investor would be treated more favourably than the beneficiaries.

141. The United Kingdom Government points 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, according to the United Kingdom Government, the taxation of an artificial device, such as a discretionary trust, based on the transfer of legal ownership of assets in order to secure low taxation on the income, is not comparable to the ordinary economically efficient making of investments through a domestic intermediary.

142. However, the United Kingdom Government observes that, if there is a valid comparison between investment in a Norwegian partnership and investment in a

[40] Reference is made to Case C-170/05 *Denkavit International and Denkavit France* [2006] ECR I-11949, paragraphs 34 to 36.

Liechtenstein trust, it is not clear from the Request for an Advisory Opinion whether participants in Norwegian partnerships are taxed both on the profits generated by the partnership and on distribution from it. If so, then, according to the United Kingdom Government, there is no less favourable treatment under the Norwegian CFC legislation.

The EFTA Surveillance Authority

143. In ESA's view, there are three measures in the present case which might restrict *prima facie* the freedom of movement: (1) the CFC taxation of the trust as such; (2) the absence of a remedy for the economic double taxation that arises in the context of CFC taxation; and (3) the taxation of distributions to the Norwegian beneficiaries.

144. As regards the first measure, ESA submits that the CFC taxation appears to constitute a restriction on the freedom of establishment. ESA points out that the Norwegian CFC rules are discriminatory as Norwegian taxpayers who are beneficiaries of a trust to which the CFC rules apply are placed in a less favourable tax position than resident Norwegian taxpayers who are beneficiaries of a trust to which the CFC rules do not apply.[41]

145. As regards the second measure, ESA contends that it constitutes a restriction not to provide a remedy for the economic double taxation which arises in the context of the CFC taxation. ESA submits that such 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 already have been taxed in the hands of the distributing companies (e.g. by means of corporation tax on Ptarmigan's subsidiaries); and 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.

146. ESA submits that the CFC rules at issue for the income years 2004-2006 entail 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.

147. As regards the third measure, ESA notes that this measure, the taxation of distributions to the beneficiaries, is not in itself a form of CFC taxation. More precisely, ESA states that the taxation of distributions from the trust in Liechtenstein to the beneficiaries that are Norwegian taxpayers constitutes regular taxation of worldwide income of residents. In its view, such taxation is not exercised in a discriminatory manner, since similar rules apply to dividends distributed by limited liability companies or enterprises assessed as partnerships.

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[41] Reference is made to *Cadbury Schweppes*, cited above.

148. ESA notes that, according to the referring court, in Norway, the taxation of distributions in the hands of the beneficiaries is equivalent to the taxation of dividends from limited liability companies in the hands of personal shareholders and the taxation of distributions from enterprises assessed as partnerships in the hands of personal owners. If this is so, in ESA's view, the Norwegian taxation of distributions to the beneficiaries that are Norwegian taxpayers does not constitute a restriction on free movement. In addition, such wholly non-discriminatory taxation cannot be considered to restrict the freedom of establishment nor can it be considered to restrict the free movement of capital.

The European Commission

149. The Commission submits that the effect of the Norwegian CFC rules in a case such as the present is that the beneficiaries of the trust are taxed on the latter's income on a current basis, whether or not that income is actually distributed to them.

150. The Commission observes that there is a potential for double taxation in two respects: first, the CFC rules do not appear to make any allowance for tax paid on the underlying income of companies in which the trust holds shares; second, tax is paid when the trust receives income and again when that income is distributed to beneficiaries.

151. The Commission questions whether such taxation is less favourable than the regime which applies in purely domestic situations. If so, this would result in a restriction.

152. As regards the first potential restriction, the Commission notes that, according to the Tax Appeals Board, a trust is not a separate legal person and, moreover, that there are several situations, notably partnerships, in which participants are taxed immediately on the profits of the business entity whether or not they receive those profits.

153. 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. In this connection, the fact that a trustee resident in Norway might be liable for tax on trust property held elsewhere has no relevance to 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, so that he is the recipient (pro rata) of those earnings. According to the Commission, that is no basis on which to conclude that trust beneficiaries may be taxed on income received by an entirely different person. Since the Tax Appeals Board gave no example 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.

154. 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 and that Norway may therefore have complete freedom of action.[42]

155. As regards the second potential restriction, double taxation, in the Commission's view, the approach taken to individual resident taxpayers affected by the Norwegian CFC rules seems to be intended to assimilate them to shareholders in a Norwegian company.

156. The Commission points out that tax is charged at the rate of 28% on the income of the trust and then a further tax charge of 28% is made on distribution to the trust beneficiaries. In the Commission's view, the fact that a trust is not entitled to an exemption from certain taxes as a Norwegian company would be must result in the conclusion that the application of the CFC rules constitutes a restriction.

*The fifth question*

The Plaintiffs

157. The Plaintiffs submit that Ptarmigan Trust was established for commercial reasons. At the same time, they contend that even if Ptarmigan Trust had been established for tax purposes, according to case law, however, this could not justify the continued application of the restriction entailed by the Norwegian CFC rules.

158. The Plaintiffs observe that a national provision that constitutes a restriction on the freedom of establishment and the free movement of capital may, in exceptional cases, be maintained if it is justified by overriding reasons in the public interest.

159. 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.

160. In addition, the Plaintiffs submit that the Norwegian CFC rules go beyond what is necessary to prevent abusive practices that circumvent national tax legislation. In their view, the scope of the Norwegian version of the CFC rules is markedly more extensive than the rules in other EEA States. This shows that the Norwegian CFC rules could clearly meet their objective in a manner that would interfere less with the single market that the EEA Agreement seeks to establish. First, the Norwegian CFC rules apply a more rigorous "anti-avoidance standard" than that used by the ECJ. Second, according to the case law of the ECJ, for CFC legislation, there must be an erosion of the national tax base.[43] Third, the application of the Norwegian CFC rules is not

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[42] Reference is made to *Aberdeen*, cited above.

[43] Reference is made to Case C-524/04 *Test Claimants – Thin Cap* [2007] ECR I-2107, paragraph 74, and Case C-201/05 *Test Claimants – CFC* [2008] ECR I-2875, paragraph 77.

limited to cases in which the motive is tax evasion or a general reduction in the tax liability. Fourth, the Norwegian CFC legislation does not provide sufficient protection against economic double taxation. Finally, the Plaintiffs stress that the public interests that rules of the CFC type are meant to safeguard are handled in a considerably less intrusive manner by other Member States.

The Defendant

161. The Norwegian Government submits that, for the Norwegian CFC rules to be regarded as justified under EEA law, they must fulfil certain requirements that have been laid down in case law.[44] 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. In addition, it is legitimate for the home State of the taxpayer to demand verifiable documentation of whether the activity does indeed meet the requirements of genuine economic activity.[45]

The French Government

162. The French Government contends that were the Court to consider the EEA provisions on free movement to apply in the present case, the Norwegian rules on CFC do not entail any discrimination and, in any event, are justified by the need to combat tax avoidance and evasion.

163. According to the French Government, it follows from case law that the objective of the Norwegian CFC rules, which is to prevent tax avoidance and evasion, can be regarded as an overriding reason in the public interest.[46]

164. In the view of the French Government, the Norwegian CFC rules are justified by the need to prevent tax avoidance and tax evasion to the extent that they provide for taxation on an ongoing basis of the Norwegian beneficiaries of a trust, such as Ptarmigan Trust, on their share of the profit whether or not dividends have actually been distributed, unless the beneficiaries document that the trust is actually established in an EEA State and pursues genuine financial activity there and they present a declaration from the tax authorities of the State of establishment confirming the accuracy of the documentation to the Norwegian tax authorities.

The Government of Liechtenstein

165. The Government of Liechtenstein submits that, in the case at hand, it is obvious that Ptarmigan Trust is domiciled in Liechtenstein, an EEA State, and pursues

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[44] Reference is made to Case C-72/09 *Rimbaud* [2010] ECR I-10659, paragraph 51, and *Cadbury Schweppes*, cited above, paragraph 59.

[45] Reference is made to *Commission* v *Italy*, paragraph 69, *Rimbaud*, paragraph 40, both cited above, and Case C-48/11 *A Oy*, judgment of 19 July 2012, not yet reported, paragraph 35.

[46] Reference is made to Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 87, and for comparison Case C-318/10 *SIAT*, judgment of 5 July 2012, not yet reported, paragraph 36.

"genuine economic activity" there, which is even more than mere "financial activity" as required in section 10-64b of the Tax Act. Ptarmigan Trust has an office and its own staff in Liechtenstein and the office is organised to manage actively several companies that are owned by Ptarmigan Trust.

166. The Government of Liechtenstein submits that the CFC rules in Norway penalise every concept in which a country with low taxes is involved, even if it is an EEA Member State. In its view, it is neither necessary nor proportionate to use the kind of restriction provided for in the Norwegian CFC rules to ensure that the Norwegian tax authorities can hinder abuse of the tax rules by their residents.

167. The Liechtenstein Government submits that the current Norwegian CFC rules go beyond what is necessary to achieve the hindrance of tax abuse[47] and cannot be justified by overriding public interests since the CFC rules are not proportionate.

The United Kingdom Government

168. The United Kingdom Government submits that CFC legislation, such as adopted by Norway, is capable of being justified by the need to maintain a balanced allocation of taxing powers between the EEA States taken together with the need to prevent tax avoidance.[48]

169. The United Kingdom Government points out that the balanced allocation between the EEA States of the power to tax provides a justification "where the system in question is designed to prevent conduct capable of jeopardising the right of an EEA State to exercise its tax jurisdiction in relation to activities carried out in its territory".[49]

170. The United Kingdom Government submits that CFC legislation such as that in issue in the national proceedings is both justified and proportionate.

171. The United Kingdom Government submits that is proportionate to put the onus on the taxpayer to establish the genuineness of activities of the company or the undertaking in the other EEA State. It is also proportionate – and consistent with the further legitimate aim of ensuring the effectiveness of fiscal supervision – for Norway to insist that the evidence provided by the taxpayer be verifiable.

The EFTA Surveillance Authority

172. ESA considers that the CFC rules constitute two measures restricting the freedom of establishment under Article 31 EEA. The first is the CFC taxation of the trust as such and the second is the economic double taxation.

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[47] Reference is made to *Cadbury Schweppes*, cited above, paragraph 60.

[48] Reference is made to Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 42.

[49] Reference is made to Case C-311/08 *SGI* [2010] ECR I-487, paragraph 60.

173. As regards the first restrictive measure, ESA submits that a restriction can be justified on the ground of prevention of abusive practices if its specific objective is 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 the national territory. This type of conduct is 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.[50]

174. In ESA's view, it must be determined whether such restrictions may be justified on the ground of prevention of wholly artificial arrangements and, if so, whether the restriction is proportionate in relation to that objective.

175. ESA submits that Norway is justified in applying CFC rules to tax the income of a Liechtenstein trust that does not constitute an actual establishment pursuing 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, ESA submits that 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.

176. As regards the second restrictive measure, ESA submits that the CFC rules at issue in the main proceedings entail a restriction on the freedom of establishment under Article 31 EEA to the extent that they entail, without exception, 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.

177. ESA considers it difficult to justify international economic double taxation in so far as double taxation is avoided or undone in comparable internal situations. This appears to be an issue for natural persons that are taxed as participants in CFC that is a trust.

The European Commission

178. The Commission submits 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.

179. The Commission observes that it is legitimate to have recourse to presumptions of tax evasion or avoidance when activities are apparently being carried out in a low-

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[50] Reference is made to *Cadbury Schweppes*, cited above, paragraphs 55 and 56.

tax country. It must, however, be open to the taxpayer to provide contrary evidence, as is provided for in section 10-64 of the Tax Act.

180. Furthermore, the Commission submits that, in line with the *Cadbury Schweppes* 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 tax agreement or other arrangement, including a declaration from the tax authorities of the State of establishment that confirms the correctness of the documentation.

181. 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. The Commission points out that 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 submission, the additional tax charge is disproportionate and contrary to Article 31 EEA.

*The sixth (first supplementary) question*

Fred. Olsen and Others

182. Fred. Olsen and 10 other plaintiffs in the case pending before the Oslo District Court argue that the charge of wealth tax amounts to a restriction contrary to the EEA Agreement on several grounds. First, the Plaintiffs are taxed in respect of assets they do not own, and such taxation does not take place in a purely domestic context. Second, the position of the Plaintiffs in relation to Ptarmigan Trust is comparable to that of a beneficiary under a Norwegian family foundation and/or asset fund. Beneficiaries in such entities are not subject to wealth tax in respect of the assets owned by the entity. Third, 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. Finally, the assessed taxable value of the interest of the Plaintiffs is determined at more than the fair market value, and such tax valuation does not take place in a comparable domestic context.

183. Fred. Olsen and Others submit that it is contrary to Articles 31 and 40 EEA to levy wealth tax on the beneficiaries for assets owned by the trust. Furthermore, in their view, the ECJ has established that a difference in treatment in the context of wealth taxation is contrary to the EEA Agreement.[51] They contend that the reasoning of the ECJ in *Baars* is relevant to the current case. Moreover, Fred. Olsen and Others

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[51] Reference is made to *Baars*, cited above.

complain that they are also denied equal treatment from a tax perspective, the reason being that the assets are owned by a Liechtenstein trust. This, they argue, is contrary to Norway's obligations under the EEA Agreement.

184. In any event, Fred. Olsen and Others submit that the taxation involves a cash-flow disadvantage which amounts to a restriction. In *National Grid Indus*[52] and *Commission* v *Portugal*,[53] which both concerned exit taxation rules, the ECJ emphasised the problem of liquidity. According to Fred. Olsen and Others, the same argument applies in their case as they are subject to wealth taxation even though they have not received the wealth. Because the tax rate has been set at 1.1%, and because this is potentially a matter concerning considerable sums, the disadvantage in terms of liquidity is substantial.

185. Fred. Olsen and Others submit that they do not own the assets in Ptarmigan Trust. They contend that they also cannot be regarded as the owners of the assets in Ptarmigan Trust due to the fact that they do not have the power to carry out any significant ownership functions, neither in theory nor in practice. Moreover, Fred. Olsen and Others submit that the relationship between the Plaintiffs and Ptarmigan Trust's assets has very few of the characteristic features of "ownership", as generally understood in the context of Norwegian taxation.

186. Fred. Olsen and Others submit that, in subjecting the beneficiaries of Ptarmigan Trust to wealth tax on a proportionate share of the trust's net assets under the general rule in section 4-1 of the Tax Act while providing an exemption for comparable domestic situations, Norway provides for the different treatment of comparable situations which, in turn, infringes the freedom of establishment and free movement of capital ensured by the EEA Agreement.

187. Fred. Olsen and Others argue that the assessment of wealth tax amounts to a restriction on the freedoms provided for in 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.

188. Fred. Olsen and Others observe that, in contrast to the beneficiaries under Ptarmigan Trust, beneficiaries in Norwegian undertakings under independent management and family foundations are generally not subject to wealth tax themselves. 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.

189. Fred. Olsen and Others take the view that the position of a beneficiary under Ptarmigan Trust is comparable to the position of beneficiary in a Norwegian family

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[52] Reference is made to *National Grid Indus*, cited above.

[53] Reference is made to Case C-38/10 *Commission* v *Portugal*, judgment of 6 September 2012, not yet reported.

foundation. Norwegian beneficiaries in family foundations are not subject to wealth tax on their pro rata share of the foundation's net assets. Instead, wealth tax is payable by the foundation, to the extent that it is taxable. According to Fred. Olsen and Others, when the two situations are comparable, a less favourable treatment of beneficiaries in the cross-border situation constitutes a restriction on the freedom of establishment and/or free movement of capital.

190. Furthermore, Fred. Olsen and Others submit that they are not in a comparable situation to shareholders or personal participants in transparent entities. They assert that they do not have the right to carry out typical ownership functions in the same manner as shareholders or personal participants.

Petter Olsen and Others

191. Petter Olsen and Others contend that the wealth taxation is more burdensome than in comparable situations, first, because such wealth taxation would not be levied on beneficiaries in Norwegian independent asset funds or undertakings and, second, because the wealth tax increases from 0.3%, which is the rate applicable to Norwegian asset funds, to 1.1% for the beneficiaries.

The Defendant

192. The Norwegian Government notes 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 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. It observes 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 the hands of the foundation and not in the hands of 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.

193. The Norwegian Government submits that there are objective differences between a trust such as Ptarmigan Trust and all forms of entities legally established in Norway. In addition, it is more appropriate to compare the beneficiaries with shareholders in a limited liability company or with participants in a partnership than with beneficiaries in a foundation. According to the Norwegian Government, the relevant legislation on wealth tax does not constitute a restriction for the purposes of Article 31 or Article 40 EEA when applied in the circumstances of the case at hand.

The United Kingdom Government

194. The United Kingdom Government considers that, in order for the wealth taxation of the beneficiaries' interests in the Trust to constitute a restriction, the beneficiaries would have to establish that they were in an objectively comparable situation to other taxpayers liable to Norwegian wealth tax who were treated more favourably. However, on the facts of the present request, it is not clear whether the beneficiaries are in fact treated less favourably than comparable taxpayers.

195. The United Kingdom Government submits that 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. However, it appears to the United Kingdom Government that personal taxpayers, such as the beneficiaries of the Trust, are subject to wealth tax at 1.1%. That is the case whether they are shareholders in a Norwegian limited liability company or beneficiaries of a Liechtenstein trust. In those circumstances, it would appear that the beneficiaries have not suffered any less favourable treatment and, therefore, the levying of wealth tax on their interests in the Trust does not amount to a restriction on their freedom of establishment in Liechtenstein.

The EFTA Surveillance Authority

196. ESA notes that, according to consistent case law, although direct taxation falls within their competence, EEA States must nonetheless exercise that competence consistently with EEA law. ESA asserts that the beneficiaries of the Trust are entitled to invoke the freedom of establishment for the purposes of challenging the legality of the wealth tax rules under the EEA Agreement. ESA submits that the application of the Norwegian wealth tax rules must be examined solely from the perspective of the freedom of establishment. Any restrictive effects on the free movement of capital should be considered an unavoidable consequence of such an obstacle to the freedom of establishment and do not therefore justify an independent examination of those rules from the perspective of Article 40 EEA.

197. ESA argues that the fact that Ptarmigan Trust is not recognised as a taxable entity under Norwegian law does not mean that there is no domestic comparator available and that the Norwegian authorities should therefore be able to treat the beneficiaries differently. 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.

198. ESA notes that if the beneficiaries of the 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 difference in tax treatment may discourage residents from establishing a trust in another EEA State and give them an incentive to establish their funds in Norway instead.

199. ESA concludes, therefore, that the way the wealth tax rules are applied to the beneficiaries results in a tax treatment different to that of beneficiaries in a comparable entity established under Norwegian law and, consequently, results in discrimination to the detriment of the beneficiaries, thus constituting a restriction on the freedom of establishment.

The European Commission

200. The Commission considers that the absence of an entity in Norwegian law identical to a Liechtenstein trust does not mean that there is no domestic comparator at all and that Norway therefore has complete freedom of action.[54] The comparison should 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 Commission considers that irrespective of the approach to be taken to the taxation of income, the closest Norwegian equivalent to a family trust is a family foundation or asset fund.

201. 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. However, were it to be regarded as a restriction, the Commission considers that, in any event, the restriction is justified.

202. 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.

*The seventh (second supplementary) question*

Fred. Olsen and Others

203. Fred. Olsen and Others submit that the restriction cannot be justified by overriding reasons relating to the public interest. Fred. Olsen and Others argue that the need to ensure the cohesion of the tax system is not applicable in this case, as, for this

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[54] Reference is made to *Aberdeen*, cited above.

reason to apply, it must be possible to prove that there is a link between a tax benefit that the taxpayer achieves and taxation of income. In their view, there is no link between the charge to wealth tax and other taxes payable by the Plaintiffs. On the contrary, the Plaintiffs are subject both to a more burdensome income tax and a more burdensome wealth tax than in a comparable domestic situation.

204. According to Fred. Olsen and Others, the interest in a balanced distribution of taxing rights cannot be cited as a justification. Moreover, they argue 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. In addition, 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.

205. Fred. Olsen and Others note that, under settled case law, the application of a national measure must be appropriate to ensure the attainment of its purported objective and not go beyond what is necessary to attain it. Fred. Olsen and Others submit that national measures intended to protect a balanced allocation of taxation and/or prevent tax avoidance can only be considered proportionate to the extent that they result in the taxpayer in question being treated in the same way as other taxpayers, i.e. by removing the benefit obtained by the alleged tax base erosion/avoidance tactics.[55] Fred. Olsen and Others submit that in subjecting the Plaintiffs to a tax at a higher rate than that which would have been payable by a Norwegian foundation or an asset fund, the Norwegian wealth tax rules go beyond what is necessary to protect the balanced allocation of taxation and/or the prevention of tax avoidance. Consequently, the national measure is not proportionate and therefore in breach of the EEA Agreement.

206. Fred. Olsen and Others argue that the case law of the 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. In *A Oy*[56], the agreement between Norway and Finland was held to meet this standard. Fred. Olsen and Others submit that the NOR-LI agreement is broadly the same as the NOR-FIN agreement and, therefore, the NOR-LI agreement suffices.

207. Fred. Olsen and Others submit that the income and wealth taxation is contrary to Article 1 of Protocol 1 to the ECHR. Fred. Olsen and Others submit that the total taxation is contrary to the EEA Agreement and that importance must be attached to the rights protected by the ECHR in this connection. Fred. Olsen and Others argues that the infringement of the right to property provided for in Article 1 of Protocol 1 to the

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55 Refence is made to *Test Claimants – Thin Cap*, paragraphs 82 and 83, and *SGI*, paragraphs 71 and 72, both cited above.

56 Reference is made to *A Oy*, cited above.

ECHR lacks a sufficiently clear statutory basis and that, therefore, the taxation contravenes that provision. Furthermore, they argue that the infringement is not proportional for three reasons. First, the taxation is not proportionate because the Plaintiffs must pay tax on a calculated income or wealth that they do not have, or will not necessarily gain access to. In their view, the taxation will also fundamentally interfere with their financial position. Second, they are taxed more severely than beneficiaries in comparable domestic situations. Third, in the proportionality assessment under Article 1 of Protocol 1 to the ECHR, account must be taken of how much time has passed from the date when the authorities first made their decision until the final decision is made.[57] In that connection, they observe that, for the income years 2001-2003, the National Tax Board gave its appeal decision on 6 December 2010, nearly five years after the first decision was issued by the tax authorities for the same income years.

Petter Olsen and Others

208. Petter Olsen and Others consider the purpose of wealth taxation to be exclusively to generate tax revenues on the basis that the wealthy taxpayer is regarded as having the taxpaying ability to bear a certain amount of taxation on his or her assets. They contend that there is no basis in Norwegian law for any wealth taxation of a taxpayer in relation to other taxpayers' assets, and this consequently cannot justify the appropriation of the taxpayers' assets in contravention of Article 1 of Protocol 1 to the ECHR or justify restrictions on any of the four freedoms.

The Defendant

209. 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 regulation 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 to be exempted 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.

210. The Norwegian Government also notes the importance of verified information concerning matters that the Norwegian authorities cannot themselves ascertain. For instance, 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.

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[57] Reference is made to the judgment of the European Court of Human Rights in Application No 9616/81 *Erkner and Hofauer* v *Austria* [1987] 9 EHRR 464, paragraphs 76 to 79.

211. 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, it is the Defendant's position that the taxation in the case at hand is fully compatible with such rights.

212. The Norwegian Government submits that the present case clearly does not violate the fair balance required under Article 1 of Protocol 1 to the ECHR. There is no case law from the European Court of Human Rights that comes close to a situation similar to the CFC taxation or wealth taxation at issue here. Nor is there relevant case law from the ECJ implying that tax legislation such as the present raises doubts concerning its compatibility with fundamental rights.

213. Furthermore, the Norwegian Government contends that there is no excessive burden or arbitrary discrimination. It observes that the discretionary trust such as the one at issue in the present case, exempted from tax in Liechtenstein, is a potential tool for tax evasion. Taken together with the limited opportunities to verify relevant information regarding circumstances in Liechtenstein, in its view, this calls for a wide discretion for the Norwegian authorities in striking the balance between the interests of the beneficiaries and the objectives of preventing tax evasion, of ensuring efficient tax control and of maintaining a balanced allocation of tax powers.

The EFTA Surveillance Authority

214. ESA considers that, in the context of the wealth tax rules, 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.

215. 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.

216. 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.

217. ESA submits that *prima facie* the existence of the NOR-LI Agreement does not change its legal analysis, notwithstanding the fact that the Trust is covered by the Agreement. ESA considers that it is not relevant to the case at hand, since there are, in ESA's view, no overriding reasons in the public interest which could possibly justify the restriction on the freedom of establishment.

The European Commission

218. 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 of the trust held in a comparable domestic entity such as a family foundation or asset fund. The Commission considers any such additional tax charge to be contrary to Article 31 EEA.

219. 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 EFTA 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.

220. As regards the NOR-LI agreement, the Commission notes that, in the case law of the ECJ, it has frequently been 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.[58] However, 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.

The United Kingdom Government

221. 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.

222. The United Kingdom Government stresses the undoubted right of a Contracting State to the ECHR to enforce tax laws so as to ensure that taxes are paid, which must

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[58] Reference is made to *Rimbaud*, cited above, paragraph 14.

include a right to take steps against tax avoidance.[59] In turn, that must include a power for Contracting States to take reasonable steps to determine the income and assets which actually belong to or are controlled by its taxpayers. Accordingly, 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 CFCs do not impose excessive burdens on the taxpayer. Therefore, there is no breach of Article 1 of Protocol 1 to the ECHR.

223. 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 Norwegian wealth tax on their interests in the Trust. It notes, moreover, that even if the beneficiaries were to establish that the Trust does carry on genuine economic activity in Liechtenstein, the beneficiaries are still liable to Norwegian 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 Norwegian 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.

## VII Proposed answers

224. The Fred Olsen and Others propose to the Court the following answer to Questions 1 to 5:

> *Question 1:*
>
> *A trust is, as a form of establishment, covered by the freedom of establishment in Article 31 EEA.*
>
> *Supplementary question:*
>
> *Taxpayers who are nationals residing in an EEA Member State and who are exposed to discriminatory taxation are rights holders in pursuance of the EEA Agreement.*
>
> *Question 2:*
>
> *A trust will be able to meet the activity requirement in pursuance of Article 31. More rigorous requirements cannot be made for the activities of a trust than for other entities.*

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[59] Reference is made to Case 13616/88 *Hentrich v. France* [1994] 18 EHRR 440, paragraph 39.

*Question 3:*

*A trust is covered by the right to free movement of capital. Nationals residing in an EEA State who are taxed for dividends from a company established in an EEA State that distributes dividends to a trust established in an EEA State are covered by the right to free movement of capital.*

*Question 4:*

*The rule on continuous taxation of nationals residing in an EEA State on income in a trust established in another EEA State entails a restriction on the freedom of establishment and on the right to free movement of capital.*

*Taxation of nationals residing in an EEA State on dividends that a trust established in another EEA State receives from a company established in another EEA State is regarded as a restriction on the freedom of establishment and the right to free movement of capital.*

*Question 5:*

*The restriction cannot be regarded as justified by overriding reasons of public interest, nor are the restrictions proportionate.*

225. Fred Olsen and Others propose that the Court should answer the supplementary questions as follows:

*The first supplementary question:*

*The wealth taxation of the beneficiaries for the trust's assets constitutes a restriction pursuant to Article 31 and/or Article 40 of the EEA Agreement – and this can be invoked by the beneficiaries in a trust as described in section 2 of the request for an advisory opinion.*

*In any event, the use of the tax rate of 1.1% constitutes a restriction pursuant to Article 31 and/or Article 40 of the EEA Agreement – and this can be invoked by the beneficiaries in a trust as described in section 2 of the request for an advisory opinion.*

*The second supplementary question:*

*The restriction cannot be regarded as justified by overriding reasons of public interest, and the restrictions are not proportionate. The use of the tax rate of 1.1% and a tax valuation of the interest of the beneficiaries at more than the fair market value is disproportionate to the achievement of any justification.*

*The taxation is contrary to the requirements of respect for fundamental rights in the EEA Agreement.*

*The restrictions cannot be regarded as justified even for the income years up to 2010. In any event, the restrictions cannot be regarded as justified from the income year 2011 when the exchange of information between Norway and Liechtenstein entered into force.*

226. Petter Olsen and Others propose that the Court should answer questions 1 to 5 as follows:

*Question 1:*

*Any form of establishment, including trusts, that can be legally established in the State of establishment in the EEA is covered by the freedom of establishment provided for in Article 31 of the EEA Agreement.*

*Taxpayers who reside in a State covered by the EEA Agreement and who are exposed to discriminatory taxation in an EEA State are rights holders pursuant to the EEA Agreement.*

*Question 2:*

*Trusts can meet the requirement for economic activity provided for in Article 31 of the EEA Agreement in the same way as any other legal form of organisation in the EEA. There is no legal basis for imposing more onerous conditions for the economic activities of trusts than for other legal persons.*

*Question 3:*

*A trust's rights are protected by the right to free movement of capital provided for in Article 40 of the EEA Agreement. Taxpayers who are nationals and reside in a State covered by the EEA Agreement and who are taxed on dividend received from a* company established in an EEA State that distributes dividend to a trust established in a State covered by the EEA Agreement are protected by the right to free movement of capital.

*Question 4:*

*The rules on continuous taxation of taxpayers who are nationals and reside in a State covered by the EEA Agreement on income in a trust established in another EEA State constitute a restriction on the freedom of establishment and the right to free movement of capital.*

*Taxation of taxpayers who are nationals and reside in a State covered by the EEA Agreement on dividend that a trust established in another EEA State than the taxpayer receives from a company established in another EEA State than the taxpayer constitutes a restriction on the freedom of establishment and the right to free movement of capital.*

*Question 5:*

*The restrictions cannot be regarded as justified by overriding reasons of public interest, nor are they proportionate.*

*The restrictions cannot be regarded as justified for the income years up to 2010. In addition, the restrictions cannot be regarded as justified from and including the 2011 income year when the agreement on the exchange of information between Norway and Liechtenstein entered into force.*

227. Petter Olsen and Others propose that the Court should answer the supplementary questions as follows:

*The continuous wealth taxation of the beneficiaries for the trust's assets constitutes a restriction pursuant to Article 31 of the EEA Agreement and can be invoked by the beneficiaries in the trust as described in section 2 of the request for an advisory opinion.*

*The continuous wealth taxation of the beneficiaries for the trust's assets constitutes a restriction pursuant to Article 40 of the EEA Agreement and can be invoked by the beneficiaries in the trust as described in section 2 of the request for an advisory opinion.*

*Applying a tax rate of 1.1% constitutes a restriction pursuant to Article 31 of the EEA Agreement and can be invoked by the beneficiaries in the trust as described in section 2 of Oslo City Court's request for an advisory opinion.*

*Applying a tax rate of 1.1% constitutes a restriction pursuant to Article 40 of the EEA Agreement and can be invoked by the beneficiaries in the trust as described in section 2 of Oslo City Court's request for an advisory opinion.*

*CFC taxation of the Norwegian companies on a subsidiary's potential income constitutes a restriction pursuant to Article 31 of the EEA Agreement when those companies have established the subsidiary in question in another EEA State with which Norway has a double taxation agreement and it invests in shares in one or more EEA States with which Norway has a double taxation agreement.*

*CFC taxation of the Norwegian companies on a subsidiary's potential income constitutes a restriction pursuant to Article 40 of the EEA Agreement when these companies have established the subsidiary in question in another EEA State with which Norway has a double taxation agreement and it invests in shares in one or more EEA States with which Norway has a double taxation agreement.*

*The second supplementary question*

*The restrictions connected with continuous wealth taxation cannot be regarded as justified by overriding reasons of public interest, nor are they proportionate.*

*The application of a tax rate of 1.1% is disproportionate in the present case and is contrary to Article 31 of the EEA Agreement.*

*The application of a tax rate of 1.1% is disproportionate in the present case and is contrary to Article 40 of the EEA Agreement.*

*The restriction connected with CFC taxation of potential income in subsidiaries where the Norwegian company has established a subsidiary in another EEA State with which Norway has a double taxation agreement and it invests in shares in one or more other EEA States with which Norway has a double taxation agreement is not justified, nor is it proportionate.*

*The taxation is contrary to fundamental principles of EEA law.*

*The restrictions cannot be regarded as justified for the income years up to 2010. In addition, the restrictions cannot be regarded as justified from and including the 2011 income year when the agreement on the exchange of information between Norway and Liechtenstein entered into force.*

228. The Defendant suggests that the Court should hold that the reference in Case E-3/13 is inadmissible. Should the Court find the reference admissible, and in any event in relation to Case E-20/13, the Defendant suggests that the Court should answer Questions 1 to 3 as follows:

*The beneficiaries of a trust like Ptarmigan Trust cannot rely on Article 31 EEA on freedom of establishment or on Article 40 on free movement of capital under the circumstances of the case before the Tax Appeals Board*[60] *and Oslo District Court*[61] *in relation to CFC taxation and wealth taxation. It is not necessary to answer the other questions referred to the EFTA Court.*

229. If the Court answers the other questions as well, the Defendant suggests that the Court should answer Questions 4 to 5 as follows:

*CFC rules like the ones provided for under Norwegian law do not constitute restrictions pursuant to Articles 31 or 40 EEA when applied for beneficiaries of a trust like Ptarmigan Trust.*

*CFC rules like the ones provided for under Norwegian law are in any event compatible with Articles 31 and 40 EEA provided that the home state has not*

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[60] Case E-3/13.

[61] Case E-20/13.

*concluded a tax information exchange agreement with the host state which is as effective as the exchange mechanism under Directive 2011/16/EU, and provided the host state has not, in the absence of such an agreement, verified that the tax payers were performing a genuine economic activity in the host state. It is for the referring body to ascertain these aspects on the basis of the facts of the case.*

230. The Defendant proposes that the Court should answer the supplementary questions as follows:

*Wealth taxation of beneficiaries of a trust like Ptarmigan Trust for their share of the trust's assets at a rate of 1.1% does not constitute a restriction under Article 31 or Article 40 EEA.*

*Wealth tax rules like the ones provided for under Norwegian law are in any event compatible with Articles 31 and 40 EEA provided suitable and necessary in ensuring social objectives, which is for the referring court to ascertain.*

231. The French Government proposes answers to Questions 1 to 5 as follows:

*The provisions of the EEA Agreement, in particular Article 31 EEA and Article 40 EEA do not preclude the legislation of an EEA Member State such as the Norwegian CFC rules which provide that:*

- *the Norwegian participants in a company, independent undertaking or capital asset, such as trust, that they own or control and which is domiciled in a low-tax country (a so-called "CFC") are taxed on a running basis on their share of the profit regardless of whether they actually receive any distributions from the company, the undertaking or the trust concerned at any time, unless they document that the company, the undertaking or the trust is actually established in an EEA State and pursues genuine financial activity there, and (i) Norway, pursuant to a tax agreement or other international agreement, can demand to obtain data from the State of establishment, or, (ii) if no such agreement exist, unless they present a declaration from the tax authorities of the State of establishment that confirms the correctness of the documentation to the Norwegian tax authorities; and*

- *while (i) notably limited liability companies and corporate participants in CFC are exempted from tax on distributions received from another undertaking established in Norway or in another EEA country and (ii) dividends received from another undertaking are not included in the net income for which the participants in the partnership are assessed, personal participants in CFC do not benefit from such an exemption.*

232. The Government of Liechtenstein proposes to the Court the following answers to Questions 1 to 5:

*A Liechtenstein trust is an independent entity which is entitled to make use of all fundamental rights under the EEA Agreement, including the right of freedom of establishment, the freedom of services and the free movement of capital. The trust is represented by the trustee and it is the trustee to whom the rights pursuant to the provision of the EEA Agreement were accruing to primarily.*

*A trust meets the requirements of economic activity provided for in Article 31 EEA.*

*A trust falls within the scope of the right of free movement of capital provided for in Article 40 EEA.*

*Article 31 EEA must be interpreted as precluding the inclusion of assets and profits of a trust based in a Member State to the income and assets of a resident person in another Member State by applying CFC rules.*

*The restrictions are not justified by the reasons argued by the Tax Board and the restrictions are not appropriate.*

233. The United Kingdom Government proposes to the Court the following answers to Questions 1 to 5:

*Trusts themselves are incapable of benefitting from the freedom of establishment provided for in Article 31 EEA, unless the Member State under whose laws they are created recognises them as having legal personality. The settlor and beneficiaries of a trust can only rely on 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 Member State. The trustees can rely on the freedom of establishment, but only in relation to their own economic activities of managing trust property. The trust itself cannot be regarded as a secondary establishment of the trustees.*

*In any event, in order to enjoy the right to freedom of establishment, it would be necessary to establish that a trust pursued a genuine economic activity. That requirement is not satisfied where the trust simply purchases assets in another Member State as passive investments.*

*The Norwegian CFC rules do not involve a restriction on the freedom of establishment or the right to free movement of capital.*

*Any restriction on the freedom of establishment or the right to free movement of capital created by the Norwegian CFC rules is justified by the need for balanced allocation of the power to tax and/or the prevention of tax avoidance. It is also proportionate for those aims.*

234. The United Kingdom Government proposes that the Court should answer the supplementary questions as follows:

> *Any restriction on the freedom of establishment created by the Norwegian CFC rules is justified by the need for balanced allocation of the power to tax and/or the prevention of tax avoidance. It is also proportionate to those aims.*
>
> *The same considerations apply both to income taxation of the beneficiaries' interests in the income of the CFC and wealth taxation of the capital value of their interests in the CFC.*
>
> *The counteraction of asset diversion to CFCs and the imposition of wealth tax on nationals who own assets in CFCs do not impose an excessive burden on the taxpayer. Therefore, there is no breach of Article 1, Protocol 1 of the ECHR*

235. ESA proposes that the Court should answer Questions 1 to 5 as follows:

> *The separate tax treatment under CFC rules such as those at issue in the main proceedings, and the resulting disadvantages for resident taxpayers who are beneficiaries of a CFC that is a trust domiciled in a low-tax country in the EEA are such as to hinder the exercise of freedom of establishment and dissuade from establishment or maintenance of a trust in a low-tax country in the EEA, as opposed to in any other EEA State, and thus constitutes a restriction on the freedom of establishment under Article 31 EEA.*
>
> *This restriction is justified provided that the trust is does not constitute an actual establishment and the pursuit of genuine economic activity in the EEA State where it is domiciled, and serves as means to escape the tax normally due on the profits generated by activities carried out on the territory of the EEA State imposing the restrictions. The CFC participants (the resident taxpayers), which are best placed for that purpose, must be given opportunity to produce evidence that the CFC is actually established and that its activities are genuine; evidence which must be accepted by the competent national authorities, subject to appropriate verification of documents.*
>
> *CFC rules such as those at issue in the main proceedings also entail a restriction on the freedom of establishment under Article 31 EEA to the extent that they entail, without exception, international economic double taxation of share income, including dividends, as received by a CFC that is a trust and subsequently distributed from the trust to its beneficiaries; in so far as double taxation is avoided or undone in comparable situations. This seems to be an issue in relation to personal participants on the CFC (natural persons that are beneficiaries of the trust).*
>
> *In not providing for appropriate exceptions, this restriction remains unjustified.*
>
> *The taxation of resident personal taxpayers in distributions made to them by a trust domiciled in another EEA State does not itself constitute a restriction on*

*the free movement of capital or the freedom of establishment, when the taxation is equivalent to taxation of dividends from limited liability companies in the hands of personal shareholders and taxation of distributions from enterprises assessed as partnerships in the hands of the personal owners.*

*The freedom of establishment can be invoked by the beneficiaries of the trust, in their capacity as participants in the CFC that is the trust, to contest their being taxed on the basis of CFC rules those as issue in the main proceedings.*

236. ESA proposes that the Court should answer the supplementary questions as follows:

*The first supplementary question:*

*The continuous wealth taxation of the beneficiaries of a trust based in another EEA country for the assets of the trust, at a rate of up to 1.1%, constitutes a restriction pursuant to Article 31 of the EEA Agreement, which can be invoked by the beneficiaries of such a trust.*

*The second supplementary question:*

*It is for the national court to assess, on the basis of the overriding reason of public interest put forward by the Norwegian authorities, whether such a restriction can be regarded as justified and proportionate.*

*It is for the national court to assess whether the continuous wealth taxation at a rate of up to 1.1% is contrary to the EEA Agreement, as interpreted in light of fundamental rights, taking into account whether such tax rules place an excessive burden on the beneficiaries or fundamentally interfere with their financial position.*

*The fact that the Agreement between Norway and Liechtenstein on the exchange of information in tax matters has entered into force is not of importance as regards the issue at hand. The existence of such an agreement can however, in practice, potentially have effect on the assessment of reasons that could justify the restrictions on the freedom of establishment.*

237. The Commission proposes that the Court should answer Questions 1 to 5 as follows:

*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.*

*The taxation on a current basis of resident beneficiaries of a trust situated in another EEA country and the failure to provide relief for double taxation, where such relief is provided in domestic situations, constitute restrictions on the freedom of establishment.*

*Such restriction may be justified where they serve to ensure the effectiveness of fiscal supervision and to combat tax avoidance, and do not go beyond what is indispensable in order to achieve those objectives*.

238. The Commission proposes that the Court should answer the supplementary questions as follows:

*The application of an aggregate rate of 1.1% in wealth tax to the assets held by a Liechtenstein family trust, in circumstances where an equivalent Norwegian arrangement would incur tax at the rate of 0.3% is contrary to Article 31 of the EEA Agreement since it results in heavier taxation of beneficiaries of a Liechtenstein trust than of beneficiaries of a comparable Norwegian entity.*

Páll Hreinsson
Judge-Rapporteur