

Onderzoekcentrum
Onderneming & Recht

TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS

Edited by

Prof. S.C.J.J. Kortmann

Prof. D.J. Hayton

Prof. N.E.D. Faber

Prof. K.G.C. Reid

J.W.A. Biemans



TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS

EDITED BY

Prof. S.C.J.J. Kortmann
Prof. D.J. Hayton
Prof. N.E.D. Faber
Prof. K.G.C. Reid
J.W.A. Biemans

Law of Business and Finance
Volume 10

Kluwer Legal Publishers – 2009

ISBN 9789013065893 Kluwer, The Netherlands
ISBN 9789041131409 Kluwer, outside The Netherlands
ISSN 1389-2711

Design: Willy Cremers, Nijmegen, The Netherlands
Lay-out: Gonnie Jakobs, Nijmegen, The Netherlands

© 2009, S.C.J.J. Kortmann, D.J. Hayton, N.E.D. Faber, K.G.C. Reid, J.W.A. Biemans (*ed*)

Published by:

Kluwer, a Wolters Kluwer Business
P.O. Box 23, 7400 GA Deventer, The Netherlands

Sold and distributed in The Netherlands by:

Kluwer BV, P.O. Box 23, 7400 GA Deventer, The Netherlands,
Email: info@kluwer.nl

Sold and distributed in North, Central and South America by:

Aspen Publishers Inc., 7201 McKinney Circle, Frederick, MD 21704, USA,
Email: customer.care@aspenpubl.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd., Pegasus Drive, Stratton Business Park,
Biggleswade, Bedfordshire SG18 8TQ, UK,
Email: kluwerlaw@turpin-distribution.com

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

PREFACE BY THE SERIES' EDITORS

This draft Directive marks the culmination of work on trusts and trust-like arrangements instigated by the Business and Law Research Centre of the Radboud University Nijmegen and which first produced the book "Vertrouwd met de Trust" (Trust and Trust-like arrangements) published in 1996.¹ This led to the formation of an International Working Group on European Trust Law that produced the book "Principles of European Trust Law" edited by Professors Hayton, Kortmann and Verhagen, published in 1999.²

The purpose of the book was to de-mystify the trust concept by explaining and exploring the flexible breadth of the trust concept embodied in eight Articles. In its strong form (the proprietary trust) the concept, as well as giving rise to obligations binding the trustee, creates property interests for the trust beneficiaries which can bind persons who receive ownership of the trust property in breach of the trustee's duties. In its diluted form (the obligational trust) the concept merely gives rise to special obligations that make the trust fund owned by the trustee immune from claims arising on the insolvency, liquidation, death or divorce of the trustee.

It was hoped that appreciation of these matters would help countries to decide whether or not to ratify The Hague Trusts Convention and whether or not to develop a domestic statutory version of the diluted trust so as to satisfy needs in the financial and business sectors. Some of these hopes have been realised in the cases of Luxembourg, Switzerland, Liechtenstein, France and Monaco.

In 2004 the Business and Law Research Centre of the Radboud University Nijmegen reinstated the International Working Group on European Trust Law, which was subsequently enlarged, so as to prepare the way for a new law on protected funds in the EU and backed by a broad range of National Reports explaining the current legal position and considering imple-

1 D.J. Hayton, S.C.J.J. Kortmann, A.J.M. Nuytinck, A.V.M. Struycken and N.E.D. Faber (eds.), *Vertrouwd met de Trust* (Serie Onderneming en Recht, Deel 5), Deventer: W.E.J. Tjeenk Willink 1996.

2 D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen (eds.), *Principles of European Trust Law* (Law of Business and Finance, Volume 1), The Hague/Deventer: Kluwer Law International/W.E.J. Tjeenk Willink 1999.

menting the protective fund directive into national law. By doing so, the International Working Group on Trust Law has shifted its purpose. Instead of reviewing or consolidating current law, as was the case in the previous two projects, it has taken a step further by working towards a proposal for new legislation in the European Union. The result of this proposal – a draft Directive on Protected Funds – is presented in this book.

The members of the International Working Group on European Trust Law are:

- Prof. P. (Pierre) Crocq – Professor of Private Law, University Paris II (Panthéon-Assas), France;
- Dr. N. (Norbert) Csizmazia – Research student at Brasenose College, University of Oxford; previously (2002-2008): Legal counsel, Department for the Codification of Civil Law and Private International Law, Ministry of Justice, Hungary; Lecturer in Roman law, Eötvös Loránd University of Budapest, Hungary;
- Prof. E. (Eric) Dirix – Justice of the Supreme Court of Belgium; Professor of Insolvency Law, University of Leuven, Belgium;
- Prof. N.E.D. (Dennis) Faber – Professor of Private Law at the Radboud University Nijmegen, Member of the Board of the Business and Law Research Centre, and Senior Counsel with Clifford Chance LL.P (Amsterdam), The Netherlands;
- Prof. L. (Luigi) Fumagalli – Professor of International Law, Faculty of Law, State University of Milan, Italy; Law firm Pavia e Ansaldo, Milan, Italy;
- Justice D.J. (David) Hayton – Justice of the Caribbean Court of Justice; formerly Barrister and Professor of Law, King's College, London University, and part-time judge in London, England and in The Bahamas;
- Dr. Christoph Hurni – Dr.iur (Bern), Dottore di ricerca (Bologna), Researcher at the University of Bern (Commercial Law, Civil Law and Comparative Law), Legal Counsel at the Swiss Federal Supreme Court, Commercial Law Division, Lausanne, Switzerland;
- Prof. em. Ph.J. (Phaedon) Kozyris – Professor emeritus of Comparative Law at both Ohio State University, U.S.A. and Aristoteleian University of Thessaloniki, Greece, assisted by Ch. (Christina) Dimitrakou-Deliyianni, Associate Professor of Law, Aristoteleian University of Thessaloniki, Greece and A. (Anastassios) Valtoudis, Assistant Professor of Law, Aristoteleian University of Thessaloniki, Greece;

- Prof. S.C.J.J. (Sebastian) Kortmann, chairman – *Rector magnificus* of the Radboud University Nijmegen, Professor of Private Law, and Honorary Chairman of the Board of the Business and Law Research Centre, The Netherlands;
- Prof. D. (Dieter) Krimphove – Jean-Monnet Professor of Economic Law and European Economic Law and Director, Institute of Harmonisation of Law, Business Law and Finance, University of Paderborn, Germany; Visiting Professor, Donau-University Krems, Austria;
- Dr. A (Andrea) Macía Morillo – Lecturer, Universidad Autónoma de Madrid, Spain;
- Prof. J.M.^a (Jose) Miquel González – Professor of Private Law, Universidad Autónoma de Madrid, Spain;
- Prof. A. (André) Prüm – Professor of Financial and Business Law, and Dean of the Faculty of Law, Economics and Finance, University of Luxembourg, Luxembourg;
- Prof. K.G.C. (Kenneth) Reid – Professor of Scots Law, University of Edinburgh, Scotland;
- Dr. T. (Tomáš) Richter – Of Counsel, Clifford Chance LLP, Prague, and Lecturer, The Institute of Economic Studies, Faculty of Social Sciences, Charles University, Prague, The Czech Republic;
- Prof. M. (Miguel) Virgós – Professor of International Private Law, Universidad Autónoma de Madrid; Partner, Uría & Menéndez Abogados, Madrid, Spain; and
- Prof. em. W. (Wolfgang) Wiegand – Professor emeritus of Legal History, Civil, Commercial and Banking Law, University of Bern, Switzerland.

The secretary of the International Working Group on European Trust Law is:

- J.W.A. (Jan) Biemans – Lecturer of Private Law and Researcher, Business and Law Research Centre, Radboud University Nijmegen, The Netherlands.

The Business and Law Research Centre owes a great debt of gratitude to the members of the International Working Group on Trust Law and to everyone who collaborated to produce the various "National Reports". Thanks to their sustained and generous efforts this book has been completed within a relatively short period of time. Special attention must be drawn to the efforts of Professor David Hayton and Professor Kenneth

Reid, who put great effort in the final drafting of the text of the proposed Directive on Protected Funds.

Nijmegen, The Netherlands, January 2009

Professor Sebastian Kortmann

Professor Dennis Faber

CONTENTS

Preface by the Series' Editors	XXI
Introduction	1
1. The need for a protected fund	1
2. The need for harmonisation	2
3. The choice of a directive	3
4. The protected fund	3
5. Integration of the protected fund within civil law and common law	5
6. The culmination of a trust project	5
Commentary to the draft Directive on Protected Funds	7
- Introduction	7
- Commercial purposes	8
- Separation of patrimony	9
- Creation	10
- Publicity	11
- Transfer of individual assets	12
- The regulated administrator	12
- Relations with third parties	13
- Duration	14
- Termination	14
- Juridical nature	14
- Equivalent institutions	15
Draft Directive on Protected Funds	17
- Article 1 – Subject matter and scope	18
- Article 2 – Definitions	20
- Article 3 – The Protected Fund	21
- Article 4 – Establishing a protected fund	23
- Article 5 – Constitutive document: further provisions	25
- Article 6 – Conferral of powers	26
- Article 7 – The administrator	26
- Article 8 – Obligations of the administrator	28
- Article 9 – Enforcers	31
- Article 10 – Obligations to third parties	32
- Article 11 – Special court powers	33

- Article 12 – Termination	35
- Article 13 – Shared positions	36
- Article 14 – Joint administrators	37
- Article 15 – Jurisdiction	38
- Article 16 – Mutual Recognition	39
- Article 17 – Review	39
- Article 18 – Implementation	39
- Article 19 – Entry into force	40
- Article 20 – Addressees	40
- Annex – Categories of person who can be appointed as administrator	40
National Report for Belgium	43
I. Introduction	43
A. Problems posed by Belgian property law	43
B. Exceptional instances of ring-fenced assets within a patrimony	44
II. Existing law and future developments	45
A. Ring-fencing of assets in succession law	45
B. Homestead exemption	46
C. Undisclosed agency	46
D. Statutory examples in the financial sector	47
E. Certification of shares	48
F. Security trusts	48
G. Escrow accounts and qualified accounts	49
III. Private international law	50
IV. Implementation of the Protected Fund Directive	52
A. General comments	52
B. Article by article	53
- Article 1 – Subject matter and scope	53
- Article 2 – Definitions	54
- Article 3 – The Protected Fund	54
- Article 4 – Establishing a protected fund	54
- Article 5 – Constitutive document: further provisions	56
- Article 6 – Conferral of powers	56
- Article 7 – The administrator	56
- Article 8 – Obligations of the administrator	56
- Article 9 – Enforcers	57
- Article 10 – Obligations to third parties	57
- Article 11 – Special court powers	57
- Article 12 – Termination	58

- Article 13 – Shared positions	58
- Article 14 – Joint administrators	58
- Article 15 – Jurisdiction	58
- Article 16 – Mutual Recognition	58
- Article 17 – Review	58
- Article 18 – Implementation	58
- Article 19 – Entry into force	58
- Article 20 – Addressees	58
- Annex – Categories of person who can be appointed as administrator	58
National Report for The Czech Republic	59
I. Introduction	59
II. Existing law and future developments	61
A. Trust-like constructs in current Czech law	61
1. The mutual fund	61
2. Assets entrusted to licensed asset managers or members of the legal profession	63
3. General comment on the above	63
4. Undisclosed agency (the commission agreement)	64
B. The trust in the draft new Civil Code	65
1. Basic features	66
2. Internal relations	66
3. External relations	68
III. Private international law	70
IV. Introducing the protected fund into Czech law	70
A. General Comments	70
B. Article by article	71
- Article 1 – Subject matter and scope	71
- Article 2 – Definitions	71
- Article 3 – The Protected Fund	71
- Article 4 – Establishing a protected fund	73
- Article 5 – Constitutive document: further provisions	73
- Article 6 – Conferral of powers	73
- Article 7 – The administrator	73
- Article 8 – Obligations of the administrator	74
- Article 9 – Enforcers	74
- Article 10 – Obligations to third parties	74
- Article 11 – Special court powers	74
- Article 12 – Termination	75
- Article 13 – Shared positions	75

- Article 14 – Joint administrators	75
- Article 15 – Jurisdiction	76
- Article 16 – Mutual Recognition	76
- Article 17 – Review	76
- Article 18 – Implementation	76
- Article 19 – Entry into force	76
- Article 20 – Addressees	76
- Annex – Categories of person who can be appointed as administrator	76
National Report for England and Wales	77
I. Introduction	77
II. Existing law and future developments	79
A. The obligation at the core of the trust concept	79
B. Personal rights against trustees and proprietary rights in trust assets	80
C. The segregation of a trust fund from the private fund of the trustee	80
D. The identification of assets within a trust fund	81
E. Settlor, beneficiary, trust property, and perpetuity period	83
F. The office of trustee	84
G. The powers and duties of trustees	84
H. Helpful assistance from the court	86
I. A trust is not a legal person, the trustees acting in their own right	87
J. Creditors' problems	88
K. Crucial significance of commercial and charitable trusts	89
III. Private international law	89
A. The ambit of the Recognition of Trusts Act 1987	89
B. Recognition of trusts that would not be valid if English trusts	93
C. Jurisdiction and recognition and enforcement of judgments	94
IV. Implementation of the Directive on Protected Funds	94
A. General comments	94
B. Need for self-contained legislation implementing all the articles	95
C. Article by article implementation	96
- Article 1 – Subject matter and scope	96
- Article 2 – Definitions	96
- Article 3 – The Protected Fund	96

- Article 4 – Establishing a protected fund	96
- Article 5 – Constitutive document: further provisions	96
- Article 6 – Conferral of powers	96
- Article 7 – The administrator	97
- Article 8 – Obligations of the administrator	97
- Article 9 – Enforcers	97
- Article 10 – Obligations to third parties	97
- Article 11 – Special court powers	97
- Article 12 – Termination	97
- Article 13 – Shared positions	97
- Article 14 – Joint administrators	97
- Article 15 – Jurisdiction	97
- Article 16 – Mutual Recognition	98
- Article 17 – Review	98
- Article 18 – Implementation	98
- Article 19 – Entry into force	98
- Article 20 – Addressees	98
- Annex – Categories of person who can be appointed as administrator	98
National Report for France	99
I. Introduction	99
II. Existing law and future developments	99
A. Existing law: the double evolution of French law	99
B. Future developments: an unfinished evolution	102
III. Private international law	104
IV. Implementation of the Directive on Protected Funds	104
A. General comments	104
B. Article by article	105
- Article 1 – Subject matter and scope	105
- Article 2 – Definitions	106
- Article 3 – The Protected Fund	107
- Article 4 – Establishing a protected fund	108
- Article 5 – Constitutive document: further provisions	110
- Article 6 – Conferral of powers	111
- Article 7 – The administrator	111
- Article 8 – Obligations of the administrator	112
- Article 9 – Enforcers	112
- Article 10 – Obligations to third parties	112
- Article 11 – Special court powers	112
- Article 12 – Termination	113

- Article 13 – Shared positions	113
- Article 14 – Joint administrators	113
- Article 15 – Jurisdiction	113
- Article 16 – Mutual Recognition	113
- Article 17 – Review	113
- Article 18 – Implementation	113
- Article 19 – Entry into force	113
- Article 20 – Addressees	113
- Annex – Categories of person who can be appointed as administrator	113
National Report for Germany	115
I. Introduction	115
II. Existing law and future developments	116
A. The fiduciary relationship (<i>Treuhand</i>)	116
B. The investment fund (<i>Investmentfonds</i>)	119
C. The investment public limited company (<i>Investment Aktiengesellschaften</i>)	123
D. Future developments, perspectives and options	125
III. Private international law	127
IV. Implementation of the Directive on Protected Funds	127
A. General comments	127
1. Technical possibility of implementation	127
2. Advantages of implementing the Protected Fund Directive	128
B. Article by article	128
- Article 1 – Subject matter and scope	129
- Article 2 – Definitions	130
- Article 3 – The Protected Fund	131
- Article 4 – Establishing a protected fund	133
- Article 5 – Constitutive document: further provisions	135
- Article 6 – Conferral of powers	135
- Article 7 – The administrator	135
- Article 8 – Obligations of the administrator	137
- Article 9 – Enforcers	139
- Article 10 – Obligations to third parties	140
- Article 11 – Special court powers	140
- Article 12 – Termination	142
- Article 13 – Shared positions	143
- Article 14 – Joint administrators	143
- Article 15 – Jurisdiction	143

- Article 16 – Mutual Recognition	143
- Article 17 – Review	143
- Article 18 – Implementation	143
- Article 19 – Entry into force	143
- Article 20 – Addressees	143
- Annex – Categories of person who can be appointed as administrator	143
National Report for Greece	145
I. Introduction	145
II. Existing law	147
A. The Civil Code	147
1. Instances of "separate patrimony" in the Civil Code	147
i. Inheritance contexts	147
a. Liquidation of estates by the Court at death on the petition of creditors (Article 1913-1922 of the Civil Code)	147
b. Acceptance of inheritance under the benefit of inventory (Article 1902-1912 CC)	148
c. Testamentary executor (Article 2017, 2020 CC)	148
d. Hereditary <i>fideicomisum</i> (Article 1923-1941 CC)	148
ii. Dependent "foundation" for a public benefit	149
iii. Other instances of "separate patrimony" of groups of assets	149
iv. Conclusion	150
2. Administration of the assets of another mostly by means of contract	150
i. Introduction	150
ii. Problems with the transfer of assets for administration (<i>Fiducia cum amico</i>)	151
a. Questioning the validity of fiduciary transfers	151
b. The discontinuous character of the administrative function	152
c. The uncertain position of the beneficiary in insolvency or bankruptcy of the administrator	153
d. The limited protection of the beneficiary in the event of an improper transfer to a third party	153
e. Conclusion	155
iii. Difficulties where the ownership of the assets to be administered stays with the beneficiary	156
a. Agency, representation and mandate	156

b. Contract for work	157
c. Contract of deposit	158
3. Transfer of assets to the creditor for security (<i>Fiducia cum creditore</i>) etc	158
i. Transfer of movables as security	158
a. The pledge	158
b. The <i>Fiducia cum creditore</i>	159
c. The new institution of the fictitious pledge	159
ii. Assignment of claims as security device	160
iii. The publicity aspect	160
iv. Distinguishing trusts from transfers and assignments by way of security	161
B. The Commercial Code and other legislation	162
1. The Commercial "Commission"	163
2. Bankruptcy	163
i. Separate property and the "bankruptcy estate": the prior regime	163
ii. The Bankruptcy Code of 2007	164
iii. Termination of continuing contractual relationships on bankruptcy	166
3. "Separate property" in investing and financing contexts: the particular institutions	166
i. Bonds of mortgage banks	166
ii. Mutual funds	167
iii. Portfolio management through Stock Exchange Service Companies	168
iv. Securitisation of claims	169
III. Private international law	171
IV. Implementing the Directive in Greece	172
A. Introduction	172
B. The technical dimension	172
1. Ad hoc additions or amendments or consolidations with particular articles of the Civil Code or wholesale separate legislation?	172
2. The "protected funds" in insolvency and bankruptcy	173
National Report for Hungary	175
I. Introduction	175
II. Existing law and possible future developments	178
- Commission contracts (commission agents)	178
- Foundations	178

- Investment funds	180
- Portfolio management by investment service providers	181
- Cash and securities on client accounts	181
- Pools of mortgages (mortgage backed securitisation)	181
- Securitisation of receivables – draft legislation	182
- Management of state-owned assets	182
- The Concept Paper on the New Civil Code and the Menyhárd proposals	184
- The drafts and the Bill of the new Civil Code	186
III. Private international law	191
IV. Implementation of the Protected Fund Directive	192
- General comments	192
- Comments article by article	192
- Article 1 – Subject matter and scope	192
- Article 2 – Definitions	194
- Article 3 – The Protected Fund	194
- Article 4 – Establishing a protected fund	196
- Article 5 – Constitutive document: further provisions	199
- Article 6 – Conferral of powers	201
- Article 7 – The administrator	201
- Article 8 – Obligations of the administrator	202
- Article 9 – Enforcers	206
- Article 10 – Obligations to third parties	207
- Article 11 – Special court powers	208
- Article 12 – Termination	208
- Article 13 – Shared positions	208
- Article 14 – Joint administrators	209
- Article 15 – Jurisdiction	209
- Article 16 – Mutual Recognition	209
- Article 17 – Review	209
- Article 18 – Implementation	209
- Article 19 – Entry into force	209
- Article 20 – Addressees	209
- Annex – Categories of person who can be appointed as administrator	209
National Report for Italy	211
I. Introduction	211
II. Existing law and future developments	212
A. General comments	212

B.	"Acts of destination" regulated by Article 2645-ter of the Civil Code	213
C.	Patrimonies destined for the achievement of a specific business purpose (Article 2447-bis of the Civil Code)	217
1.	Introduction	217
2.	Financial resources originating from the assets of the company	217
3.	Financial resources originating from external lenders	218
D.	Fiduciary contracts	219
E.	Specific legal regimes permitting the creation of a protected fund	220
F.	Patrimonial fund for family needs	222
III.	Private international law	223
IV.	Implementation of the Directive on Protected Funds	228
A.	General comments	228
B.	Article by article	230
-	Article 1 – Subject matter and scope	230
-	Article 2 – Definitions	230
-	Article 3 – The Protected Fund	230
-	Article 4 – Establishing a protected fund	231
-	Article 5 – Constitutive document: further provisions	232
-	Article 6 – Conferral of powers	232
-	Article 7 – The administrator	233
-	Article 8 – Obligations of the administrator	234
-	Article 9 – Enforcers	235
-	Article 10 – Obligations to third parties	236
-	Article 11 – Special court powers	236
-	Article 12 – Termination	236
-	Article 13 – Shared positions	237
-	Article 14 – Joint administrators	237
-	Article 15 – Jurisdiction	237
-	Article 16 – Mutual Recognition	237
-	Article 17 – Review	238
-	Article 18 – Implementation	238
-	Article 19 – Entry into force	238
-	Article 20 – Addressees	238
-	Annex – Categories of person who can be appointed as administrator	238