

### ECJ rules in favour of cross-border giving

#### Outline

---

The European Court of Justice (ECJ) delivered on 27<sup>th</sup> January its long-awaited judgment in the Persche case<sup>1</sup>. The ECJ has ruled that tax laws which discriminate against donations to public-benefit organisations based in other EU Member States are against the EC Treaty, as long as the recipient organisations based in other Member States are to be considered “equivalent” to resident public benefit foundations.<sup>2</sup>

The Persche case concerns a German donor, Hein Persche, making an in-kind donation of bedclothes and other equipment to a Portuguese care home. As donations to charities, including in-kind donations, are tax deductible for individual donations in Germany, Mr Persche deducted the donation on his income tax return in Germany in 2003. However, his deduction was rejected on the grounds that only donations to German resident public benefit organisations may benefit from tax incentives. A donation to a German public benefit organisation with similar activities as the Portuguese one would have been tax deductible. A referral from the German Federal Court of Finances Bundesfinanzhof was lodged on 11<sup>th</sup> July 2007 asking for a preliminary ruling by the ECJ in this regard according to Article 234 EC Treaty.

In the judgment, the Court first notes that donations to public-benefit organisations based in other EU Member States come within the free movement of capital guaranteed by the EC Treaty, even when they are made in the form of everyday consumer goods. The Court also notes that as the possibility of obtaining a tax deduction can have a significant influence on the donors’ attitude to giving, the inability of German donors to deduct donations made to public-benefit organisations in other Member States is likely to reduce such cross-border gifts. Therefore such legislation constitutes a restriction on the free movement of capital and is against Article 56 of the EC Treaty.

According to the Court, the restriction in German tax law is not justified. A Member State may apply a different tax treatment of donations between national organisations with recognised public-benefit causes in their home country, and public-benefit organisations based in other EU countries, which pursue purposes not recognised as public benefit purposes in the country of the donor. However, when the public-benefit organisation based in the other Member State pursues objectives which would be recognised as public-benefit causes in the country of the donor, there is no justification for a different tax treatment for the donor. Furthermore, the ECJ notes that the German legislation is not justified in order to safeguard the effectiveness of fiscal supervision. The taxpayer making the cross-border donation should be given the opportunity to present proof that the public-benefit organisation based in the other Member State has purposes which would also qualify as public-benefit causes in the country of the donor.

The ruling in the Persche case forms an important precedent for cross-border giving in Europe, and Germany will now have to amend its tax laws to bring them in line with the judgment. As most national tax laws do not treat donations to resident and foreign public benefit organisations on an equal footing, they could therefore be in conflict with the EC Treaty and the European Commission may now ask other EU countries to review their legislation in this respect.

---

<sup>1</sup> ECJ case number C-318/07. Full text of the judgment is available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=allldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=allldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-318%2F07&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit>.

<sup>2</sup> ECJ press release No 05/09 is available at

<http://curia.europa.eu/en/actu/communiqués/cp09/aff/cp090005en.pdf>

## Action Point

---

The EFC welcomes the decision in the Persche case as the outcome will most likely bring national foundation tax laws in the EU Member States to a more cross-border friendly direction. The EFC Secretariat will continue to monitor relevant EU level and national developments and keep its membership informed. For further information on Persche case or foundation law in general, please contact [legal@efc.be](mailto:legal@efc.be).

For many years, EFC has pressed for a better operating environment for foundations' and donors' cross-border work. The EFC has developed a Model Law for Public-Benefit Foundations in Europe, as well as Fundamental Legal and Fiscal Principles for Public-Benefit Foundations, which aim to provide positive examples for national foundation law revisions as well as ideas for EU legislation for foundations, both available at: <http://www.efc.be/projects/eu/legal/modellaw.htm>.