



# efc briefing

## legal and fiscal

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### European Commission requests Netherlands to change its rules on cross-border giving

#### Outline

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The European Commission has issued a formal [request](#) to the Netherlands to change its rules concerning tax incentives for local tax payers making donations to foreign-based public benefit organisations. The request takes the form of a reasoned opinion, the second step of the infringement procedure provided for by Article 258 of the Treaty on the Functioning of the EU.

Currently, domestic donors (individual or corporate) can receive a tax benefit when donating to a foreign public benefit organisation only if that organisation has undergone local registration procedures and been qualified as a charitable institution by the Dutch Ministry of Finance. Meeting these requirements, charitable organisations resident in the EU, the Netherlands Antilles, Aruba or other qualified countries have the same tax privileges as similar Netherlands-based institutions.

The Commission considers these requirements to be unnecessarily restrictive, since they do not allow for the possibility of tax relief in cases where the foreign receiving organisation has not registered itself as charitable in the Netherlands. The Dutch rules do not give the tax payer the possibility to prove that a donation going to a public benefit organisation based in another Member State or EEA State satisfies the Dutch requirements for tax incentives. The rules are thus considered to be contrary to the freedom of movement of capital. The Commission refers to the European Court of Justice case C-318/07 (the so called "[Persche](#)" case of January 2009), in which "it held that nothing would prevent the tax authorities from requiring the tax payer to provide such proof as they may consider necessary to determine whether the conditions for deducting expenses had been met".

A further 19 EC initiated infringement procedures are currently pending, requesting member States to alter their treatment of tax payers making donations to foreign based public benefit organisations. These latest developments serve to highlight the importance not only of Member States ensuring that incentives matching those available for domestic giving are available to donors to "comparable" non-resident organisations, but also of ensuring that suitable procedures are in place to make these available and genuinely accessible to the donors and organisations involved. Other Member States, which have recently introduced the tax deductibility of cross-border donations enable donors to benefit from the tax advantages provided that they file evidence that the organisation is comparable to a resident tax exempt organisation (for example France).

The EFC welcomes this overall European trend and wishes to recall the responsibility of national legislators to provide for an enabling environment for foundations, taking into account the European reality. It has always called for a more favourable environment for public-benefit foundations and their funders, including in a cross-border context. In 2003, the EFC produced its "[Fundamental Legal and Fiscal Principles for Public Benefit Foundations](#)", which were translated into a "[Model Law for Public Benefit Foundations in Europe](#)" that aims to influence positively the development of new foundation laws as well as the revision of existing laws at national level. In those documents the EFC suggests that companies and individuals should receive tax incentives with respect to donations made to resident and foreign foundations engaged in activities of public benefit.

The Commission's case reference number for these proceedings against the Netherlands is 2005/2301.

## **Action Point**

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The EFC secretariat will continue to monitor and report on national and EU level foundation law developments in the area of cross-border giving. More information on ongoing infringement procedures is available at: [http://ec.europa.eu/taxation\\_customs/common/infringements/infringement\\_cases/bycountry/index\\_en.htm](http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/index_en.htm)