

## **European Court of Justice ruling finds Austrian rules on tax incentives for gifts for R&D incompatible with TFEU**

### **Outline**

In its June 2011 judgment, the European Court of Justice (ECJ) found the Republic of Austria's provisions concerning the deductibility of gifts to research and teaching institutions to be in breach of article 63 of the [Treaty on the Functioning of the European Union](#) (TFEU) and article 40 of [the European Economic Area Agreement](#), since tax deductions were only granted for gifts made to research and teaching institutions established within Austria and not to equivalent bodies based within the EU/EEA.

Details of the judgment on the case, *Commission v. Austria* (C-10/10), can be found [here](#). In summary: In 2007, the European Commission brought infringement proceedings against Austria, on the basis that donations to research and educational institutions which pursue non-commercial objectives come under the free movement of capital under Article 63 TFEU and that Austria's then provisions for such gifts drew a distinction between institutions established in Austria and those based in other EU/EEA Member States on purely geographic grounds and irrespective of the purpose of the beneficiary institutions.

The Republic of Austria considered that the provision did not constitute a restriction of the free movement of capital under the TFEU and that any restriction that could be shown to exist was justifiable by an overriding reason in the public interest. The limitation of the benefit of deductibility from tax to gifts to the research and teaching institutions listed in Paragraph 4a(1)(a) to (d) of the amended *Einkommensteuergesetz*/Austrian Income Tax Act (EStG) "corresponded to the objective of maintaining and supporting the position of Austria as a centre of culture and learning. The tax exemptions were justified because those institutions make a contribution to the public interest by providing their services and the gifts can take the place of the payment of taxes". The Republic of Austria argued that "...an extension of that deductibility to institutions established in Member States other than the Republic of Austria could not guarantee the same objectives, because it would have the consequence that part of the gifts in question, would benefit institutions which pursue objectives that are not in the public interest of the Republic of Austria...."

The action was brought to the ECJ 8 January 2010. In response to the arguments put forward by the Republic of Austria, the court found the Austrian Income Tax Act to draw its distinction between Austrian domestic and foreign EU/EEA based teaching and research institutions according to the sole criterion of the seat of the recipient of the gift, which the court considered as incompatible with the requirements of Article 56 EC and Article 40 of the EEA Agreement. The court noted that while the Austrian national authorities have additional means available to them for supervising and influencing the conduct of institutions established in Austrian territory compared to those established in other Member States, the Republic of Austria had failed to show that such intervention in the management of the institutions in question is necessary for guaranteeing the attainment of the objectives in the public interest Austria was seeking to promote (namely the objective of maintaining and supporting the position of Austria as a centre

of culture and learning) and that thus seat alone cannot be a valid criterion for assessing the objective comparability of the organisations or, consequently, for establishing an objective difference between them.

Drawing on the case law of the “Persche” judgement, the court recalled that while a Member State can lawfully reserve the granting of tax advantages to bodies pursuing certain objectives in the public interest, it cannot reserve the benefit of those advantages solely for bodies established in its territory. The court noted that “Since the possibility of obtaining a tax deduction can have a significant influence on the donor’s attitude, the non-deductibility of gifts to research and teaching institutions established in Member States other than the Republic of Austria may discourage taxpayers from making gifts to them” and that thus the limitation resulted in a restriction on the free movement of capital under the TFEU.

The court recalled that while direct taxation falls within the competence of the Member States, they must nonetheless exercise that competence in a way that is consistent with European Union law, which prohibits all restrictions on the movement of capital between Member States.

The ECJ found in favour of the Commission.

## **Outcome**

Following the judgment, the Austrian Ministry of Finance issued guidance on the application of the ECJ ruling. The guidance, date 2 August 2011 and applicable to all open cases, stipulates that the domestic legislation on the deductibility of donations must be interpreted in the light of the ECJ decision and applied in a compatible way with EU law.

## **Context**

The judgment of this case is in line with the principle of non-discrimination of cross-border donations (tax treatment of individual and corporate donors) and the tax treatment of public-benefit organisations based in other Member States already previously shaped by the “Persche” ([Case C-318/07](#)) and “Stauffer” ([Case C-386/04](#)) rulings of the ECJ, and later reflected in the “Missionswerk” ([Case 25/10](#)) ruling.

The judgments make clear that limiting preferential tax treatment to domestic public-benefit organisations and excluding comparable foreign organisations and their donors from such benefits is not compatible with EU law. The ECJ cases also make clear that fundamental freedoms of the EC Treaty are applicable to public-benefit organisations.

The EFC welcomes this overall European trend, as it has always called for a more favourable environment for public-benefit foundations and their funders, including in a cross-border context.