

# A border-free Europe for philanthropy?

A recent briefing organised by the Academy of European Law (ERA) and the European Foundation Centre analysed the consequences of the European Court of Justice's judgment in the Persche case on 27 January. The ruling could encourage cross-border philanthropy in Europe but, as ERA Deputy Director John Coughlan explains, doubts remain as to how EU member states will respond to it.

The value to society of charitable giving and philanthropy is especially great in a time of economic uncertainty. Many countries promote such giving by providing fiscal benefits, for example by allowing donors to deduct the value of their gifts from their tax returns. In most cases, though, the tax authorities extend such benefits only to donations made to charitable organisations and public-benefit foundations in their own country.

In the Persche case, the EU's highest court ruled on 27 January 2009 that this restriction of fiscal advantages to domestic donations is incompatible with the EC Treaty. The European Court of Justice found that denying the same benefits for cross-border donations as are provided for domestic ones would constitute a disincentive to making such donations and thus impede the free movement of capital, a fundamental principle of EU law.

In 2003 Mr Hein Persche, a German tax adviser, sought to deduct the value of a donation of linen and toys worth over €18 000 that he had made to the Centro Popular de Lagoa, a public-benefit foundation that runs an old people's home and crèche near Mr Persche's holiday home in Portugal. German tax law, however, only permits such deductions to be made for donations to public-benefit foundations established in Germany. So Mr Persche's local tax office rejected the application and after a number of appeals the case arrived at Germany's highest court for tax matters, the Bundesfinanzhof.

Rather than simply restate the German law, the judges at the Bundesfinanzhof asked the European Court of Justice (ECJ) whether cross-border donations such as Mr Persche's were covered by the principle of free movement of capital enshrined in the EC Treaty, and – if so – whether treating them differently from

domestic donations was against EU law. The Court ruled in favour of Mr Persche and as a result any EU member state that treats cross-border donations less favourably than domestic ones must now change their tax laws in order to remove such discrimination.

At the briefing organised by the EFC and ERA in Brussels on 10 March, Dr Thomas von Hippel of the Max Planck Institute for Comparative and International Private Law explained that the Persche judgment built on the ECJ's earlier Stauffer judgment of 2006. In that case the Court ruled that national tax authorities must apply the same tax benefits to the income of foreign-based foundations in their country as to that of domestic foundations. Where Stauffer prohibited discrimination against cross-border foundations, Persche prohibits discrimination against cross-border philanthropists.

According to Dr von Hippel, the response of certain governments to the Stauffer judgment indicates some of the challenges that foundations and philanthropists will face in turning the principle established by the ECJ into practice. An important administrative hurdle will be the comparability test required to decide whether the recipient organisation in another EU member state is equivalent to an institution benefiting from tax-deductible status in the member state of the donor. Who will decide and how?

The ECJ has not actually said that cross-border donors and public-benefit foundations should receive tax-efficient treatment – only that they should not be treated differently from domestic donors and foundations. One option for states that are reluctant to comply is to change the definition of public benefit. In a new law passed at the end of 2008, Germany – whose tax laws were the subject of both

these cases – has defined "public benefit" to mean benefiting the German public or contributing towards Germany's reputation abroad. These qualifications are so vague, said Dr von Hippel, that they seemed deliberately designed to create legal uncertainty and thus to discourage cross-border philanthropy. But at least the new law does not discriminate between German and foreign-based foundations.

Even if other European governments do not try to wriggle out of the ECJ's rulings, the example of the Netherlands – which made cross-border donations tax-deductible at the beginning of 2008 – shows that the administrative burden on foundations wishing to fundraise in other countries will be great. Annette Deckers from the Dutch Ministry of Finance explained to the briefing that any charitable organisation seeking tax benefits in the Netherlands must make a detailed application to the tax authorities. If this approach were to be repeated, foundations would have to make separate applications in each EU member state. As a Europe-wide solution, this would only be feasible for those with plentiful resources.

While Persche is certainly a step forward for cross-border philanthropy, it does not mean that Europe suddenly has a more favourable environment for giving. Indeed the position taken by some governments in the case suggests that the philosophical debate over the role of philanthropy remains to be won. Is it merely a way to relieve the state of part of its burden as a social welfare provider, in which case restricting tax benefits to domestic beneficiaries makes some sense? Or is it a public good in itself, regardless of who exactly benefits?

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**The Academy of European Law (ERA) is a Foundation based in Trier, Germany. For more information see: [www.era.int](http://www.era.int)**