

## Cross border philanthropy: why not try creative solutions?



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## Tax Privileges Are Landlocked

- No income tax deduction when donated abroad (treaties do not allow either)
- Potential high gift and inheritance tax rates
- No planned giving facilities (US)
- No equal exempt treatment for foreign philanthropic organisations

## Rationale landlock

- Lack of common concept 'public benefit'
- Lack of actual national benefit
- Lack of control on international flow of grantmakings
- No trust in foreign supervisory regime
- Great differences in notion of and functioning of charitable organizations

## Convincing rationale?

- Is equivalency required? To what extent?
- 'National benefit' is obsolete since charities generally are allowed to carry on activities and spend abroad
- Who should be in charge of control? Authorities of donor country or donee country ?
- There is no principal distrust between countries (e.g. EU continental 'public' charities qualify in US)

## Arbitrary exceptions to landlock

- NL: reciprocity requirement (gift tax), discretionary power to except foreign charities with multinational/ Dutch purposes (income tax)
- Canada: a foreign charity to which Her Majesty in right of Canada has made a gift during the individuals' taxation year or 12 months immediately preceding

## Arbitrary exceptions to landlock

- US: gift and estate tax exempt, but taxable if foreign recipient is a private foundation that does not meet all US requirements for private foundations
- Move of situs and asset strips remains without consequence in many countries

## EU law: freedom of capital

- ECJ 11/12/2003 *Barbier*, gift to foreign organization is subject to EU freedom of capital
- Restrictions on freedom of capital should meet the 'rule of reason'
- Recent ECJ court cases are very strict (*Lenz*, *Manninen*, *Fokus*)

## Rule of reason freedom of capital

- No reciprocity requirement is allowed (*quid pro quo*), ECJ 28/01/1986, *Avoir fiscal*
- Discretionary exception of landlocked privilege is not allowed if in domestic context allowance *ex iure*, ECJ 8/5/1990 *Biehl I* :  
**Freedom of capital should not be contingent on discretionary powers of authorities;**
- Required control should be in proportion to domestic control (if little domestic control...)  
→ if no control on emigration charity, control is no argument for landlock

## Only sensible rationale landlock: control

- Normative level of control (equivalency, destination funds)
- Tax relief may be contingent on non-discriminatory and objective criteria within EU law, EcJ *Egon Schemp* 12 July 2005
- Laws should require international control on flow of money in order to grant tax relief: control not necessarily exercised by *domestic* charity (what if charity emigrates?)

## Solving the landlock: in control

- Scenario A (private foundations):  
donor is responsible; only tax relief in home country after provision of sufficient proof to domestic authorities on status foreign charity and operational requirements; *proportionality*
- Scenario B (public charities):  
foreign charity is responsible; should register in donor' country, virtual residence, or evt. appoint tax representative in home country donor tax credit withheld by recipient charity; release upon control reliable information.



## Solving the landlock: in control (2)

- Proof should be made available by persons closest to source; communication on different law requirements by bi-national lawyer's letters, no *good faith*;
- Tax relief should ideally be given only upon charitable *result (reports)* not on *due diligence efforts*;
- Foreign charities should be held responsible like domestic charities (re public charities: no adverse consequences for donors)

## EU solution: boiler plate for rest of the world

- Step 1: normative equivalency and operational tests should be determined; what is essential?
- Step 2: equal treatment foreign and domestic charities, foreign charities may have more burdensome onus of proof (but *proportionality*)
- Step 3: development of international *charity law practice* between specialised lawyers
- Step 4: development of international *practical standards as to operational tests, safeguards against diversion of charitable flows of money etc.*

# Landlock solved

