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A Consideration of the European Foundation

Alle Menschen werden Spender[1]

In this article, the authors examine the proposed regulation on the European Foundation focusing on the tax treatment of the new entity.

1. Introduction

The progress of EU integration and the creation of the internal market have consequences for the law of legal entities. The spectrum of EU legal forms, already including the European Company (*Societas Europaea*, SE),[2] the European Cooperative Society (*Societas Cooperativa Europaea*, SCE)[3] and the European Private Company (*Societas Privata Europaea*, SPE),[4] may be broadened by another legal entity: the European Foundation (*Fundatio Europaea*, FE). On 8 February 2012, the Commission submitted a proposal for a regulation on the FE (the "FE Regulation").[5] Remarkably – and in contrast to the SE, SCE and SPE Regulations – the FE Regulation features a chapter on taxation. Briefly, the proposal is intended to remove obstacles to cross-border donations and requires the Member States to treat an FE, its donors and beneficiaries in the same way as domestic entities.

In this article, the authors elaborate on several civil and tax law aspects of the FE. Section 2. describes the general requirements for the FE and the concept of public benefit. Section 3. discusses the different ways to create the FE. Section 4. deals with the provisions on the registered office of the FE and its transfer abroad. Section 5. outlines the case law against which the FE Regulation has been developed and some tax law aspects of the FE regime. In some areas, a parallel is drawn between the FE and entities qualifying as public benefit organizations (*algemeen nut beogende instelling*, ANBI) under Dutch law. Section 6. includes a summary and some conclusions.

It should be noted that the term "foundation" may incorrectly suggest that the FE Regulation applies to foundations in general. However, a more analytic interpretation of the FE Regulation reveals that it only applies to foundations that pursue one or more public benefit purposes.[6] Consequently, the legal status of FE cannot be just compared with any foundation under national law. This article refers to foundations as legal entities under national law that may also qualify as FEs.[7] In this context, the term "charities" is also used. It could be argued that the name "European Charity" would be more accurate for the proposed legal entity.

2. General Provisions of the FE Regulation

2.1. Introductory remarks

On 8 February 2012, the Commission presented the final "Proposal for a Council Regulation on the Statute for a European Foundation (FE)". This proposal should simplify the establishment and operations of charities within the internal market, reducing their costs and leaving more resources to be spent for public benefit activities. The proposal does not extend to foundations that have ties with political parties, which are subject to specific EU legislation.

The FE Regulation has 52 articles, divided into nine chapters. Chapter I (General provisions) describes the subject matter, the rules applicable to an FE, and gives a number of definitions of terms used in the FE Regulation.

2.2. The FE

The FE Regulation describes an FE as an entity pursuing a public benefit purpose with legal personality and full legal capacity in all the Member States.[8] The FE acquires legal personality on the date it is entered into the registry.[9] In addition, the FE has full legal capacity and the right to own movable and immovable property, to make donations, and to raise funds. The FE Regulation does not seem to stipulate any restrictions on the nature and origin of

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1. An adaptation of the famous line from Friedrich von Schiller's "*Ode an die Freude*" (*Alle Menschen werden Brüder*). Ludwig van Beethoven used the wording of this poem as a textual addition to the finale of his ninth symphony, which has been the European anthem since 1985.
2. EU SE Regulation (2001): Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L294 (2001), pp. 1-21, EU Law IBFD.
3. EU SCE Regulation (2003): Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L207 (2003), pp. 1-24, EU Law IBFD.
4. At the time of the writing of this article, the proposed regulation on the European Company was still awaiting adoption.
5. Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final, 2012/0022 (AP), 8 Feb. 2012, EU law IBFD (the "FE Regulation").
6. Art. 5 (2) FE Regulation.
7. The translation of "*Fundatio Europaea*" as "European Foundation" also led to a lack of clarity for the Dutch government. In the BNC fiche of 23 March 2012, DIE-BNC 447/12, fiche 2 (a record in which the Dutch government expresses its opinion on new legislative proposals), the Dutch government compares the FE with a foundation under Dutch law (which would be more flexible) and examines comparable legal entities in several Member States (sometimes even lacking the form of foundation).
8. Arts. 1 and 9 FE Regulation.
9. Art. 9 FE Regulation.

these donations, as long as they are obtained from lawful sources.[10] There are no geographical restrictions either: the FE may be established in any Member State and may also carry out activities in any third country.[11]

The minimum value of the assets of the FE is EUR 25,000. This minimum amount serves to emphasize reliability towards donors and government agencies.[12] The liability of the FE is limited to the scope of its assets.[13] It is doubtful whether or not the objective of (financial) reliability can effectively be pursued by solely considering the assets and ignoring the liabilities of the FE. After all, when all assets have been funded with one or several loans, it may be possible to doubt the FE's reliability towards donors and government bodies.

2.3. Public benefit purposes

An FE can only be established for a limited number of public benefit purposes.[14] According to the explanation to the FE Regulation, this concerns public benefit purposes "accepted under civil and tax laws in most Member States".[15]

From a Dutch tax perspective, the definition in the FE Regulation includes virtually all institutions that can also qualify as charities under national law, with the major exception of amateur sports, which Dutch legislation and case law do not consider to be charities, but which qualify as public benefit under the FE Regulation.[16] In the light of the competitive position of sports clubs in the border regions, it has been questioned in the Dutch literature whether or not the Netherlands should also qualify amateur sports as public benefit for domestic law purposes once the FE Regulation has been adopted.[17]

Although the FE Regulation is broader in scope than Dutch law regarding amateur sports, it does not contain any reference to religion, philosophy and spirituality. Regrettably, in framing the FE Regulation, the Commission purports to line up with what qualifies as public benefit in (most) Member States, while excluding religion, which is regarded as a public benefit in all Member States.[18] This approach is like to turn out to be rather inefficient if the result is that religious institutions and similar bodies must perform all sorts of tax and legal contortions in order to be able to benefit from the advantages of the FE regime. To qualify for the FE regime, such institutions should be able to demonstrate that their activities include, for instance: the maintenance of cultural heritage (management of church buildings), civil or human rights, social welfare, prevention or relief of poverty, humanitarian relief, development aid (missionaries), science, education, assistance to or protection of vulnerable, and disadvantaged groups.

Under the preamble to the FE Regulation, an FE may only promote public benefit purposes.[19] This also seems to follow from the second sentence of article 5(2) of the FE Regulation:

> The FE shall serve the public interest at large. It may be created only for the following purposes, *to which its assets shall be irrevocably dedicated.* (Emphasis added)

The condition that the assets must irrevocably be used to achieve a specific public benefit purpose does not, however, preclude the FE from carrying out unrelated economic activities, as long as the revenue from these activities does not exceed 10% of the FE's net annual revenue and the profits from such activities are used entirely to realize one or several public benefit purposes.[20] These results must be presented separately in the accounting records.[21]

3. Formation

3.1. Introductory remarks

An FE can be formed by testamentary disposition, a notarial deed effected by individuals or legal entities, a merger, or conversion.[22] With the multiple ways in which to form the FE (in contrast to other European legal entities), the FE Regulation also envisages permitting the application of the FE regime in situations where organizations operate only in their home state. The objective is to make the FE broadly accessible for existing charities. This implies that an FE can also be formed if there is no effective cross-border element. Likewise, this means that a foundation that has been established under national law can be converted into an FE and that two domestic charities can merge into one FE. Such a domestic merger is subject to national merger rules.[23] Section 3.2. explains the formation of an FE through a merger in cross-border scenarios. The tax consequences of formation by conversion are similar.

3.2. Formation by merger

The FE Regulation provides for the formation of an FE by both domestic and cross-border mergers between charities.[24] There are two ways for doing this:[25]

(1) formation that leads to a new legal entity, while the merging legal entities cease to exist; or

10. Article 10(1) of the FE Regulation mentions "donations of any kind, including shares and other negotiable instruments, inheritances and gifts 'in kind' from any lawful source including from third countries".
11. Art. 10(1) and (3) FE Regulation.
12. Art. 7(2) FE Regulation.
13. Art. 8 FE Regulation.
14. Art. 5(2) FE Regulation.
15. COM(2012) 35 final, 2012/0022 (AP), p. 7.
16. NL: HR, 13 May 1970, Decision No. 16 343, BNB 1970/132.
17. S.J.C. Hemels, *De Europese Stichting en de Nederlandse ANBI: een grens aan de Nederlandse fiscale autonomie?* WFR sec. 5 (2012/724).
18. S.J.C. Hemels, *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross Border Charitable Giving and Fundraising?*, EATLP Paper sec. 5.5.1. (2012).
19. Para. 7 Preamble to the FE Regulation.
20. Art. 11(1) FE Regulation.
21. Art. 11(2) FE Regulation.
22. Art. 12(1) FE Regulation.
23. Arts. 14 and 16 FE Regulation.
24. The Netherlands takes the view that the FE Regulation does not adequately protect the interests of any parties involved and that the FE Regulation is too broad on this point. It argues that more detailed rules would be necessary. The Netherlands indicates that enacting such rules would be a laborious process due to the differences in national laws of the Member States. *See* BNC fiche, 23 Mar. 2012, DIE-BNC 447/12, fiche 2 under 9.
25. Art. 16 FE Regulation.

(2) a merger in which the entity being absorbed ceases to exist and the absorbing entity is converted into an FE.

The merger is subject to the domestic civil and tax law of the Member State in question.

For a cross-border merger, a detailed request is to be submitted to the competent authorities of the Member States in which each of the merging entities is established. It appears that the Merger Directive (2009/133)[26] is not applicable to such cross-border mergers, as neither the Dutch legal form "foundation" and its foreign equivalents nor the FE is listed in its annex. In this respect, on implementing the Merger Directive (2009/133) into national law, the Netherlands stipulated that tax benefits in a cross-border merger only apply if the foreign absorbing or absorbed entity is listed in the annex to the Merger Directive (2009/133).[27] Conversely, in domestic mergers between two foundations, no reference is made to the annex to the Merger Directive (2009/133), so that tax benefits may apply. This difference in treatment may be a restriction on the freedom of establishment.[28] If a merger between two foundations in domestic situations is facilitated, tax benefits must also apply to cross-border mergers between similar legal entities. Even if the Merger Directive (2009/133) does not apply, primary EU law can be invoked.[29] After all, it is settled case law of the Court of Justice of the European Union (ECJ) that Member States awarding tax concessions in purely domestic situations may not deny them in cross-border situations by solely referring to the place of business of the entities concerned.[30]

3.3. Cross-border component

To guarantee the cross-border dimension of the FE, the FE must be active in at least two Member States when it is registered or have a statutory objective to that effect.[31] The question, therefore, arises as to whether or not this rather formal requirement could lead to the abuse of an FE. For instance, if a charity adopts the statutory objective to pursue activities in two Member States on conversion into an FE but effectively only operates on national territory, this does not seem to interfere with the formation of the FE. This may create possibilities for entities that do not qualify as charities under current national law, although they do pursue a public benefit purpose under the FE Regulation.[32]

Although not explicitly noted, the wide scope of the requirements for the FE seems to stem from the objective to promote cross-border donations. The fact that the FE qualifies as a charity in the Member State of establishment[33] and must be treated as such in other Member States[34] avoids the FE having to register separately in each Member State and provides certainty to donors about the deductibility of gifts.

4. Registered Office and Its Transfer

Both the registered office and the central administration (or the principal place of activities) of an FE must be established in a Member State.[35] In contrast to an SE, the registered office and central administration of the FE are not explicitly required to be established in the same Member State.[36] The extent to which a charity constituted under national law or an FE is liable to tax in the Member State of establishment is determined based on national law. This seems to permit dual resident FEs. With cross-border activities, the powers to tax business profits of the FE, if any, are, thus, allocated under the tax treaty concluded between the Member States concerned. Obviously, the power to tax is, in principle, allocated to the Member State where the central administration is established, as it is customary under article 4 of the OECD Model.[37]

As with the SE, the FE can transfer its registered office to another Member State while retaining its legal personality. This does not lead to liquidation or formation of a new legal entity.[38] The transfer has effect on the date of registration in the host Member State,[39] but it cannot take place:

- when the FE is dissolved;
- when winding-up, insolvency or similar proceedings have been started; or
- where the transfer is against the statutes of the FE or would jeopardize the realization of the FE's purpose.[40]

The FE Regulation does not set any requirements for the transfer of the actual place of business of the FE to another Member State. As the actual place of business and the registered office do not have to be established in the same Member State, it appears that the place of effective management can be transferred to another Member State. This is not surprising, as, from a Dutch perspective, no civil law

26. EU Merger Directive (2009): Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States, OJ L310 (2009), p. 34, EU Law IBFD.
27. NL: Corporate Income Tax Act (*Wet op de vennootschapsbelasting*, Vpb) 1969, art. 14(b) (8) and Income Tax Act (*Wet op de inkomstenbelasting*, IB) 2001, art. 3.55 (5), National Legislation IBFD.
28. Para. 12 Preamble to the FE Regulation.
29. FI: ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy v. Uudenmaan verovirasto and Helsingin kaupunki*, ECJ Case Law IBFD.
30. SE: ECJ, 18 Nov. 1999, Case C-200/98, *X AB and Y AB v. Riksskatteverket*, ECJ Case Law IBFD; SE: ECJ, 21 Nov. 2002, Case C-436/00, *X and Y v. Riksskatteverket*, ECJ Case Law IBFD; and FI: ECJ, 19 July 2012, Case C-48/11, *Veronsaajien oikeudenvalvontayksikkö v. A Oy*, ECJ Case Law IBFD.
31. Art. 6 FE Regulation.
32. For example, a Dutch amateur sports club that cannot qualify as a charity under Dutch law, but it can under the FE Regulation.
33. Art. 49 FE Regulation.
34. Arts. 50(2) and 51 FE Regulation.
35. Art. 35 FE Regulation.
36. Art. 7 SE Regulation.
37. Most recently, *OECD Model Tax Convention on Income and on Capital* (22 July 2010), Models IBFD.
38. Art. 36(1) FE Regulation.
39. Art. 36(2) FE Regulation.
40. Art. 36(3) FE Regulation.

consequences are attached to transfer of the actual place of business of the FE. However, this can be different in terms of tax law.

If the FE also performs business activities, the transfer of the actual place of business may lead to exit taxes. The Merger Directive (2009/133) contains provisions that attempt to avoid exit taxes on transfers of an SE or SCE, insofar as a permanent establishment (PE) continues to exist in the Member State of departure.[41] Given that the registered office and actual place of business of the SE and SCE must be situated in the same Member State, such a rule was necessary in those cases. The Merger Directive (2009/133) does not provide for situations in which no PE continues to exist. In that case, national rules on exit taxes are to be invoked.

As there are no comparable provisions for the FE, exit taxes cannot be avoided without further amendments to the Merger Directive (2009/133). Transfers of FEs are, in principle, subject to the national law of the state of departure. Member States must offer the possibility of deferral of tax payment in conformity with the recent ECJ case law.[42] The immediate collection of a tax debt arising on the transfer without the possibility of deferral of payment violates the freedom of establishment. In the cases concerning individual taxpayers that hold a substantial interest in a company, *Lasteyrie du Saillant* (Case C-9/02) and *N* (Case C-470/04), the ECJ held that deferral of payment must be granted automatically and unconditionally to emigrating substantial interest holders.[43] The ECJ did not accept that the provision of guarantees and the charging of interest on tax due were compatible with EU law in these cases. Hence, it is possible to question whether or not this should also be the case for legal entities paying corporate income tax. Although Advocate General Mengozzi raised this question in *Commission v. Portugal* (Case C-38/10),[44] the ECJ did not discuss it in its judgement.[45] Neither did the ECJ mention this point in a more recent judgement in *Commission v. the Netherlands* (Case C-301/11).[46] With regard to corporate taxpayers and other enterprises, new proceedings must show whether or not the required guarantees and interest charged are compatible with EU law.[47]

Obviously, the discussion on exit taxes upon emigration is irrelevant for non-business foundations. As non-business foundations are generally not subject to corporate income tax, they are not liable to exit taxes on the transfer of their registered office.

5. Tax Treatment

5.1. Tax obstacles to cross-border donations

5.1.1. Initial comments

Many Member States facilitate donations, for example by permitting deduction of gifts to charities. Although EU law prohibits that gifts to foreign charities are treated less favourable than gifts to domestic charities, it is still a fact that the tax treatment of cross-border gifts is subject to a more disadvantageous treatment in certain Member States. These geographical restrictions are very diverse, ranging from limitations of exemptions at the level of the donee to reduced deductibility of gifts at the level of the donor.[48]

It is also not always clear how a charity established in one Member State is to be treated from the perspective of another Member State. Particularly relevant is the question of whether or not gifts by a resident of one Member State to charities in another Member State are tax deductible and, if so, under what conditions. Uncertainty about this may hinder the freedom of both potential beneficiaries and donors to raise and/or donate funds to a charity of their choice. Some authors argue that intricate structures are sometimes necessary to enable foreign donors to donate to a charity.[49] Not surprisingly, this difference in treatment has prompted various complaints, infringement proceedings[50] and ECJ judgements.

5.1.2. ECJ case law

The ECJ has, on several occasions, ruled that favourable national rules for deduction of gifts may not be restricted to gifts to domestic charities.[51] The ECJ found this to be an unjustifiable restriction of the freedom of establishment and the free movement of capital. Even though the ECJ accepted the effectiveness of tax audits as a possible justification for a restriction of the fundamental freedoms, it added that the tax authorities of Member States have the possibility of information exchange.[52]

The ECJ takes the view that mutual recognition is basically not an obligation under EU law. Member States may stipulate their own conditions according to which an entity is regarded as a charity. However, if the country of the charity applies the same or similar conditions to those of the donor's Member State, the latter may not take the position that its own conditions have not been fulfilled merely because the institution is established in

41. Arts. 12-14 Merger Directive (2009/133).
42. NL: ECJ, 29 Nov. 2011, Case C-371/10, *National Grid Indus v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, ECJ Case Law IBFD and NL: ECJ, 31 Jan. 2013, Case C-301/11, *European Commission v. Kingdom of the Netherlands*, ECJ Case Law IBFD.
43. FR: ECJ, 11 Mar. 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, ECJ Case Law IBFD and NL: ECJ, 7 Sep. 2006, Case C-470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, ECJ Case Law IBFD.
44. PT: Opinion of Advocate General Mengozzi, 28 June 2012, Case C-38/10, *European Commission v. Portuguese Republic*, ECJ Case Law IBFD.
45. PT: ECJ, 6 Sep. 2012, Case C-38/10, *European Commission v. Portuguese Republic*, ECJ Case Law IBFD.
46. *Commission v. The Netherlands* (C-301/11), *supra* n. 42.
47. J.J. van den Broek, *The 2013 Netherlands Act on Deferral of Exit Taxation*, 53 Eur. Tax. 4 (2013), Journals IBFD.
48. I.A. Koele, *How Will International Philanthropy Be Freed from Landlocked Tax Barriers?*, 50 Eur. Taxn. 9, p. 409 (2010), Journals IBFD.
49. Id.
50. *See*, for example, the following press releases of the European Commission, 14 July 2005, IP/05/936; 10 July 2006, IP/06/964; 30 Sep. 2010, IP/10/1252; 6 Apr. 2011, IP/11/429.
51. DE: ECJ, 14 Sep. 2006, Case C-386/04, *Centro de Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, ECJ Case Law IBFD.
52. DE: ECJ, 27 Jan. 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, ECJ Case Law IBFD.

another Member State.[53] Member States must offer donors the possibility to show whether a foreign charity is comparable to a domestic charity, or the Member State itself must exchange information with the other Member State involved.[54] This principle of *host country control* has been confirmed in later ECJ case law.[55]

5.1.3. Application to Dutch legislation

The Dutch tax system contains a broad range of tax measures encouraging charitable giving which relate to both donors and beneficiaries.[56] Grants to a public benefit organization may be deducted for both personal and corporate income tax purposes.[57] Associations and foundations qualifying as an ANBI whose profit does not exceed either EUR 15,000 in any year or EUR 75,000 in a particular year and the four preceding years may be eligible for profit exemption.[58] Under the Dutch Corporate Income Tax Act 1969, a deduction regarding activities to acquire funds is possible for all charities,[59] while cultural institutions and social interest organizations (*sociaal belang behartigende instellingen*, SBBIs) may form a special reserve (*bestedingsreserve*) to cover expenses relating to the acquisition, production and improvement of certain assets.[60] Both ANBIs and SBBIs may be exempt from gift[61] and inheritance tax.[62]

Under current Dutch law, there is no longer a distinction as regards the place of business of the philanthropic institution. In principle, grants to all charitable institutions can be deductible. Thus, the ECJ case law referred to above no longer seems to have a great effect on Dutch legislation. Nevertheless, one aspect of the Dutch rules could still infringe the free movement of capital: grants to charities only qualify for deduction if the institution is registered with the Dutch tax authorities. Institutions established abroad also qualify for registration.

According to the Commission,[63] this registration requirement means that foreign institutions would face an additional administrative burden. The Commission considered that it would be disproportionate if the foreign institution, which has already been registered as a philanthropic institution in its country of establishment, had also to register in the Netherlands. The Commission took the position that tax motives should not be underestimated in the event of donations. In its opinion, the Netherlands had sufficient safeguards and possibilities in place to obtain information from the foreign tax authorities about the charity status and comparability with the Dutch ANBI regime. For these reasons, the Commission took the view that the Netherlands would have to unequivocally recognize the status of institutions that are regarded as charities abroad.

The Commission ultimately withdrew the infringement proceedings instituted against the Netherlands on 27 September 2012. The precise reason is unclear, as the Netherlands has not amended its legislation on that point. Apparently, the Commission no longer considers that the Dutch registration obligation infringes EU law. However, no clear statement on the compatibility of that obligation with EU law has been issued.

5.2. Tax provisions in the FE Regulation

5.2.1. Initial comments

Unlike earlier legislation on EU legal entities, the FE Regulation contains tax provisions. The tax rules try to offer a solution to the tax problems encountered by donors and donees, which the ECJ case law has already identified. They discuss the tax treatment of an FE itself, its donors and beneficiaries.

5.2.2. Tax treatment of the FE

An FE should be subject to the same tax treatment in the Member State where it has its registered office as a charitable entity established under the laws of that country. This applies to "income and capital gains taxes, gift and inheritance taxes, property and land taxes, transfer taxes, registration taxes, stamp duties and similar taxes".[64] The lack of an explicit reference to corporate income taxes is notable; however, a reference to corporate income tax may be assumed to be embedded in the terms "income and capital gains taxes", which may be imposed on the income earned by both individuals and legal entities. In the authors' view, the reference to the types of tax should not be interpreted so strictly as to only apply to the taxes explicitly included: while other secondary EU legislation, such as the Merger Directive (2009/133), specifically lists the taxes to which it applies, the FE Regulation includes a more general reference to the types of tax. Other language versions are equally unclear in this respect. They refer to "*inkomstenbelasting*", "*Einkommensteuern*" or "*les impôts sur le revenu*", without any specification as to whether this concerns personal and/or corporate income tax. This very general approach in several language versions reinforces the authors' opinion.

Under the FE Regulation, the registered office and the place of effective management need not be located in the same Member State, so that an FE may be regarded as resident in two Member States. Both Member States must give the FE the same treatment as applicable to public benefit purpose entities established in their jurisdictions.[65]

53. *W. Stauffer* (C-386/04), *supra* n. 51, at paras. 39-40.
54. *H. Persche* (C-318/07), *supra* n. 52, at paras. 57-60.
55. BE: ECJ, 10 Feb. 2011, Case C-25/10, *Missionswerk Werner Heukelbach eV v. État belge*, ECJ Case Law IBFD; AT: ECJ, 16 June 2011, Case C-10/10, *European Commission v. Republic of Austria*, ECJ Case Law IBFD; and FR: ECJ, 10 Mar. 2005, Case C-39/04, *Laboratoires Fournier SA v. Direction des vérifications nationales et internationales*, ECJ Case Law IBFD.
56. For more information on Dutch tax measures, *see* F.M. Richelle & F. Sonneveldt, *Netherlands*, in *Cahiers de droit fiscal international: Death as a taxable event and its international ramifications*, vol. 95b (Sdu Uitgevers 2010), Online Books IBFD.
57. Art. 16 Vpb 1969.
58. Art. 6 Vpb 1969.
59. Art. 9a Vpb 1969.
60. Art. 12 Vpb 1969.
61. NL: Inheritance Tax Act 1956, arts. 32(1)(3), 32(1)(8) and 32(1)(9).
62. Arts. 33(4), 33(13) and 33(14) Inheritance Tax Act 1956.
63. European Commission, 6 Apr. 2011, IP/11/429.
64. Art. 49(1) FE Regulation.
65. Art. 49(2) FE Regulation.

5.2.3. Tax treatment of donors and beneficiaries

A natural person or legal entity making a donation must be subject to the same tax treatment, irrespective of whether the gift is made to an FE or to a charitable institution established under the laws of the country of residence of the donor.[66] The FE is considered to be in an equal position to a public benefit purpose entity established under the laws of the Member State where the donor is liable to pay tax.[67] The equal treatment of gifts applies to income tax, gift tax, transfer tax, registration tax, stamp duties and similar taxes.[68]

Although the provisions on the tax treatment of the donor do not contain an explicit reference to corporate income tax, the FE Regulation does stipulate that grants to an FE should be treated in the same manner as grants to domestic charities by individuals or legal entities. As mentioned in section 5.2.2., the reference to the term "income tax" should be interpreted to include both personal and corporate income tax.

The unconditional recognition of FEs established in other Member States simplifies any claims relating to a deduction of gifts. However, the FE Regulation does not solve the problems of the Dutch obligation for foreign charities to register (*see* section 5.1.3.), which may be incompatible with EU law. Instead of fully resolving the registration problem, the FE Regulation would only seem to offer an alternative solution in specific cases.

With regard to the benefits received from an FE, beneficiaries must be treated as if these benefits were received from a public benefit purpose entity established in the Member State in which the beneficiary is resident for tax purposes.[69] This provision seems of little practical relevance for the Netherlands, as a beneficiary of a Dutch ANBI receives no tax benefits directly linked to the domestic status of an ANBI.

6. Conclusions: *Largitio Fundum Non Habet*[70]

To ensure that cross-border donations are not treated less favourably than domestic ones, the Commission has proposed the FE Regulation. Although the proposal has largely been motivated by civil law considerations, its tax component should not be underestimated. In this regard, it distinguishes the FE Regulation from legislation on other EU legal forms for cross-border business.

The tax provisions of the FE Regulation merely prescribe that, under national law, an FE, its donors and beneficiaries should receive the same treatment as their domestic equivalents. In many Member States, this should considerably improve legal certainty regarding the tax treatment of grants to qualified charities. Moreover, it will no longer be necessary for EU charities to register in multiple Member States. However, charities from third-countries will still have to register (in the Netherlands) before there is any certainty about the deductibility of grants to such institutions.

Finally, it must be kept in mind that the FE Regulation has not been enacted yet. The final version of the tax and civil law provisions is, therefore, eagerly awaited.

66. Art. 50(1) FE Regulation.
67. Art. 50(2) FE Regulation.
68. Art. 50(1) FE Regulation.
69. Art. 51 Regulation.
70. "*Largitio fundum non habet*" means "generosity has no bottom" (Cicero, *De Officiis*, 2, 15, 55).