

# ANBI OR NOT ANBI?

INEKE A KOELE  
EXPLORES THE USE OF  
DUTCH FOUNDATIONS,  
INCLUDING THE  
ANBI REGIME

## → KEY POINTS

### WHAT IS THE ISSUE?

With Brexit on the agenda, there is increased attention on the use of charitable organisations in the Netherlands.

### WHAT DOES IT MEAN FOR ME?

International clients, whether wealthy families looking for a combination of charitable and asset-protection purposes, or international non-governmental organisations, would like to be informed on the use of Dutch charitable foundations.

### WHAT CAN I TAKE AWAY?

How Dutch charities are often used in parallel planning with foreign charities. Dutch charity law is flexible, without strict oversight, and provides for tax exemptions, generally in relation to corporate income tax.

THE NETHERLANDS, SWITZERLAND and the UK are generally popular jurisdictions in Europe to base an international operating charity. With Brexit on the agenda, there is increased attention on the use of charitable organisations in the Netherlands. This is partly because it may affect access to European institutional and foundation's capital, where requests for funds are restricted to organisations with a European presence.

It may also be due to the fact that, under the *Treaty on the Functioning of the European Union*, international philanthropy is subject to different non-discriminatory provisions that overrule national restrictions on philanthropy. It is not a coincidence that, since 2008, the Netherlands has opened its borders entirely to international philanthropy. As a result, gifts and bequests to non-resident charities are eligible for the same tax benefits (including income tax deductions) as domestic charities.

### FLEXIBILITY OF DUTCH CHARITIES

Dutch charities normally take the legal form of a foundation or association, which are both corporate entities without shares. The law on foundations and associations is very flexible and contains only a few compulsory provisions. As much space is available for creativity when designing tailor-made entities, the Dutch foundation or association is a frequent choice for international non-governmental organisations looking to create a governing supranational charity that balances and integrates the interest of the various chapters worldwide. Since the large majority of charities

take the form of foundations, I will concentrate on the use of charitable foundations.

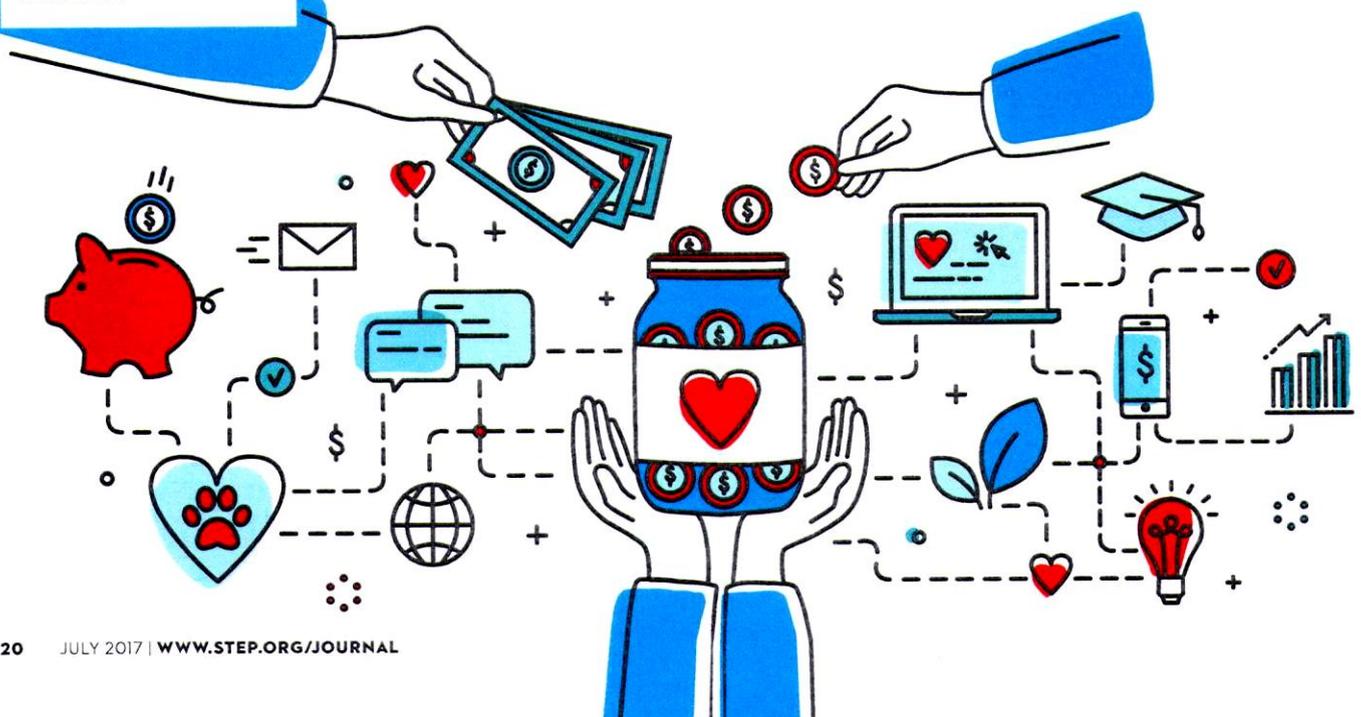
Foundations are part of the 'private domain' in the Netherlands, rather than the public domain, which is why they face little regulatory oversight. A foundation currently has no obligation to publish annual accounts unless it carries out an active enterprise. The articles of association and the names of persons on the board and supervisory board are published by the Dutch Chamber of Commerce (*Kamer van Koophandel*). Other regulations that may contain detailed rules on the affairs of the foundation are discreet. Only in catastrophic situations does the local court and prosecutor have ultimate supervisory powers.

### STRUCTURE

A foundation has a board of directors that is responsible to the purpose of the foundation, and it is recommended that a controlling board of trustees oversees the governance of the foundation. Non-Dutch residents setting up a charitable foundation in the Netherlands and wishing to maintain a level of control over its operations may choose to have a function on the board of the foundation, or may join the board of trustees so they can have the power, for example, to appoint and dismiss board members.

A Dutch foundation (irrespective of whether or not it pursues a charitable objective) is not subject to Dutch corporate income tax unless it carries on an enterprise or is deemed to do so.

There are no legal or tax impediments to using a Dutch foundation as an industrial foundation – i.e. holding the shares of an



enterprise as a 'patient shareholder' is allowed, and does not constitute an enterprise for tax purposes. For instance, one of Europe's wealthiest families, Kamprad, holds important parts of the Ikea chain of entities via a Dutch (non-charitable) foundation used as a top-holding asset-protection entity.

#### CHARITABLE FOUNDATIONS

A foundation that, according to its constitutional documents and activities, nearly exclusively pursues a public interest may qualify as a charitable organisation for Dutch tax purposes. Such an organisation in the Netherlands is referred to as *algemeen nut beogende instelling* (ANBI): a public-interest-pursuing organisation.

In an international context, where funds are not being raised from the Dutch populace, the main tax advantage of an ANBI is the full exemption from gift tax. If the foundation is not recognised as an ANBI, any distribution it makes to a beneficiary exceeding a minimum threshold would be subject to Dutch gift tax rates of between 30 and 40 per cent, depending on the amount of the gift.

However, foundations that do not provide gifts or grants, but instead have operational activities, would not need the exemption of gift tax.

To meet the requirements of an ANBI, some broadly formulated qualitative criteria should be met. The test's aim is to convince the taxman of the true public-interest motive above anything else, such as creating a business model or providing a useful platform for private purposes. Special emphasis is placed on the requirement of an actual policy plan that provides information on the activities to be carried out in light of the public-interest purpose.

Rather than imposing distribution payouts, an ANBI must demonstrate that it does not maintain more properties than is 'reasonably required' for the continuity of the public-benefit activities of the organisation – the policies on this topic would typically be explained in the policy plan. In addition, meeting conditions in the bilateral gift agreement relating to maintenance of funds is always considered to be 'reasonable'.

Instead of excess business-holding rules or investment diversification provisions, an ANBI may completely own all shares in a private company, wherever they are located. The 'private' character of an ANBI means that there is no regulatory oversight at this level of detail.

Rather than having specified expenditure responsibility on overseas grants, an ANBI must be able to demonstrate its genuine 'overall'

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DR INEKE A KOELE TEP  
IS THE FOUNDER  
OF KOELE TAX &  
LEGAL PERSPECTA



public-interest activities as it sees fit, or support a foreign charity.

The main negative feature of a Dutch ANBI is that it does not provide for full exemption from corporate income tax on related or primary business income. Dutch corporate income tax is based on non-competition considerations; therefore, an active enterprise carried out by an ANBI is subject to tax like any other enterprise. There are, however, notable benefits that may be obtained in this field that are only available to ANBIs. The distinction between related/unrelated or primary/non-primary business income is not relevant for corporate income tax purposes.

On the other hand, from the perspective of qualifying as an ANBI, the pursuance of non-related business income is less tricky than related business income, since the latter may be said to be infringing on the requirement that an ANBI should operate on a non-profit basis, while unrelated business income may be harmlessly framed as 'fundraising'.

Finally, since 2013, there has been a requirement to be transparent to the 'public at large' on key figures of the ANBI. However, where ANBIs are endowed and not soliciting funds from the public, they do not need to publish balance sheets and financial details – only a statement of proceeds and costs, and a description of intended expenditures.

#### COMBINING CHARITABLE AND PRIVATE PURPOSES

Where families pursue a combination of philanthropic and private purposes, it is very interesting to focus on the relatively new concept of a Dutch private foundation. Since 2010, it has been possible to structure a Dutch private foundation (which does not qualify as a charity due to the private purposes involved) for foreign-resident families without Dutch tax consequences, since Dutch tax law deems the assets and income of the Dutch private foundation to be attributed for Dutch tax purposes to the transferor.

As a result, foundations with mingled purposes do not trigger Dutch gift tax issues if they are funded by non-resident families. If well structured, there is no need in that situation to comply with the ANBI requirements in order to create an effectively exempt foundation.

In practice, practitioners can eventually combine parallel structuring of both ANBIs, foreign charitable organisations and non-charitable Dutch foundations, thereby combining the features of distinct legal qualifications and jurisdictions to serve wealthy families' wishes and intentions.