TAXATION OF CROSS-BORDER PHILANTHROPY IN EUROPE AFTER PERSCHE AND STAUFFER

From landlock to free movement?

TGE
Transnational Giving Europe

efc
EUROPEAN FOUNDATION CENTRE

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Foreword

The Transnational Giving Europe (TGE) network and the European Foundation Centre Aisbl (EFC) have undertaken this project together to find out how close we are in reality to achieving non-discriminatory tax treatment of cross-border philanthropic activities in the European Union (EU), whether that is giving, fundraising, investing or being otherwise active in the public-benefit arena.

TGE is a network of organisations that have come together to facilitate cross-border philanthropy in Europe. We enable donors and beneficiaries to enjoy the same tax benefits when giving/receiving cross-border as they would if they were active domestically.

We exist precisely because the current operating environment for cross-border philanthropy is not meeting the needs of citizens. TGE's aim is to grow faster to disappear sooner, which we intend to do once all the pieces of the EU puzzle for cross-border philanthropy have been collected and assembled.

The EFC, as an international membership association of foundations and corporate funders, advocates for an enabling environment for philanthropy on behalf of its 200+ members throughout Europe and further afield. Its Legal Committee has been very active in tackling the issue of cross-border taxation for public-benefit organisations.

EU law does require that within the Union public-benefit organisations and their donors and beneficiaries are treated in a non-discriminatory way for tax purposes, wherever they are active in the EU. But the reality that philanthropic actors face is rather different, as we shall see. Why does this matter? Citizens of Europe are more and more mobile – donors have international assets and international interests and the public-benefit organisations that philanthropists are donating to and founding are increasingly working to address issues that do not stop at national borders. Cross-border philanthropy is clearly increasing and it needs an enabling environment to unleash its full potential.

The rationale for TGE/EFC undertaking this project together, is that we want not only to provide practical solutions to the problems that the current fiscal framework presents, but also see it as part of our responsibility to contribute to the discussion on this issue and to the development of policy solutions to move matters forward. Our aim is that this paper will encourage citizens, foundations and other public-benefit organisations and policy makers and regulators to make a difference. This study is based on 28 detailed country reports with useful practical information for donors and public-benefit organisations facing cross border situations, which are available to download from the EFC (www.efc.be) and TGE (www.transnationalgiving.eu) websites. Initial findings of this study were already discussed at a workshop bringing together some 50 stakeholders from foundations, donors, and beneficiaries to academics, philanthropy advisors, and legal practitioners, as well as representatives of the European Commission. Key points raised in those lively discussions were taken into account in finalising this report. The event revealed a strong appetite among partners in the sector for further collaboration to move this issue forward. This publication represents one step; many more will follow.

We would like to thank all national country experts listed on page 6 and of course Thomas von Hippel, comparative foundation tax law expert/researcher as well as Hanna Surmatz and Natasha Ibbotson from the EFC Legal Department for their time and expertise. I hope that you will enjoy reading what we believe is a timely and important study. I encourage you to approach EFC and TGE with your feedback or expressions of interest in collaboration on this topic.

Ludwig Forrest

Philanthropy advisor at King Baudouin Foundation, co-ordinator Transnational Giving Europe and Chair of EFC's Legal Committee

Executive Summary

Context

1. Cross-border philanthropic activity is increasing (including activities by foundations, other public-benefit organisations – PBOs - and their donors).
2. Almost all Member States provide for tax incentives for philanthropic activities. Since the 1990s the trend is that these incentives are being extended.
3. Traditionally, Member States have limited eligibility for tax-privileged status to resident PBOs and their donors. However, following several key judgements (the "Stauffer", "Persche", and "Missionswerk" cases), the European Court of Justice (ECJ) has developed a general non-discrimination principle, according to which an EU-based foreign PBO is entitled to hold the same tax-privileged status as a national PBO, provided that it can be shown to be comparable to a national PBO.

The subject of this study

4. In order to comply with the non-discrimination principle referred to above, Member States were supposed to adapt their legislations where necessary to remove all (tax) discriminations against "comparable" foreign EU based PBOs and their donors. This study investigates if and how the non-discrimination principle has been well and correctly implemented in the various Member States.

Implementation of the non-discrimination principle

5. The non-discrimination principle established by the ECJ has not yet been implemented in the text of the national tax laws of all the 28 Member States.
   a. According to the interpretation of the country experts providing data for this study, there are still a number of cases in which the wording of Member States' laws discriminates against foreign EU-based PBOs in certain circumstances.
   b. If we take the three ECJ cases referred to above as the basis for three key cross-border scenarios involving PBOs and consider whether the non-discrimination principle has been implemented in the laws applying to each of these situations in each of the 28 Member States, we find that in 22 of a possible 84 cases the wording of Member States' laws discriminates[1] .
   c. Member States will have to change their laws in these cases. Strictly speaking, the laws must already be interpreted in such a way as to be in conformance with the Treaty on the Functioning of the European Union, namely as providing for the possibility of a comparability test. But on a practical level this presents a problem: people and PBOs may be being prevented from claiming and receiving tax incentives that are due to them because it is not clear that the possibility to seek these incentives exists.
   d. Furthermore also in the remaining 62 cases in which the wording of the law does not discriminate against foreign-based PBOs and their donors, (practical) barriers continue to exist, since it is not at all clear under which circumstances Member States consider a foreign EU based PBO comparable to a resident one. There is no common approach as to how Member States check/test such comparability.

Performance of the comparability test

6. In the majority of Member States, no formal or uniform approach to the comparability test is foreseen: Usually it is the competent tax authority which decides on a case by case basis whether a foreign PBO is considered comparable to a domestic one. In around 10 Member States, however, at least in certain cases we find formal procedures which set out the binding framework for determining whether a foreign PBO is comparable to a domestic one.
7. In all Member States the burden of proof within the comparability test lies, in the case of tax incentives sought by a foreign PBO, with that PBO. In the case of tax incentives for donors giving to foreign-based PBOs, the burden of proof generally lies with the donor. The tax authorities often request that certain documents are made available (in translation) by the PBO or the donor. Such documents frequently include the statutes of the PBO and the annual financial report. The procedures to show comparability vary across the Member States and they are often lengthy, costly and accompanied by a certain level of legal uncertainty
8. The benchmark for the comparability test is the national tax law of the Member State from which the tax incentives are sought. Despite the differences between Member States' tax laws, it is generally required that in order to receive tax privileges a PBO pursues a public-benefit purpose. Typically, it should pursue this purpose exclusively and some Member States have stipulated further requirements. Tax laws differ in their details and it is often unclear at what level of detail the respective national tax law requirements have to be fulfilled in order to show a potential comparability. The practice can even vary from one authority to the other within one country.

[1] Three scenarios (Persche/tax incentives for donors giving abroad; Stauffer/tax treatment of foreign PBO generating income; Missionswerk/gift and inheritance tax treatment of cross-border legacies/inheritances) multiplied by 28 Member States provide 84 situations to consider.

Challenges and possible solutions

9. As referred to above, there are still cases where Member States' laws are not in compliance with European law. The issue of non-compliance will be addressed in time through court cases and European Commission initiated infringement procedures.
10. Formal compliance does not however solve all problems. One key problem with the current system is that the comparability tests imposed by Member States are demanding and create significant legal uncertainty: long and complicated procedures, translation costs, and fees for legal/tax counselling.
11. From a policy point of view, the main hurdle to solving existing barriers is a need among Member States to build more trust in each other's systems by being assured that a certain level of control is guaranteed. Examples of attempts to develop simpler practice can be found in some Member States (e.g. model certificate in Luxembourg) and it should be in the interests of all Member States as well as the sector (and society as a whole) to continue to try to simplify and ease the process of the comparability test.

From a legal point of view, the following options to improve the situation exist:

a. The process of checking comparability could be eased through the use of binding multilateral or bilateral treaties which would enable a foreign-based PBO's tax-privileged status to be automatically recognised.
b. If Member States are adverse to this type of permanent commitment model statutes, reflecting the requirements that would need to be fulfilled by a PBO in order for it to be eligible for tax-privileged public-benefit status throughout the EU, could be established.
c. Even a simplification of the procedural law could be helpful by, for example, limiting the checks carried out for the comparability test to some agreed core elements or to ensuring that only the specific donation will be used in accordance with the national law of the Member State from which the tax incentive is sought.

Way forward from the perspective of EFC/TGE

The EFC and TGE, together with other partners, are committed to working towards further developing and implementing best practices and proposals made in this study to further ease tax effective cross-border philanthropy.

Useful practical information on taxation of cross-border philanthropy can be found in the form of 28 detailed country profiles on the EFC (www.efc.be) and TGE websites (www.transnationalgiving.eu). The notes outline the relevant legal requirements and associated administrative procedures in each of the countries surveyed for this study.

2. The development of the non-discrimination principle

2.1 Historically no tax privileges for foreign PBOs

Just 10 years ago, the general rule to be found across the Member States was that tax incentives were restricted to domestic PBOs and donors giving to domestic PBOs. Foreign-based PBOs and donors giving across borders were consequently not able to obtain tax privileges.

Explicit justification for the exclusion of foreign-based PBOs is typically not found in the legal texts. Legal scholars have outlined two main arguments.

One conceivable reason for the exclusion of foreign-based PBOs from access to tax-privileged status, is that receipt of such support through the tax system is justified by some kind of domestic connection to the state in question. Some experts have tried to explain the traditional "domestic connection" or "landlock" approach to tax incentives in this way: Tax incentives for PBOs are given because those organisations fulfil tasks that are of interest and benefit to the state and should hence benefit the resident public-benefit community of the given state.

It should be noted however that in no Member State has there ever been a requirement for a domestic connection so strict that it is necessary that the state be directly financially relieved of burdens/obligations by the philanthropic activity in question. No Member State limits the beneficiary circle of tax-privileged public-benefit activities to its own citizens or residents. Rather, all Member States permit that tax-privileged philanthropic activities may benefit foreigners living abroad.

A second possible reason for the traditional exclusion of foreign-based PBOs from access to tax-privileged status is pure practicality: Foreign PBOs are governed by different legal provisions the comparability of which with domestic laws cannot, it is argued, readily be determined. In addition, a foreign PBO is by nature located in another territory, meaning that the national tax authority of the state from which the PBO is seeking tax-privileged status has no direct control over the foreign PBO nor any direct powers of intervention should the foreign PBO flout applicable legislation. While a request for assistance from the foreign authorities would be possibe, it would also be cumbersome.

2.2 The Non-discrimination-rule of the ECJ

The traditional regulatory approach as described above has however been overhauled: The European Court of Justice has, in a series of judgements specifically dealing with taxation of PBOs and their donors (e.g. Stauffer[5], Persche[6], Missionswerk[7], Laboratoires Fournier[8], European Commission vs. Austria[9]) developed a general non-discrimination principle as regards tax law in the area of public-benefit activities[10] and has set the following rules for Members States' national tax laws:

- It is at the discretion of Member States whether or not they wish to provide for tax privileges for PBOs and their donors[11]. Similarly, Member States are in principle free to determine the relevant conditions and requirements. It is theoretically also permissible for the beneficiary circle, namely the recipients of the support of the PBO, to be limited to domestic citizens or to persons living within the domestic territory[12]. Member States are in particular not obliged to automatically grant a status equivalent to that of a domestic PBO to a foreign EU-based PBO recognised as holding tax-privileged public-benefit status in its country of origin[13].
- However, limits to the scope of discretion of the Member States are established by the fundamental freedoms of the Treaty on the Functioning of the EU:
  - It is not permitted that foreign EU-based PBOs and their donors are excluded from eligibility for tax privileges if, seat aside, they fulfil all requirements of the national public-benefit tax law[14].
  - It is not permitted that a (domestic or foreign EU-based) PBO is required to undertake its philanthropic activities in the Member State which grants the tax privilege, unless there are compelling objective reasons for this. Such reasons do not, for example, exist in the case of the promotion of science as a public-benefit purpose; Member States must not restrict tax benefits for donors of gifts made to domestic universities or laboratories[15].
- It is necessary in cross-border cases that Member States carry out a comparability test to determine whether or not a foreign EU-based PBO meets the requirements of national tax law. Such tests are to be carried out by the national authorities and courts of the Member State concerned[16].
- Within the framework of the comparability test the competent national authorities may require the foreign PBO, and/or as relevant its donors, to provide any documentation they deem useful for the carrying out of the comparability test[17].

(5) ECJ 14.9.2006 - C-386/04 (Centro di Musicologia Walter Stauffer/Finanzamt München für Körperschaften).

(6) ECJ, 27. 1. 2009 - C-318/07 (Hein Persche/Finanzamt Lüdenscheid).

(7) ECJ, 10. 2. 2011 - C-25/10 (Missionswerk Werner Heukelbach eV/Belgien).

(8) ECJ, 10.3.2005 - C-39/04 (Laboratoires Fournier SA/Direction des vérifications nationales et internationals).

(9) ECJ, 16. 6. 2011 - C-10/10 (Commission/Austria).

(10) Apart from these cases the ECJ has also dealt with dividend withholding tax cases which are also of relevance to PBO investors - see ECJ, 20.10.2011 - C-284/09 (Commission/Germany).

(11) ECJ, Persche, para. 43.

(12) ECJ, Stauffer, paras. 37f., 57, Missionswerk, para. 30

(13) ECJ Stauffer, para. 39; Persche, para. 48.

(14) ECJ, Persche, para. 46, Missionswerk, paras. 30-31.

(15) ECJ, Laboratoires Fournier, para. 23; Commission/Austria, paras. 35-38.

(16) ECJ, Persche, para. 49, Missionswerk, paras. 33-34.

(17) ECJ, Persche, paras. 53-58.

2.3 Relevant judgements

The above described rules of the European Court of Justice are drawn from certain judgements through which the non-discrimination principle has become established, making clear that philanthropic activities are protected by the fundamental freedoms enshrined in the Treaty on the Functioning of the EU. The restriction of these freedoms is therefore only justifiable and proportionate if the foreign PBO is not comparable to a domestic one; a blanket discrimination is not permissible.

Stauffer (C-386/04)[18]

The case: An Italian foundation with its seat in Italy awards, in accordance with the purposes set out in its statutes, scholarships to young people from Switzerland, particularly those from Bern, to pursue studies in music. The foundation is the owner of a building in Germany from which it obtains rental income. The rental activity is dealt with by a German property management company. German tax law exempts PBOs from corporate income tax for this kind of rental income. However, this exemption would not be applied to foreign-based public-benefit organisations, even if they fulfil all the requirements outlined under German tax law.

Does this rule infringe the fundamental European freedoms?

European Court of Justice: Rental income is protected under the free movement of capital. According to settled case law of the European Court of Justice, restrictions on the fundamental freedoms are only permissible if (1) they are applied in a non-discriminatory way, (2) are justified by overriding reasons in the public interest, (3) are an appropriate means to achieve the objective that they pursue, and (4) do not go beyond what is necessary and reasonable to achieve this objective. The less favourable treatment of foreign EU-based PBOs is not, in the view of the European Court of Justice, justifiable according to these criteria: although the need for Members States to be able to exercise adequate fiscal control can be considered an overriding reason in the public interest, the principle of proportionality prohibits irrefutable presumptions that are to the cost of the tax payer. Rather, the tax payer must be given the opportunity to bring forward supporting documents and evidence to enable the necessary checks on their having fulfilled the respective requirements to be carried out. In particular, a restriction on tax incentives cannot be justified on the grounds that the organisation concerned has its registered seat in another Member State and that this hinders the clarification of the facts of the case and the application of the necessary procedures, because in such circumstances the Mutual Assistance Directive[19] and the Recovery Directive[20] would provide adequate protection. Furthermore, the risks of loss of tax revenues and of foreign EU-based PBOs engaging in money laundering for terrorist financing purposes do not justify a restriction of tax incentives.

Conclusion: The rule of the German tax law is therefore invalid. A denial of the tax incentive would only be permissible if the Italian foundation was not (notwithstanding its seat) comparable to a German PBO. In this case the tax authority did not carry out a comparability test.

(18) ECJ 14.9.2006 - C-386/04 (Centro di Musicologia Walter Stauffer/Finanzamt München für Körperschaften).

(19) Council Directive 2011/16/EU on administrative cooperation in the field of taxation

(20) Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

STAUFFER CASE (ECJ C-386/04)

TAX EXEMPTIONS FOR FOREIGN ORGANISATIONS

THE CENTRO DI MUSICOLOGIA WALTER STAUFFER IS A FOUNDATION BASED IN ITALY

THAT GIVES SCHOLARSHIPS TO SWISS MUSIC STUDENTS.

THE FOUNDATION HAD RENTAL INCOME FROM GERMAN REAL ESTATE THAT IT OWNED.

NORMALLY SUCH INCOME IS TAX-EXEMPT IN GERMANY, BUT IN THIS CASE, THE TAX REDUCTION WAS REJECTED.

TAX AUTHORITY: GERMAN TAX EXEMPTION IS ONLY GRANTED IF INCOME IS GENERATED BY A GERMAN RESIDENT ORGANISATION.

ECJ RULED: GERMAN CORPORATE INCOME TAX LAW DISCRIMINATES AND IS IN CONFLICT WITH EU LAW.

www.zldrawings.com

Persche (C-318/07)[21]

The case: German resident Mr Persche requested in his personal income tax declaration of 2003 a special deduction for an in-kind donation of bed and bath linen, walking frames, and other equipment. This donation was made in favour of the Centro Popular de Lagoa, a Portuguese PBO working on a number of social issues including providing care homes for the elderly. German tax law provides for a deduction for a donation made to a PBO. However, this tax incentive was not applied for donations to foreign EU-based PBOs, even in cases when the organisation in question met all the requirements set out in the German tax law. The fiscal authorities therefore rejected the request for the tax deduction.

Does this rule infringe the fundamental European freedoms?

European Court of Justice: Donations (including in-kind donations) are protected under the free movement of capital. The discrimination in this case is not justifiable. The European Court of Justice recalled its remarks made in the Stauffer judgement, to which it explicitly referred several times.

Conclusion: The rule of the German tax law is therefore invalid. A denial of tax incentives would be permissible only in the concrete case that the Portuguese organisation were not (notwithstanding its seat) comparable to a German PBO. In this case the tax authority did not carry out a comparability test.

(21) ECJ, 27. 1. 2009 - C-318/07 (Hein Persche/Finanzamt Lüdenscheid 07).

Missionswerk (C-25/10)[22]

The case: Missionswerk is a public-benefit association with its registered seat in Germany. Mrs Renardie, a Belgian citizen, who had lived her whole life in Belgium, died on 12 June 2004 in Malmedy, Belgium, having appointed Missionswerk as her heir. The Belgian regional tax authority applied inheritance tax at a rate of 80%, amounting to €60,038.51 of tax payable on the inheritance Missionswerk was to receive. Missionswerk sought to have the reduced tax rate of 7%, which the tax authority of the Walloon region provides for legacies to resident PBOs, applied instead. The tax authority rejected the request for the application of the reduced tax rate on the grounds that it was only to be applied to foreign EU-based PBOs in cases where the testator had lived or worked in the country in which the foreign organisation was based.

Does this rule infringe the fundamental European freedoms?

European Court of Justice: Legacies are protected under the free movement of capital. The discrimination in this case is not justifiable. The European Court of Justice recalled its remarks made in the Stauffer and Persche judgements, both of which it explicitly referred to several times.

Conclusion: The rule of the Belgian regional tax authorities is therefore invalid: a restriction on tax incentives would be permissible only in the concrete case that the German association were not (notwithstanding its seat) comparable to a Belgian PBO. In this case the tax authority did not carry out a comparability test.

(22) ECJ, 10. 2. 2011 - C-25/10 (Missionswerk Werner Heukelbach eV/Belgien).

MISSIONSWERK CASE (ECJ C-25/10)

GIFT AND INHERITANCE TAX

TAX AUTHORITY: UNDER BELGIAN LAW, ONLY LEGACIES TO ORGANISATIONS WHICH HAVE THEIR CENTRE OF ACTIVITIES IN BELGIUM OR IN A MEMBER STATE WHERE THE TESTATOR HAD LIVED OR WORKED BENEFIT FROM A LOWER TAX RATE.

ECJ RULED: BELGIAN GIFT AND INHERITANCE TAX LAW DISCRIMINATES AND IS IN CONFLICT WITH EU LAW.

www.zldrawings.com

European Commission vs. Austria (C-10/10)[23]

The case: the European Commission alleged that the Austrian tax law, which only allowed tax deductibility for donations to institutions with research and teaching activities in cases where those institutions had their registered seat in Austria, was in conflict with the free movement of capital within the EU.

Does this rule infringe the fundamental European freedoms?

The European Court of Justice: Donations are protected under the free movement of capital. The discrimination in this case is not justifiable. The European Court of Justice recalled its remarks made in the Stauffer and Persche judgements, to which it explicitly referred several times. The restriction of tax incentives only to donations made to domestic research institutions cannot be justified on the grounds of overriding reasons of public interest. This is because it stands in direct conflict with the goals of European policy in the fields of research and technological development, whereby according to the Treaty on the Functioning of the EU legal and tax obstacles to research co-operation should be removed.

Conclusion: The Austrian law had to be amended to the effect that a restriction would only be applied if the foreign-based research institution were not (notwithstanding the location of its seat) comparable to an Austrian research institution.

(23) ECJ, 16. 6. 2011 - C-10/10 (Commission/Austria).

B. Comparative Legal Analysis

The following comparative legal analysis is based on country reports provided by selected experts from all EU Member States. All experts were asked via a structured questionnaire to outline what have been the consequences in their country of the ECJ cases outlined above, as regards the academic discussion, the tax law and administrative practice. The individual country reports can be found as an annex to this study. The following discussion represents a general overview of the information in the country reports.

3. Consequences of the ECJ decisions

3.1 Infringement procedures

The European Commission started infringement procedures in the field of public-benefit tax law in 2005. It looked both at the tax treatment of PBOs and at the tax treatment of donors. 28 cases were successfully closed due to changes in legislation, and a few cases are still pending.

Also in the field of discriminatory withholding tax on foreign investments, the European Commission has initiated infringement procedures against various Member States. There has also been a specific complaint launched by a Dutch public-benefit foundation with investments in various EU countries.

3.2 Academic discussion in the Member States

The ECJ decisions, in terms of both theory and practice, have been discussed to varying degrees by the Member States. Whilst in some Member States there has been a wealth of academic articles and debate on this topic that it is almost impossible to overlook, in other Member States there are no publications on the subject. Given that key cases involved Germany, significant academic literature on the taxation of cross-border philanthropy can in particular be found in Germany.

3.3 Reactions of the Member States in legislation and/or practice

The case law/jurisprudence of the European Court of Justice has brought about the following reactions by Member States:

- The majority of Member States have adapted the text of their regulations and now deal explicitly with the non-discrimination principle established by the European Court of Justice in their relevant tax laws (exceptions are discussed in more detail below under 5.2).
- However, the comparability test necessitated by the non-discrimination principle is specifically regulated by explicit new provisions in only relatively few Member States. In the rest of the Member States, existing general provisions are applied (this is discussed in more detail below under 6.3.2).
- Thus far hardly any Member States have resorted to the possibilities referred to by the European Court of Justice to abolish tax privileges for PBOs altogether (which could be considered as negative implementation on the non-discrimination principle), or to limit the beneficiary circle of a PBO holding tax-privileged status to domestic citizens or domestically resident persons (exceptions are discussed in more detail below under 7.4.5)

4. Existing taxes and tax privileges

Naturally, the question of granting incentives in relation to certain types of taxes is only relevant where those taxes exist. Therefore, this comparative legal analysis begins by looking at the situation in the Member States whose fiscal frameworks give rise to taxation which tax advantages might relieve. This study does not however intend to provide an exhaustive exploration of the highly complex rules relating to the taxation of PBOs and their donors. Rather the findings that follow present an overview, not a complete description, of the present situation. It should be noted that tax privileges such as those available in relation to real estate tax, sales tax, VAT or other taxes are not considered here.

4.1 Tax incentives for donors

Almost all Member States grant tax incentives for donations to PBOs, provided that certain requirements are fulfilled which are stipulated in the national tax law of the individual country concerned.

In technical terms the most commonly found of such incentives is the tax deduction: the donor can deduct the amount donated from their personal taxable income. Alternative approaches exist but are rare (e.g. the Gift Aid Scheme in the UK) and from an economic perspective their effect is similar to the tax deduction scheme.

Many Member States apply a limit or ceiling, up to which donations can be deducted. Some Member States further differentiate in their rules between types of donors (natural person/legal person) and/or the object of the donation (cash donation/in kind donation). It should also be noted that in all Member States there are delimitations (e.g. a donation is not for consideration, whereas sponsorship is), which for the purposes of this study will not be discussed further.

As the two charts that follow show, Slovakia is the only Member State that has no tax incentives for donations to PBOs. All other Member States offer some form of tax incentive at least in certain cases.

Chart 1: Tax treatment of individual donors:

Country	Limit of incentive
Austria	Donations are deductible up to 10% of taxable income.
Belgium	Cash donations of €40 or more are deductible up to 10% of the taxable income, with an absolute maximum of €376,350 for the tax year 2013.
Bulgaria	Donations are deductible at rates of 5, 15, or 50% of the income depending on the recipient. Total deduction cannot exceed 65% of the total income.
Cyprus	The full value of donations is tax deductible with no limits.
Croatia	Donations are deductible up to 2% of taxable income.
Czech Republic	Deductions up to 10% of taxable income, provided at least 2% of taxable base is donated, but not less than 1,000 CZK (approx. €35).
Denmark	Donations exceeding 500 DKK (approximately €70) and up to 14,500 DKK (approximately €1,950), the limit for the 2013 fiscal year, are deductible.
Estonia	Donations up to the value of 5% of the donor's total income can be deducted.
Finland	**No tax incentives for individual donors**
France	Income tax reduction at 66% of the value of the gift (75% for specific donations), up to 20% of the donor's taxable income. Alternatively wealth tax reduction of 75% of the value of the gift, but is limited to €50,000.
Germany	Tax deduction up to 20% of the yearly taxable income
Greece	20% of the value of the gift may be deducted from the tax payer's gross income up to 10% of the donor's total income.
Hungary	**No tax incentives for individual donors**
Ireland	Tax credit of a blended rate of 31% for donations to approved charities, which is claimed by the charity provided donor has paid sufficient tax to cover the claim amount. Minimum annual donation of €250 and maximum of €1m. If donor is associated with the PBO then maximum tax refund of 10% of her/his income tax applies.
Italy	Donations to ONLUS (Organizzazione Non Lucrativa di Utilita' Sociale) are deductible up to 10% of income with a maximum of €70,000. Alternatively tax credit of 26% (for year 2014) for donations to ONLUS and other kinds of charities, up to the value of up to €2,065.
Latvia	Income tax deduction up to 20% of the donor's total taxable income.
Lithuania	**No tax incentives for individual donors** but they can allocate 2% of their income tax to an approved PBO.
Luxembourg	Tax deduction up to an annual aggregate maximum limit of 20% of the taxable income of the donor or €1,000,000, provided the donations have an aggregate value in excess of €120.
Malta	Cash donations made to certain organisations can be deducted with different caps of €50,000 or €60,000 or in some cases €100,000.
Netherlands	Donations can be deducted up to 10% of the donor's gross income. No deduction is possible for donations below 1% of the gross income or €60.
Poland	Donations of cash, shares, securities, real estate and in-kind donations are deductible up to 6% of the taxable base.
Portugal	Cash donations: income tax deduction up to 25% of the amount donated where there is no limit for corporate donors. Where there is a limit on deduction for corporate donors, the amount deducted by individuals should not exceed 15% of the value of the donor's total income tax.
Romania	Donors can direct 2% of their income tax to NPOs. Contributions (sponsorship) are deductible up to 5% of total income.
Slovakia	**No tax incentives for individual donors.**
Slovenia	Donors can direct up to 0.5% of their income tax.
Spain	Tax credit of 25% of the value of cash or in kind donations up to 10% of total taxable income.
Sweden	25% of a donation 200-1,500 SEK (approx. €25-170) is deductible and total gifts amounting to at least 2,000 SEK (approx. €225).
United Kingdom	Cash donations are deductible via Gift Aid or payroll giving schemes. The donor claims a deduction from taxable income or capital gains for the amount of the donation grossed up by the basic rate of tax (currently 20%). Gift Aid allows the charity to then reclaim the income tax deemed to be deducted from the donation from the tax authorities.

Chart 2: Tax treatment of corporate donors

Country	Limit of incentive
Austria	Deductions up to 10% of taxable income.
Belgium	Only cash donations (of more than €40), the exception being works of art donated to museums: up to 5% of the taxable income, with a maximum of €500,000 in 2013.
Bulgaria	Donations are not levied with a tax withheld at the source and lead directly to decrease of the financial result if they amount up to 10%, 15% or 50% (dependent on the recipient) of the positive financial result. The total amount of the deduction cannot exceed 65% of the total income.
Croatia	In kind and monetary donations can be included in business expenses (which will decrease the tax base) up to 2% of the total revenue generated in the previous calendar year.
Cyprus	Whole amount of the donation can be deducted - subject to certain conditions. The same conditions are applicable as to individual donors.
Czech Republic	The donation can be a movable asset or real estate. The donation is deductible up to 10% of the tax base provided that at least 2% of the tax base is donated.
Denmark	Gifts to qualifying charitable organisations exceeding 500 DKK (approximately €70) up to 14,500 DKK (approximately €1,950) are deductible each year. The limit is adjusted annually and was 14,500 DKK for the fiscal year 2013.
Estonia	Total of donations deducted from taxable income may not exceed 3% of the sum of the payments made during the year, nor exceed 10% of the calculated profit of the latest fiscal year.
Finland	Monetary donations made by corporations, with a minimum amount of €850, are eligible for a tax deduction. Maximum amount depends on the recipient, divided in two categories. Maximum amount of a donation given to a publicly financed university or to a fund within the university is €250,000. Maximum amount of a donation given to a public-benefit foundation is €50,000.
France	A tax reduction equal to 60% of the donations to qualifying PBOs up to 0.5% of their annual turnover. Should there be no profits in the following years, the deduction can be carried forward over the next five years. The deduction may also be carried forward over the following five years, if the donations are beyond the 0.5% limit.
Germany	A tax deduction on the income up to 20% of yearly taxable income (or 0.4% of the sum of the turnover and salaries).
Greece	Cash donations are deductible up to a maximum of 10% of the taxable income.
Hungary	Up to 20% of the value of the donation (or the book value of the goods or services provided). 50% of the value if provided to certain national funds. An additional 20% of the value of the donation if provided under a long term donation contract, up to the amount of the pre-tax profit on the aggregate.
Ireland	Donations over €250 are deductible in full.
Italy	Cash donotaions only. Up to 2% of income up to €1,032.91 for donations to ONLUS (Organizzazione Non Lucrativa di Utilita' Sociale) and other NGOs. No limits on donations to universities or university foundations. Donations to ONLUS can be deduction from income tax up to an amount not exceeding 10% of the total declared income. Maximum €70,000 per year. Alternatively, corporate donors can deduct from their declared income donations to ONLUS up to a maximum of €2065.83 or for an amount not excedding 2% of the total declared income.
Latvia	A tax deduction of 85% of donated sums, up to 20% of total payable tax.
Lithuania	Corporate donors can deduct cash, in-kind donations, and even services offered. Exception is cash payments beyond 250 MLS for one single recipient. In some cases, double the amount of the donation may be deducted up to 40% of taxable income.
Luxembourg	Tax deduction up to an annual aggregate maximum limit of 20% of the taxable income of the donor or €1,000,000, provided the donations have an aggregate value in excess of €120.
Malta	Only donations to certain specific organisations would be deductible
Netherlands	The amount of the donation can be deducted up to 50% of the profits with a maximum of €100,000 euro. Donations to cultural institutions can be taken into account for 150%. Maximum annual deduction in this case is €5,000.
Poland	Cash, shares, real estate and in-kind donations are deductible. Limit of incentive: 10% of the tax base.
Portugal	No limits on tax deduction when donations benefit state-supported foundations or represent endowment of private origin foundations pursuing social or cultural aims. Donations are calculated as a cost to the donor and rates range from 120-150% of the monetary value of the donation.
Romania	Donations can be deducted up to 20% of the income tax, but not more than 0.3% of the turnover.
Slovakia	**No tax incentives in place for corporate giving.**
Slovenia	A tax deduction on the amount of donations up to 0.3% of the taxable income, but not exceeding the amount of the total tax base. An additional deduction of up to 0.2% of taxable income for donations to organisations established for cultural purposes or for protection from natural and other disasters.
Spain	Corporations can deduct from the amount of tax payable an amount equivalent to 35% of the deduction base, up to a limit of 10% of the taxable base for the corresponding period.
Sweden	No deductions in general. However, some donations can be deducted as business expenses.
United Kingdom	Money, land, and quoted shares are deductible. A 100% deduction from taxable profits can be claimed.

4.2 Gift- and inheritance tax

To the extent that gift/inheritance tax is collected, it is typically levied by the Member State in which the testator was last resident. A different system seems to be in place only in Hungary. The tax payer is typically the heir or legatee. In certain cases, however, the living donor or heir (in the case of a legacy) may be jointly liable for the inheritance / gift tax.

One should keep in mind that in recent years, a number of Member States have abolished their gift and inheritance tax laws. For those Member States, the question of a tax deduction in such circumstances will therefore be relevant, since the tax from which the exemption or reduction would be sought does not exist in the first place.

In those Member States that do have gift and inheritance tax, tax exemptions are usually foreseen if the recipient is a PBO.

Chart 3: Gift and inheritance taxation and tax benefits for PBOs

Country	Does gift/inheritance tax exist?	Exemptions for domestic donations?
Austria	No	Not applicable
Belgium	Yes	Yes
Bulgaria	Yes	Yes
Croatia	Yes	Yes
Cyprus	No	Not applicable
Czech Republic	Yes	Yes
Denmark	Yes	Yes
Estonia	No	Not applicable
Finland	Yes	Yes
France	Yes	Yes
Germany	Yes	Yes
Greece*	Yes	No
Hungary	Yes	Yes
Ireland	Yes	Yes
Italy	Yes	Yes
Latvia	No	Not applicable
Lithuania	Yes	Yes
Luxembourg	Yes	Yes
Malta	Yes, stamp duty	No
Netherlands	Yes	Yes
Poland	Yes	Not applicable since levied only on natural persons
Portugal	Yes, stamp duty	Yes
Romania	No	Not applicable
Slovakia	No	Not applicable
Slovenia	Yes	Yes
Spain	Yes	Not applicable since levied only on natural persons
Sweden	No	Not applicable
United Kingdom	Yes	Yes

** Pending ministerial clarification*

4.3 Tax treatment of PBOs

A PBO would generally be taxed on rental and lease income through the application of income tax or corporation tax. Again here we find technical differences: Some Member States do not tax the income of the organisation, instead taxing only shareholder dividends.

Tax privileges for PBOs do exist in the majority of Member States, but typically not for all the different types of income of the organisation. More often distinctions are made between specific types of income.

5. Treatment of cross-border scenarios

As already outlined under 3.3., the majority of Member States have adapted the text of their regulations and deal explicitly with the non-discrimination principle established by the European Court Justice.

There are, however, some Member States in which the necessary implementation has (at least partly) not taken place, so that the wording of the law still excludes foreign EU-based PBOs from holding equal tax status to domestic PBOs in one or more of the scenarios discussed above (sections 4.1. – 4.3).

5.1 Tax incentives for donors in cross-border cases

The following chart deals with the question of whether the Member States have adopted the non-discrimination rule in situations similar to the Persche case.

Chart 4: (Non-)discrimination for donors according to the wording of the law

Country	Can individual/corporate donors giving to comparable EU/EEA-based PBOs get the same tax benefits as they would for giving to a domestic PBO according to the wording of the law?
Austria	Yes, but the recipient organisation must be included in a list
Belgium	Yes
Bulgaria	Yes
Croatia	No
Cyprus	Yes
Czech Republic	Yes
Denmark	Yes, but the recipient organisation must be included in a list
Estonia	Yes
Finland	Yes, but the recipient organisation must be included in a list
France	Yes
Germany	Yes
Greece	Yes
Hungary	No
Ireland	Yes, but the recipient organisation must be included in a list
Italy	Yes
Latvia	Yes
Lithuania	No
Luxembourg	Yes
Malta	Yes, but the recipient organisation must be included in a list
Netherlands	Yes, but the recipient organisation must be included in a list
Poland	Yes
Portugal	No
Romania	No
Slovakia	No, but no tax incentives for local giving, so no discrimination
Slovenia	Yes
Spain	No
Sweden	Yes, but the recipient organisation must be included in a list
United Kingdom	Yes, but the recipient organisation must be included in a list

As the chart shows there are three different solutions:

1. In 21 Member States the wording of the law includes a non-discrimination rule; 8 of those Member States require a registration of the relevant PBO in a list.
2. In one Member State, Slovakia, the wording of the law does not state a non-discrimination rule, but there is no discrimination because there are no tax incentives for donors.
3. In six Member States according to the wording of the law foreign EU-based PBOs are (still) discriminated against, even if they are comparable. In some of those countries the exclusion of foreign PBOs is explicit. In other countries there is no explicit exclusion, but the interpretation given by the country expert working on this study indicates that foreign PBOs are still discriminated against.

One example of the difficulties encountered in interpreting the national laws can be seem when considering the Spanish law on foundations: Spanish tax law just refers to a "foundation" according to the Spanish foundation law. Whereas such a reference to the civil law status may be efficient for domestic foundations, it is self-evident that such a reference is not helpful as regards foreign foundations which naturally have a foreign civil law status. In such a case the reference of national tax law will have to be interpreted and two interpretations are possible:

a. The reference means that the foreign-based foundation has to establish itself as a Spanish foundation in order to be eligible to hold tax-privileged status on equal terms to a domestic Spanish foundation.
b. The reference means that a foreign-based foundation has to apply the relevant requirements for the civil law status, which have to be checked by the Spanish tax authorities.

If the first interpretation were applied, the wording of the law would violate the non-discrimination principle of the ECJ as it forces the foreign-based foundation to obtain the civil law status of a Spanish foundation. Only the second interpretation could be in line with the prescriptions of the ECJ (on the condition that the civil law status does not require the foundation to have its seat within the territory of Spain which would be against the non-discrimination rule of the ECJ). Thus only interpretation (b) would be acceptable and the real question is whether the law has to be clarified in order to avoid misleading interpretations like interpretation (a).

5.2 Gift and inheritance tax in cross-border cases

The following chart deals with the question of whether the Member States have adapted their legislation to the non-discrimination principle for situations similar to the Missionswerk case.

Chart 5: (Non-)discrimination of foreign-based PBOs as regards gift and inheritance tax

Country	Where gift/inheritance tax exists and there are exemptions for donations to domestic PBOs, are the same benefits available for donations to a comparable EU/EEA based foreign-based PBO according to the wording of the law?
Austria	Not applicable, no tax
Belgium	Yes
Bulgaria	Yes
Croatia	No
Cyprus	Not applicable, no tax
Czech Republic	Yes
Denmark	Yes, but the recipient organisation must be included in a list
Estonia	Not applicable, no tax
Finland	Yes
France	No
Germany	No
Greece	Information pending
Hungary	No
Ireland	Yes
Italy	Yes
Latvia	Not applicable, no tax
Lithuania	No
Luxembourg	Yes
Malta	Not applicable, no tax
Netherlands	Yes, but the recipient organisation must be included in a list
Poland	Not applicable, no tax
Portugal	No
Romania	Not applicable, no tax
Slovakia	Not applicable, no tax
Slovenia	Yes
Spain	Not applicable, no tax levied on legal entities
Sweden	Not applicable, no tax
United Kingdom	Yes

As the chart above shows there are three different solutions:

In 11 Member States the wording of the law explicitly provides a non-discrimination rule; 2 of those Member States require a registration of the relevant PBO in a list.

In 10 Member States, there is no discrimination because there would be no taxation at all in such a case.

In six Member States, according to the wording of the law, foreign PBOs are discriminated against, even if they are comparable to a domestic PBO. Sometimes the exclusion of foreign EU-based PBOs from access to tax-privileged status is explicit. In other cases where the wording of the law is less clear, the interpretation given by the country expert working on this study indicates that foreign PBOs are still discriminated against.

5.3 Tax treatment of the PBO in cross-border cases

The following chart deals with the question of whether the Member States have adapted their legislation to the non-discrimination principle in a situation which is similar to the Stauffer case.

As the chart shows there are three different solutions employed by Member States:

Chart 6: (Non-)discrimination of foreign-based PBOs as regards income taxation?

Country	Where corporate income tax exemptions exist for domestic PBOs, are the same benefits available for comparable EU/EEA based foreign-based PBO according to the wording of the law?
Austria	Yes
Belgium	Yes, but only for one of the two alternative grounds for obtaining exemption
Bulgaria	Yes
Croatia	No
Cyprus	No
Czech Republic	Yes
Denmark	No
Estonia	No
Finland	Yes
France	Yes
Germany	Yes
Greece	Yes
Hungary	Yes
Ireland	Yes, but the recipient organisation must be included in a list
Italy	Yes
Latvia	No
Lithuania	Yes
Luxembourg	No
Malta	Yes, but the recipient organisation must be included in a list
Netherlands	Yes
Poland	Yes
Portugal	No
Romania	No
Slovakia	No, but no tax incentives for PBOs, so no discrimination
Slovenia	No, but no tax incentives for PBOs, so no discrimination
Spain	No
Sweden	Yes
United Kingdom	Yes

1. In 16 Member States the wording of the law explicitly provides a non-discrimination rule; 2 of those Member States require a registration of the relevant PBO in a list.
2. In two Member States, there is no discrimination because there would be no tax privileges at all in such a case.
3. In 10 Member States according to the wording of the law foreign EU-based PBOs are at least in certain aspects discriminated against, even if they are comparable to a domestic PBO. Again the exclusion is sometimes evident and sometimes indicated by the interpretation given by the country expert in cases where the wording of the law is less clear.

5.4 Conclusions

According to the interpretation of the country experts it seems that most, but not all, Member States have implemented the non-discrimination rule of the ECJ in case of tax benefits for foreign EU-based PBOs and their donors. However, there are still 22 out of a possible 84 cases[24] where the wording of the law appears to discriminate against foreign EU-based PBOs. What happens in such cases where the law still excludes foreign EU-based PBOs from access to tax-privileged public-benefit status on equal terms with domestic PBOs?

According to the general rules of European law the national law must in those 22 cases be interpreted in such a way as to be in conformance with the European non-discrimination principle. This is even the case in the unsatisfactory circumstance that the wording of the law contradicts the actual legal situation (i.e. does not conform to the requirements of European law). Such situations are problematic because uninformed PBOs and donors may, simply on account of lack of clarity of the law, be prevented from obtaining tax incentives to which they are entitled.

In such cases a Member State might be forced to formally amend its law through a European Commission Infringement Procedure.

However, even where Member states formally no longer discriminate from a tax point of view, significant procedural barriers continue to exist for cross-border philanthropy as the next chapters will outline.

(24) Three scenarios (Persche/tax incentives for donors giving abroad; Stauffer/tax treatment of foreign PBO generating income; Missionswerk/gift and inheritance tax treatment of cross border legacies/inheritances) multiplied by 28 Member States gives 84 situations to consider.

6. Procedural requirements – comparative overview

6.1 Introduction

The ECJ cases require Member States to not discriminate against comparable foreign EU-based PBOs and their donors from a tax point of view and the question is which procedures Member States have put in place to test the comparability of foreign-based public-benefit PBOs and their donors.

In all Member States that grant tax privileges to PBOs and their donors, the question arises as to how the comparability test to determine whether or not a foreign EU-based PBO can be considered as comparable to a domestic one. The benchmark for the comparability test is in each case established by the requirements of the national tax law, which will be further discussed in section 7.

6.2 Special regime vs. general provisions

As regards the procedural rules for the comparability test, the following approaches theoretically are possible:

- automatic recognition of a foreign EU-based PBO with a tax exempt status in its country of origin,
- a special regime that governs the process and according to the specifications of which the comparability test for foreign EU-based PBO is conducted, or
- general provisions are applicable, as there are no express special provisions in place.

Different or hybrid approaches are of course also possible, putting in place specific provisions for the comparability test applying only to certain types of taxes and thus in turn to only certain scenarios, with other situations still governed by the general rules.

The information provided by the country experts shows that a special procedural regime for foreign EU-based PBOs is the exception, while recourse to general provisions is common. No Member State has introduced automatic recognition of a foreign EU-based PBO with a tax exempt status in its country of origin. Thus in most cases the content of the procedural law applied in assessing the eligibility of a PBO for access to tax-privileged status is the same whether it is a domestic or a foreign EU-based organisation whose eligibility is being assessed. As the analysis will show, this approach presents some challenges for foreign EU-based PBOs and donors giving cross-border as to how much evidence/proof of fulfilment of the legal requirements the donors have to provide. It often depends on the authority practice how much detail/proof is required and if indeed the smallest detail has to be fulfilled.

6.3 General decision vs. case by case decision

An important differentiation that can be identified is whether the comparability test is undertaken to apply only for the single specific case in which the tax concession is sought or whether it is carried out in such a way as to grant a more general access to tax privileges; namely whether eligibility for access to tax-privileged status for a foreign EU-based PBO is assessed on a case by case basis, or a general decision as to the status of that organisation is taken by an authority. It is in general the tax authorities that are responsible for awarding tax-privileged public-benefit status. Differences exist between Member States as to whether it is the local tax authority where the seat of the organisation seeking the designation is located that is responsible for making the necessary checks, or whether the responsibility lies with a central tax authority that oversees the awarding of tax-privileged status in a particular region or throughout the whole country.

As the chart below shows the case by case decision is most commonly found, but a general binding decision about elements of the status as tax-privileged PBO, which is then generally kept in a list is taken in some Member States.

Chart 7: Awarding tax-privileged status by the competent authority in cross-border cases: Is this a general decision (YES) vs. case by case decision (NO)?

Country	Persche	Stauffer	Missionswerk
Austria	Yes	No	No such tax
Belgium	No	No	No
Bulgaria	No	No	No
Croatia	No	Yes	No
Cyprus	Yes	Yes	No such tax
Czech Republic	No	No	No
Denmark	Yes	No	Yes
Estonia	No	No	No such tax
Finland	Yes	No	No
France	No	No	No
Germany	No	No	No
Greece*	No	No	No
Hungary	No	No	No
Ireland	Yes	Yes	Yes
Italy	No	No	
Latvia	No	No	No such tax
Lithuania	No	No	
Luxembourg	No	No	No
Malta	Yes	Yes	No
Netherlands	Yes	No	Yes
Poland	No	No	No
Portugal	No	No	No
Romania	No	No	No such tax
Slovakia	No	No	No such tax
Slovenia	No	No	No
Spain	No	No	No
Sweden	Yes	No	No such tax
United Kingdom	Yes	Yes	Yes

** Pending ministerial clarification*

6.3.1 General binding decision on elements of the PBO status

In case of a general decision, the following procedural rules are common:

The decision is usually made *ex ante* (before the donor can ask for tax exemption for this recipient PBO or the PBO carries out activities) by a centralised authority, typically a tax authority or a ministry. The PBOs that have fulfilled the requirements of the comparability test are usually listed in a list or register. The status as tax-privileged PBO will typically remain valid until it is revoked. In some Member States the status has to be renewed after a specific period of time.

It should be noted that inclusion in the register on the basis of the information available as to the organisation's nature and purpose at the time of the comparability test cannot guarantee absolute legal certainty, since only the statutes of the organisation and details of its management and activities up to the moment of entry in the register will have been checked, not the actual management and activities after the comparability test and entry into the register has taken place.

6.3.2 Non-binding case by case decision for a specific tax status

A case by case decision entails the responsible tax authority performing the test only for this specific case/request for a tax incentive of the PBO or its donor. This individual decision is not binding. This means it is not kept in any register/list and may be judged differently for the same PBO by another donor's responsible local tax authority.

In the case of a case by case decision, the following procedural rules are common:

Typically the case by case decision will be made by the local tax authorities as an ex post assessment. An ex post assessment means that the PBO's status is only verified and the decision as to whether it meets the requirements to receive the sought tax incentive only taken after the activities in relation to which the tax incentive is sought have been carried out. Some Member States may allow the PBO or its donor to apply for an ex ante assessment. An *ex ante* assessment entails that the PBO is assessed before it carries out its activities.

An *ex ante* assessment clearly has the advantage of establishing greater legal certainty. It should however be kept in mind that public-benefit status, as noted above, is not static and requires continuous assessment: it is not enough that an organisation according to its statutes serves a public-benefit purpose; the organisation must in its ongoing practice follow its statutes and internal regulations and in addition comply with the relevant statutory and regulatory provisions, something that can only happen through ongoing fiscal supervision. An *ex ante* assessment can only ever be a check of the organisation's statutes – the actual management and activities of the organisation during a given period can only be checked *ex post*. Absolute legal certainty for national or foreign-based PBOs is therefore not possible.

6.4 Performance of the comparability test

In either case the comparability test will begin with a check by the competent authority that the statutes of the PBO meet the requirements for the tax incentive in question. The burden of proof lies in general with the person or entity that will directly benefit from the tax privilege, namely the PBO itself or the donor. When it comes to foreign documents, this means that the authorities may require of the PBO or individual applying for the tax incentive that they provide a translation of the materials into the national language of the country from which the tax concession is sought.

The authorities appear to have wide discretion as to what evidence of the status of a foreign-based PBO they require for the purposes of the comparability test. On the one hand, the comparability test may be straightforward, simply requiring that the foreign PBO is already recognised as eligible for and holds public-benefit status for tax purposes in its Member State of origin. Such an approach assumes sufficient comparability of the national laws of the Member States concerned. One example for such a practice can be found in Luxemburg in the "Persche" scenario (a donor from Luxembourg gives across border). The procedure for the comparability test here foresees that the donor submits a model certificate list of the PBOs including the following information: (a) Date of establishment according to which laws of which state, address, (b) PBO pursues exclusively one of the following purposes: Art, education, Philanthropy, Religion, Science, Social, Sports, Tourism, Development cooperation, (c) These purposes are recognised as eligible for tax incentives in the state of establishment, (d) PBO is exempt from income and wealth tax and the donation would be fiscally deductible in the country of establishment of the PBO. The certificate as well as the PBOs tax status in its country of establishment does not bind the Luxembourgian tax authority – the authority may in the end disregard the certificate/ask for additional information such as statutes of the PBO/financial reports etc. However there is at least an opportunity to perform the comparability test in a foreseeable and relatively unbureaucratic manner.

On the other hand however (and this is the most common scenario), the authorities may require the submission of all relevant documents (statutes, annual report, balance sheet, evidence of the actual use of resources in the form of receipts, statements/ certificates etc., and potentialy specific questionnaires) in official translation, which can lead to considerable costs. The question as to how intensively the checks will be applied is therefore an important one in practical terms, but equally cannot be answered in a general way. There is anecdotal evidence to suggest that even within one tax authority, individual officials may apply varying benchmarks. Furthermore it can be observed that large, well-recognised national or international PBOs have an advantage based on their reputation, which can result in less stringent checks being carried out.

A special situation exists in those Member States where the civil law establishment of the PBO leads automatically to the recognition of public-benefit status for some or all relevant tax purposes, namely where the relevant requirements of civil and tax law are identical . In such cases the ongoing supervision of the actual management and activities of the PBO is nonetheless necessary and is carried out by the tax authorities.

As some practitioners have outlined (see the examples provided in the Annex), the costs of gaining comparable status can be prohibitive to the cross-border recognition of PBOs. Invariably a foreign PBO will require the assistance of a lawyer in the other country in order to make a valid claim and provide an appropriate comparability analysis to support the claim. Where the benefits of recognition are small in value, the costs are likely to deter PBOs from exercising their rights under EU law unless a streamlined procedure can be adopted.

7. Benchmarks for the comparability test

7.1 Introduction

The benchmark for each comparability test is established by the requirements of the respective national tax law.

It should first be noted that the provisions can differ in terms of scope: on the one hand, there are uniform standards that apply to all tax breaks and on the other hand there are differentiated provisions that have different requirements for incentives related to different types of tax. Thus, for example, the income tax deduction for a donation is sometimes only granted for certain public-benefit purposes, while other purposes, although not providing access to an income tax deduction for donors, are nonetheless recognised as being of public-benefit for tax purposes in relation to other types of tax (e.g. corporate income tax exemption of the PBO).

Comparative legal analysis of the requirements for the tax-privileged status is a very challenging area. From a comparative legal perspective, it is necessary to note that the wording of the relevant laws often employs vague legal terms the interpretation of which leaves scope for a lack of clarity. Accordingly, there have even been a number of controversial cases dealing with the question of whether a national PBO meets the requirements of its own national public-benefit law.

Hence a comparative examination of the relevant provisions throughout the EU is even more complicated. Rules which seemingly have the same wording may have different meanings. It can also be the case that in one country a rule is explicitly codified, while in another no such rule is codified but is nonetheless applied in practice, the practice having been developed through the interpretation of undefined legal terms.

This study focuses on the rules and requirements that comparative experience in the field has revealed as being the most central and fundamental in cross-border philanthropy scenarios. A comprehensive and exhaustive account of all existing rules in all Member States is not intended and, due to the current state of comparative legal research, is not possible.

The basic structure of the various national provisions can be classified as follows:

- It is often the case that only certain specific types of organisations and legal forms are recognised as being eligible for public-benefit status (relevant for being an eligible as a recipient for tax deductible donations and own tax exemptions for the PBO).
- Furthermore it is necessary that a PBO promotes a particular public-benefit purpose with specific requirements in place as to how this purpose is to be pursued.
- Sometimes there are requirements regarding the means by which the organisation may acquire its resources as well as formal requirements for the internal organisation of the PBO and the content of its statutes.

7.2 Legal form

In all surveyed countries, tax benefits are not limited to one legal form, but can apply to various forms (e.g. public-benefit foundation, association, limited liability company etc.).

Most civil law countries provide for tax incentives for public-benefit associations and public-benefit foundations and their respective donors. In several civil law and common law countries companies/corporations may also receive tax-privileged status (Austria, Germany, Netherlands and UK), whereas in other countries companies/corporations cannot get tax-privileged status (such as in France, Spain and Sweden). In common law the unincorporated tax-privileged organisation is frequently found (charitable trust or unincorporated association), but tax privileges are also granted to public-benefit organisations without legal personality in several civil law countries (e.g. Austria, France, Germany, Netherlands, Sweden). With regard to the comparability test for charitable trusts, some civil law countries continue to argue that a charitable trust cannot be comparable to a civil law foundation because the relevant civil law does not recognise the trust as a valid legal entity. However in a decision of the Court of Appeal of Brussels, on 9 September 2009 in the so called Great Ormond Street Hospital case, the Court states that a UK charitable trust, recognised by the Charity Commission, has specific characteristics that make it comparable with a non-profit legal entity in Belgium. As a consequence such kind of trust should benefit from the reduced tax rate. There is also some ECJ case law in the context of collective investment funds to the effect that foreign entities cannot be discriminated against solely on the basis of their legal form[25]. It is hence expected that Member States will be prepared to apply this principle to charitable trusts without requiring another ECJ decision to this effect.

(25) e.g. ECJ 18.06.09 - C-303/07 (Aberdeen Property Fininvest).

Only in a few cases are there specific tax privileges that are only provided for certain types of PBOs and/or their donors (Germany provides for more tax incentives for public-benefit foundations and their donors in specific cases; and Austria provides for different solutions for incentives linked to different taxes).

7.3 Public-benefit purposes

The tax-privileged status of a PBO, which leads to its tax exemption and to tax incentives for its donors, depends on the pursuance of a public-benefit purpose. Most countries provide for either a general clause or an open clause as the basis to determine what purposes can be considered as being of public-benefit (e.g. Netherlands and Spain) while other countries have a closed list of public-benefit purposes, which has the advantage of more legal certainty but the disadvantage of less flexibility (e.g. Germany). In Hungary the closed list of public-benefit purposes has been cancelled; it is not enough to simply choose a public-benefit activity but it is necessary to make reference to a suitable law, since the public-benefit activity should help in the accomplishment of a state or municipal public task defined within a law directly or indirectly.

The purposes accepted in the Member States vary according to the different national contexts and legal as well as social/cultural traditions. Nonetheless, a common core of purposes, which seem to be accepted as being of public-benefit for tax purposes in all or at least most Member States, can be identified. These include: arts and culture; social welfare; poverty relief; humanitarian/disaster relief; support for children, youth and the elderly; science, research and innovation; education and training; health, well-being and medical care; and protection of vulnerable and disadvantaged persons.

7.4 Usage of funds

7.4.1 Exclusivity of the use of funds

It seems that most Member States do require that in order to receive tax-privileged status a PBO must pursue its public-benefit purpose exclusively.

However, a few Member States would accept exemptions under special conditions: in Germany, a tax-privileged public-benefit foundation may spend up to one third of its income on the living expenses of the founder or his/her close relatives or on the care of their graves (if the statutes of the foundation expressly allow this). In Denmark, whilst the purpose does not need to be pursued exclusively, tax privileges are only given for donations made to the public-benefit purpose. In Sweden, a limit is set that a maximum of 10% of all value of the foundation's annual expenditure may be used for purposes other than the public-benefit purpose; the same is true for a Dutch foundation (with the legal form ANBI).

In order to avoid circumventions of the requirement to promote the public-benefit purpose exclusively, all Member States generally state that the assets of a public-benefit foundation cannot revert to private ownership upon dissolution of the PBO, but must go either to another PBO with similar aims to the dissolved entity (often to be stipulated in the statutes) or, in cases where this is not possible, to the state.

7.4.2 Remuneration of board members

There are different traditions as regards the remuneration of board members of tax-privileged PBOs in the Member States.

In most Member States an adequate remuneration is accepted (an excessive remuneration is not accepted in any Member State, because this would be a circumvention of the rule to promote the public-benefit purpose exclusively).

In the following Member States, remuneration of board members by a tax-privileged PBO generally is not permitted: France, Greece, Ireland, Lithuania, Luxembourg, Slovakia, Slovenia, and Spain. The same is generally true in the UK, but UK charities can apply for permission from the Charity Commission if they wish to pay their trustees (it is currently under discussion if larger charities could do so without permission). It should however be noted that none of those Member States have similar restrictions as regards the remuneration of the staff.

Thus in reality you may find different organisational structures in the Member States as a consequence of the remuneration rules for board members: in Member States which do restrict the remuneration of board members such board members will usually restrict themselves to a more supervisory role and the daily business of the organisation will be carried out by an executive staff member who can receive a reasonable salary. In the other Member States which allow adequate remuneration, the board members may also work as managing directors, doing a full-time job in exchange for an adequate remuneration.

With regard to the comparability test, a recent decision in Spain concerning the Riksbankens Jubileumsfond should be mentioned where the court held that the fact that remuneration of the foundation's board members was permitted by Swedish law did not preclude the comparability of the Swedish foundation to a Spanish foundation.

7.4.3 Administration costs

In most Member States, the legislation does not explicitly specify that a tax-privileged PBO's administration costs are subject to any fixed limitation. In the majority of these countries, however, there is in practice some form of limitation in place: examples are Austria, Cyprus, Estonia, and the UK.

In a handful of Member States a specific limit on the administration costs of a tax-privileged public-benefit foundation is set: Belgium (maximum of 20% of resources), Denmark (must be approved by the authorities if exceeding 12% of annual gross income), Latvia (maximum of 25% of general donations is stated in civil law), Lithuania (may not exceed 20% of fund's annual income, including income from endowment), and Spain (should not exceed the highest amount of either 5% of a foundation's equity or 20% of its net income). In the Czech Republic there is also a specified limitation, but with some choice about how the limitation is expressed: the statutes must announce that administration costs will not exceed a specified percentage of revenues from assets/endowment; or a specified percentage of the disbursements for the year; or a percentage of the assets/equity as announced at end of the year.

Even in Member States where no explicit restrictions exist it is likely that there will be implicit restrictions. An interpretation of the requirement to promote the public-benefit purpose "exclusively" would prohibit unreasonable or excessive administration costs.

7.4.4 Support of the "public at large" and not a limited section of the population

Most Member States prohibit a tax-privileged PBO from supporting only a certain limited section of the population e.g. members of a family.

In 13 Member States a tax-privileged PBO must explicitly serve "the public at large": Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Poland, Portugal, Spain, and the UK.

In other Member States this is not explicitly required but, the public nature of the benefit is determined on the basis of other criteria, e.g. in Greece, the section of the public that is benefited must be chosen on the basis of "an objective criterion".

7.4.5 Activities abroad

In most Member States activities abroad do not put the tax-privileged status of a PBO at risk. Only a few Member States have rules which restrict such activities.

One of the very rare examples of an explicit rule can be found in Germany. While the judgement in the Stauffer-case was pending there was a tendency among the tax authorities of the German Länder to avoid granting tax privileges for donations to foreign countries, which are not developing countries. Later the law was amended to require that the activities "either have to support individuals which have their permanent residence in Germany or the activities could benefit Germany's reputation". The new wording of the law "could benefit" makes clear that it is necessary only that such a benefit is possible. Thus the tax authority is likely to interpret the provision in a way that only purposes or campaigns which are against the public order of Germany would fail the test. However, in such a case the purpose would in any case not be regarded as a public-benefit purpose. It seems therefore that the provision theoretically cannot limit cross-border giving. However it may create legal uncertainty and deter people from donating to foreign countries. Thus it seems that this kind of law provision is an example of symbolic legislation or "scarecrow legislation" (If the bird dares to land, the scarecrow is in fact not able to do anything).

A further example of a limitation of activities abroad on the basis of an interpretation of the law can be found in France: the French tax authorities, intending to comment on the new French tax law with a circulaire, had tried to add as an additional requirement the fact that the EU- or EEA-based PBO should pursue the main part (around 60%) of its activities in the French territory. Foundations and associations contested this position and the French government decided in July 2013 to withdraw the tax administration comments/circulaire and to consult foundations and associations in the drafting of a new comment. Although the details are still in discussion, the condition relating to the carrying out of the main part of the activities in the French territory should not be maintained in the comment to be drafted. If such a limitation were to become law, it seems questionable whether it would be consistent with the ECJ judgement in the case Commission vs. Austria .

7.4.6 Duty of timely disbursement

In most of the Member States, there is no explicit requirement for tax-privileged public-benefit foundations to spend their income or a certain portion of their income on their public-benefit purposes within a certain period of time.

However, several Member States give a specification as to the amount of income and/or the time within which it must be spent in order for tax-privileged status to be retained. Examples are: Germany (income should be used before the end of the following year - this changed recently), Portugal (50% of income to be spent within 4 years of receipt), Spain (70% of net income to be spent within 4 years), and Sweden (required to use approximately 80% of income within a period of five years).

Some countries' legislations require more generally that income (or most of the income) be used towards the public-benefit purpose within a "reasonable" period of time: Finland (most of the annual income, not including capital gains, within a reasonable time frame) and the UK (income should be spent within a 'reasonable' period – in practice generally accepted to be around 3 years). In Ireland while there is no explicit requirement for a tax-privileged PBO to spend its income within any specified period, to accumulate capital for more than 2 years, the PBO must first obtain permission from the tax authority.

7.5 Generation of funds

In almost all Member States, PBOs seem to be generally permitted to engage at least in some form of economic activity as regards the organisation law. One exception is, for example, Slovakia where the foundation law stipulates that economic activities of foundations are generally not permitted, with only limited exceptions provided for in the legislation.

As regards tax law it should be noted that, that most Member States seem to distinguish between (purpose-) related economic activities, promoting directly the public-benefit purpose (e.g. running a museum in order to promote the purpose of arts and culture) and (purpose-)unrelated economic activities which only generate money to be spent for the public-benefit purpose (e.g. running a noodle factory). Of course there exist cases, where it is arguable, whether the activity should be regarded as related or unrelated economic activity (e.g. running a museum shop or a museum cafeteria).

Another question is the tax treatment of income generated by such an activity at the Member State level. The tax treatment of economic activity varies. Some Member States tax all business income in full. Most countries tax income from unrelated economic activity - in some cases if it exceeds a certain ceiling (in Germany income from unrelated economic activity below €35,000 is not taxed) and exempt economic activity related to the public-benefit purpose (in some cases only up to a certain ceiling).

However, in some Member States the performance of major unrelated economic activities may put the tax-privileged status at risk.

7.6 Further requirements

Additional elements can be found in some Member States tax laws and foreign EU-based PBOs and their donors should take them into account when wanting to meet the criteria for the comparability test in those countries.

C. Outlook and conclusions

8. Outlook

From a policy point of view, the main hurdle to solving existing barriers is a need among Member States a need to build more trust in each other's systems by being assured that a certain level of control is guaranteed. Examples of attempts to develop simpler practice can be found in some Member States (e.g. model certificate in Luxembourg) and it should be in the interests of all Member States as well as the sector (and society as a whole) to continue to try to simplify and ease the process of the comparability test.

From a legal point of view, different legal options to facilitate the determination of comparability and to establish greater legal certainty for all parties involved in the application of the comparability tests, do however exist. Five possible approaches are reviewed below.

8.1 Implementation by multilateral or bilateral treaties

The Member States could develop uniform requirements for the status of a tax-privileged PBO through a multilateral treaty of all Member States. However, such an approach shows no real prospect of getting the unanimous approval of Member States that would be necessary for such an undertaking. The prospects for a move by national governments to harmonise their foundation tax law, to conclude a special multilateral tax treaty, or to make more use of double taxation treaties granting eachother's PBOs automatic recognition for tax-privileged status, is not much better.

8.2 Automatic comparability of foreign PBOs in national tax laws

Member States could of course be encouraged to grant automatic exemption of any foreign EU-based organisation recognised as having tax exempt status for tax purposes in its country of origin. Seeing that Member States were not able to agree on such an automatic recognition for the European Foundation Statute[26] regulation, it is unlikely that they would at this stage be willing to grant automatic exemption to all other foreign EU-based tax-exempt PBOs since they do not appear to trust/know each other's' tax law requirements and efficiency of fiscal controls.

8.3. Strictest common denominator of the national tax laws

According to the non-discrimination principle of the European Court of Justice, it is unlawful for a Member State to deny tax-privileged status to a foreign EU-based PBO if that PBO meets all that state's requirements for a national PBO to hold tax-privileged public-benefit status, notwithstanding the location of its seat.

Thus theoretically a foreign EU-based PBO would be automatically tax-privileged in all Member States, if it statutes/bylaws were to combine all requirements of the tax laws of the Member States (de facto strictest common denominator), i.e., permitting only such public-benefit purposes as are allowed and would confer tax-privileged status in all Member States, prohibiting remuneration for the board of directors (like the Spanish tax law), requiring a duty of timely disbursement and several formal statements in the foundation's statute (like the German tax law), etc. Drafting model statutes could also be considered in this context, which would include the strictest common denominator of tax laws. PBOs could use the "model statutes" in order to be able to get the additional advantage of almost certainly being accepted as holding tax-privileged public-benefit status in all Member States.

There are two main objections against such an approach:

At first sight, such a tax-privileged status via model statutes may seem unrealistic, because it would be over-regulated and too 'bureaucratic.' However, according to the current information, the fundamental tax law requirements seem to be comparatively similar in most Member States. Model statutes may therefore be a viable means to facilitate the possibility for an organisation to hold tax-privileged public-benefit status in all Member States.

Nonetheless it is a big challenge to develop model statutes due to the legal uncertainty of the current tax legislation of the Member States. The guidance or least the assistance of the tax authorities would be needed in order to assure that the model statutes would really be accepted by the tax authorities of the relevant Member State. In case of amendments to the relevant law or its interpretation, model statutes would also need to be amended.

8.4 Common principles rather than detailed rules for equivalency determination

Another approach could be to encourage Member States fiscal authorities to focus their checks on a set of common principles rather than detailed rules. This need not prevent a state from imposing a detailed rule in a domestic context but it would require the state to make a broader based assessment for comparability purposes. For example, as the recent Spanish case shows (see Annex) it seems that a rule regulating the remuneration of board members need not constitute a key principle in its own right but can be considered as an aspect of a broader principle that PBOs should have a non-distribution constraint and avoid providing excessive private benefit. It should be sufficient for comparability purposes that each state restricts the ability of a PBO to provide private-benefit except where it is incidental to the provision of public benefit.

Member States had in the past (2007-2009) already tried to work towards better coordination via soft law approaches. However, at the time no agreement was found at the Council level. Times may however have changed and there may be more appetite and trust among Member States to further review the matter now. The idea could be to agree on core principles that tax authorities would check in cross-border cases.

8.5 Facilitation of the procedural law

A significant easing of the process of equivalency determination could be achieved through the simplification of the way in which the comparability tests are carried out.

Clear, simple and easy to understand procedures for how the comparability of a foreign based PBO is checked would be essential and the use of model certificates (as used in Luxembourg) would be an innovative approach to consider in this regard.

An alternative to the comparability test would be to limit the check that the specific donations received by the foreign PBO will be used in accordance with the national law of the Member State from which the tax incentive is sought. Obviously, this would ease the burden of proof for organisations receiving punctual donations from foreign donors.

(26) Proposal for a Council Regulation on the Statute for a European Foundation (FE) COM/2012/035

9. Conclusions

The comparative legal analysis shows that the jurisprudence of the European Court of Justice requiring a non-discrimination of PBOs of other Member States has led to the comparability test being the method used by Member States to determine whether or not a foreign-based PBO is eligible for tax-privileged status. The comparability test is, when compared with the legal situation that preceded it, a significant step forward: where as in the past, foreign EU-based PBOs were simply excluded from the eligibility to have their public-benefit status recognised for tax purposes by other Member States, now the possibility is open. But this study does show, that the way in which the non-discrimination principle is currently implemented is not an entirely satisfactory solution.

Concluding remarks by EFC/TGE

We see that the foundation sector and philanthropy more broadly have become increasingly international but that the fiscal environment is still far from being satisfactory. The landmark judgements of the European Court of Justice force Member States not to discriminate foreign EU-based public benefit organisations and their donors. However, this study reveals that barriers continue to exist. Several Member States have not yet removed discrimination and even where they have, problems remain. PBOs and their donors encounter a lack of legal clarity, long and complicated procedures, and significant additional translation and consultancy costs to show their comparable status. Within the EU no formal or uniform approach to the comparability test is foreseen: Usually it is the competent tax authority who decides on a case by case basis whether a foreign PBO is considered comparable to a domestic one.

The benchmark for the comparability test is generally the national tax law of the Member State from which the tax incentives are sought and the crucial question is always in what level of detail this benchmark has to be fulfilled. We consider that "comparable" in the context of cross-border philanthropy should not mean "identical" and imply fulfilment of all precise details of respective national tax laws but rather that the organisations have to be in essence comparable. The EFC and TGE together with other partners are committed to working towards further developing and implementing best practices and proposals made in this study to further ease tax effective cross-border philanthropy. Apart from incremental improvements that should be encouraged at national level, the most feasible option appears to be to try to put the focus of Member States' fiscal authorities on a set of core principles for the comparability test. There are already interesting practices developed, and the Luxembourg model certificate certainly being one of them.

The main problem in finally resolving the landlock is still the issue of control and trust among Member States. We can however be hopeful that with the non-discrimination principle having now been in force for several years, Member States will be more willing to address the issue.

This study may provide the ground for a roadmap for the years to come.

ANNEX: How does comparability determination work in practice?

The Wellcome Trust

By Paul Bater

Wellcome Trust is an English charitable trust established to advance medical research and education in the history of medicine. Around 50% of its endowment, which each year generates investment income in the region of £230 million and funds charitable expenditure of around £800 million, is invested in a global portfolio of listed shares.

Wellcome is generally exempt from UK tax on its investment returns. But when Wellcome makes investments in another country, that country usually exercises its right to tax the income from the investments. However, if the country is an EU or an EEA member state and it taxes a foreign investor at a higher rate than it applies to a comparable domestic investor that difference in treatment is likely to constitute an unjustified restriction of the free movement of capital protected by EU/ EEA law.

It was the Stauffer case that alerted Wellcome to the possibility of filing tax reclaims on this basis. Wellcome has filed refund claims in nine EU states and Norway going back as far as local time limits allow. Four countries (Austria, Netherlands, Sweden and Norway) have settled our claims in full. The other five have either totally or partially rejected our claims or have not yet addressed the merits of the claim.

To undertake these reclaims procedures, it is necessary to appoint a local adviser with suitable expertise in each country where we filed a claim. It may also be necessary for a charity to liaise closely with its custodian to obtain the documents required to support the claim. In our experience no two countries have the same procedure. The supporting documents that are required may include certificates of tax residence, withholding tax vouchers, audited accounts, governing documents (constitution, statutes, articles, etc.), evidence of receipt of income and its application to public benefit activities - with translation and notarisation where appropriate.

States that impose withholding tax in breach of EU law will not voluntarily refund the tax to foreign charities and the European Commission cannot require them to do so. It is up to each foundation to prove its case under the relevant national law procedure. Wellcome only makes claims where it is cost effective to do so, so the amount of tax involved in each country has to be large enough to make the exercise worthwhile. The total costs to date incurred by Wellcome for filing claims, comparability analysis, claim validation, appeals and litigation costs in the ten countries concerned total around £900,000. This compares favourably with total refunds to date of over €8 million from the four states that have settled our claims in full and the prospect of further refunds from the other countries that continue to dispute our claims.

Riksbankens Jubileumsfond

By Göran Blomqvist and Anna Mogård

Stiftelsen Riksbankens Jubileumsfond (RJ) is an independent foundation that promotes and supports academic research related to Sweden. The foundation funds in Sweden as well as in other countries. RJ can invest in all types of financial instruments and structures that are on the market, and investments are made in Sweden and abroad. We buy and sell shares on the stock market in Stockholm as well as in a number of other cities, a substantial part of them inside the EU. Around 28% of our assets are in international shares.

The national tax authorities of several EU countries have withheld tax levied on the dividends from these investments. With the support of external tax advisors, we have had some recent successes in reclaiming foreign tax from the UK and Spain; claims from Italy and Belgium have been rejected; and a case in Germany is pending.

The Spanish case in particular was something of a breakthrough. Initially launched in May 2009, we received a final and favourable judgement in November 2013, after appeal proceedings in the administrative and then the high court. The key issue in this case was proving the comparability of RJ with a Spanish public-benefit foundation. RJ's board members are remunerated. This is regulated by the law governing the remuneration of the Swedish Parliament, which ensures that such remuneration by the Riksbankens foundation is limited, transparent, and audited. However, board remuneration is prohibited for Spanish foundations. Our case succeeded in demonstrating that comparable does not mean identical - differences in the national legal contexts in which foundations are established do not rule out that they can be found to be in essence comparable.

The outcome of this case is that a refund of approximately €237,000 plus €85,000 in interest for the years 2005-2008 was approved. The cost of the process for RJ was around €50,000. In total across all its claim in various countries, RJ has received refunds amounting to some €2.4 million, with around half a million being spent on tax advisors between 2006 –2013.

One way to save costs in the long term is to obtain public-benefit tax exempt status in other countries. We have obtained such status in Norway, Denmark, Finland, Ireland, Netherlands and USA.

UK charitable trust versus Belgian public-benefit foundation

By Francis Houben, Legal & Tax Management SPRL

The non-discrimination principle on cross border gifts and legacies has fully been implemented in Belgian law. Nonetheless, problems remain concerning the way in which the tax administration should proceed concretely when it has to examine a cross border legacy. An interesting example to consider is the Great Ormond Street Hospital case. This case concerns a resident of Brussels Region who made a legacy to a UK charitable trust in 1999. In its decision of 9 September 2009, the Court of Appeal of Brussels found that where a UK charitable trust is in a situation that can be compared with the situation of the legal entities mentioned in the Belgian inheritance tax code the reduced rate of inheritance tax should be applied. This is despite that fact that Belgian inheritance tax law focuses almost exclusively on the legal form of the beneficiary and the UK charitable trust does not have a legal personality. The key element of this decision is the fact that the registration of the charitable trust by the Charity Commission and additional specific characteristics "confer to this trust a legal identity which could be compared with the legal personality in Belgium". This decision is remarkable, since it does not limit itself to a strict and literal interpretation of the law.

Since the facts of the Great Ormond Street Hospital case took place, the tax regime in Belgium has undergone changes. Reduced tax rates now vary according to legal form. In the Brussels Region public-benefit foundations benefit from a much lower tax rate than associations or private foundations (6.6% versus 25%). A recent case has raised the question as to which rate should apply in cross-border cases – can it be shown that a UK charitable trust should be taxed at the rate of a public-benefit foundation? A number of elements suggest that the charitable trust is closely comparable with a public-benefit foundation: Both have only one governing body, can be constituted unilaterally through a will, imply the idea of endowment of funds and sustainability or permanency and the pursuance of a public-benefit purpose and support for the general public. Charitable trusts as well as the Belgian public-benefit foundations need to receive a formal approval on their public-benefit status - for charitable trusts this approval is given by the Charity Commission, while the "Fondation d'utilité publique" should follow a comparable procedure by submitting its statutes to the approval of the Ministry of Justice.

To verify comparability, the Belgian tax authorities sought to obtain a document of the UK authorities stating that the English entity can be considered as public-benefit foundation. Such a document was impossible to obtain, since the word "foundation" does not exist in the English legislation. However, as an alternative solution a declaration of the UK tax authority HMRC confirming their acceptance of the trust as charitable according to the recognition by the Charity Commission, attaching a copy of a brochure of the Charity Commission describing the criteria that should be met in the UK on the "public-benefit purpose", was provided. The case, which was still pending when the EFC workshop was organised, was finally solved two months later: the tax authorities accepted the abovementioned point of view and applied the reduced rate for public benefit foundations (6.6%). This is excellent news for UK charitable trusts receiving expecting legacies from Belgian donors.

Notes

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