

INFORMATION NOTE – September 2020

What could be done to simplify cross-border philanthropy taxation for donors and philanthropic investors in Europe?

By Hanna Surmatz, European Foundation Centre (EFC), Enabling Environment Manager; on behalf of the Donors and Foundations Networks in Europe (DAFNE), EFC and Transnational Giving Europe (TGE)

What's at stake?

Cross-border philanthropy in Europe is growing, but the fiscal and administrative environment for cross-border philanthropy, even within the European Union, is still far from satisfactory.

While the European Court of Justice (ECJ) recognised the application of the free movement of capital to philanthropic funds and continues to interpret the fundamental freedoms guaranteed under the European treaties along with ensuring that the principle of non-discrimination applies to donors and public benefit organisations in the EU, this does not yet work in practice, and we would like to explore with EU and national policy makers what could be done to improve the situation.

A series of ECJ cases examined the tax treatment of public benefit entities and their donors, including: Stauffer: C-386/04 Centro di Musicologia Walter Stauffer/Finanzamt München für Körperschaften [2006] ECR I-8203; Hein-Persche: C-318/07 Hein Persche/Finanzamt Lüdenscheid [2009] ECR I-359 and Missionswerk: C-25/10 Missionswerk Werner Heukelbach eV/Belgien [2011] 2 C.M.L.R. 35. The impact of the ECJ cases on national level regulation and practices was analysed in the 2014 EFC/TGE commissioned report on taxation of cross-border philanthropy in Europe: <http://efc.issuelab.org/resource/taxation-of-cross-border-philanthropy-in-europe-after-persche-and-stauffer-from-landlock-to-free-movement.html>
New legal mapping in 2020 provided up to date information.

Member States are hence under an obligation not to discriminate between comparable foreign EU-based philanthropic organisations and their donors and domestic organisations and their donors, and a series of EU infringement procedures have helped “encourage” Member States alignment with the Treaty of the Functioning of the EU. However, several Member States are still discriminating against foreign based comparable organisations and their donors, and those that do not discriminate have nonetheless adopted their own approaches to comparability. Administrative burdens continue to hamper the work of both larger endowed foundations investing their assets cross-border, as well as donors giving cross-border. For cross-border philanthropy and investments, the single market freedom of capital does not yet work.

What could the EU do?

As a sector, we have developed some recommendations as to what the EU could do to improve the situation. Please see the recent 2017 EFC/TGE study suggesting some solutions:

<http://efc.issuelab.org/resource/boosting-cross-border-philanthropy-in-europe-towards-a-tax-effective-environment.html>

- Could the EU consider proposing its own legislation, knowing that the field of direct taxation is competence of the Member States?
- Could the EU consider entering again the field of tax coordination / recommend guidance to the national level / soft-law approaches / code of conduct with regard to the comparability test?
- Could the EU call on Member States to provide for tax incentives in cross-border scenarios and for introducing less complex processes?
- Could the EU support sector-driven initiatives like www.transnationalgiving.eu that try to enable cross-border giving, as well as the creation of a digital European cross-border giving web platform?

Two scenarios – Giving and investing across borders

What do we mean when we talk about “cross-border philanthropy”? Not only are we talking about giving across borders, but also about philanthropic organisations being able to invest their assets in other countries without penalty.

1. CROSS BORDER PHILANTHROPIC GIVING

The level of international philanthropic giving has grown, with more European citizens willing to make cross-border gifts and donations to support international causes and foreign charities. But these donors also find it hard to claim the tax incentives they are entitled to.

As regards cross-border giving, the key barrier is the ability of the foreign charity to meet the **comparability test**. This is a problem that is mainly faced by philanthropic donors, be they individuals or corporate donors.

Just ten years ago, the general rule to be found across the Member States was that tax incentives were landlocked, that is they were restricted to domestic public-benefit organisations (PBOs) and donors giving to domestic PBOs.

Today – *in principle* – this situation has been largely overturned by the aforementioned important decisions of the European Court of Justice (e.g. Stauffer, Persche, Missionswerk, Laboratoires Fournier, and European Commission vs. Austria). These decisions developed the general non-discrimination principle, implying that PBOs and their donors acting across borders within the EU are entitled to the same tax incentives as would apply in a wholly domestic scenario, where a foreign EU-based PBO can be shown to be comparable to a domestic one.

However – *in practice* – we have found that barriers still exist. The 2014 joint EFC-TGE study, [“Taxation of cross-border philanthropy in Europe after Persche and Stauffer - From landlock to free movement?”](#), as well as 2016 and 2020 follow-up research, outlines how several Member States have not yet removed this discrimination; and even where they have, practical or legal problems persist. Across the EU, no formal or uniform approach exists. Member States have developed different approaches to check if a foreign EU-based organisation is comparable to a domestic one (however, in the majority of countries no rules or even procedural guidelines for the tax authorities appear to exist). The criteria/reference point for the “comparability test” is generally the national tax law of the Member State from which the tax incentives are sought, but the crucial question is how the fulfilment of this criteria is checked.

Whilst legislation has been amended to accommodate the Persche ruling in most countries, this appears to have been done to the letter of the law, rather than the spirit, in several EU countries.

Example 1 – France: In order to claim tax credits in France, the recipient organisation must have either gained accreditation by French tax authorities or the donor must be able to prove its equivalency.

Example 2 - In Germany, the spirit of the Persche ruling has been sidelined in favour of insular national interest: in order to deduct charitable donations to EU or EEA-based organisations that have no activities in Germany, the activities “either have to support individuals which have their permanent residence in Germany or the activities could benefit Germany’s reputation.”

2. ASSET ADMINISTRATION CASE

Institutional philanthropy’s asset administration clearly does not stop at national borders. A small data survey of European EFC members (all with total assets of at least €500 million) in 2016 revealed that claiming back foreign withholding tax is often lengthy and costly – in the majority of cases, foundations are using some form of external advice and have been struggling with individual cases for several years as illustrated by a number of examples (taken from 2017 TGE study <http://efc.issuelab.org/resource/boosting-cross-border-philanthropy-in-europe-towards-a-tax-effective-environment.html>).

Example 1 –The UK’s Wellcome Trust has had some of its dividend withholding tax refund claims rejected by the same Federal Tax Office in Bonn: “The main reason given for the rejection of the 2008 claims was that the claims were not filed on the correct form. We submitted an objection in 2013 but have heard nothing further to date. In November 2015 we received a further response from the authority concerning claims for the years 2004-2006, arguing that Wellcome Trust would not be subject to unconditional taxation in the UK on the basis that it is tax exempt. Our advisers consider that not only the denial of the withholding tax refund claims is discriminatory, but the procedure adopted by the German tax authorities is also discriminatory”. The Wellcome Trust after awaiting 10 years since they submitted the first claim has now been informed that all tax refund claims have been formally rejected. The Trust has now had to start court proceedings in Germany. They also have court proceedings pending in Italy, Portugal and Spain.

Example 2 – The Swedish Riksbankens Jubileumsfond also reported: “We have finally given up our claims in Germany for the years 2003-2005. First there has been confusion as to whether the federal or regional tax authority level was responsible. We then handed in our application for refund at the federal level in 2007 and nine years [!] later the authority has sent us a letter asking for complementary information. In Spain, however, our case was dragging for a long time but turned out to be successful in the end. But it took five years from the day we handed in our claim to the final judgements.”

The **tax treatment of philanthropic investments**, and in particular the discriminatory taxation of dividends and interest paid to foreign foundations and other foreign charities,

raises on the one hand the same concerns about the delays and other difficulties encountered by foreign portfolio investors in general when making similar investments within the EU. In this respect, we support the recommendations in the 2017 EC Code of Conduct on Withholding Tax.

In this context, we would like to stress that we believe that the withholding tax situation has actually deteriorated since the Commission's recommendations on withholding tax relief procedures in at least three respects over the past years:

- (i) several Member States have increased their domestic rate of withholding tax on dividends and/or interest;
- (ii) many Member States have introduced more extensive documentation requirements;
- (iii) there has been a general increase in the time it takes for Member States to process and approve withholding tax refund claims.

It is also worth noting that the refund claim processes suffer the same problems if the investor uses the **services of a reputable custodian**. Several EFC members can supply evidence of own experience if required. It needs to be noted that these features are not applicable only to philanthropic organisations; they affect all kinds of portfolio investors.

The December 2017 EU withholding tax code of conduct includes some very useful elements, which are key also for philanthropic investors, in particular the call for a *reliable and effective timeframe for tax authorities for the granting of withholding tax relief* and the ask for a *single point of contact in Member State tax administrations to deal with questions from investors on withholding tax*. The new [Code of Conduct](#) offers solutions for different types of investors who, as a result of how withholding taxes are applied, end up paying taxes twice on the income they receive from cross-border investments.

Philanthropic investors/endowments, however, face additional difficulties where their refund claims are based on EU law (rather than a bilateral tax treaty) because they then have to show that they are **COMPARABLE to a domestic charity** in order for the discrimination to be unjustified. Moreover, some Member States have not adapted their internal systems to provide an appropriate procedure for dealing with EU law based claims. Thus, for example, a foreign charity may be asked to complete the same form that is used for a tax treaty claim, even if it seeks information that is irrelevant to the merits of an EU law based claim.

These comparability question issues are not unique to philanthropic investors since foreign pension funds and collective investment funds face similar issues of comparability. We hence hope that the Commission appreciates that this is a widespread problem and agree that there is **a good case for its 2017 code of conduct approach to withholding tax procedures to be extended and adapted to EU law-based claims of withholding tax discrimination, with the aim to simplify and streamline the comparability test for such EU law-based claims.**

Streamlining the comparability test

What can be done to enhance and clarify the fiscal framework for tax effective cross-border philanthropy in Europe? Firstly, what likely will not work are treaties and automatic exemptions, for a variety of reasons.

However, in addition to wider and clearer information sharing, a simplification and streamlining of processes for the comparability test should be considered. The existing practice for the comparability test in some countries, such as Luxembourg and the Netherlands, is clear and straightforward, and could potentially serve as a blueprint for other countries with the aim of administering tax effective cross-border philanthropic actions faster and more cost-effectively.

Should there be the appetite among Member States, we recommend shifting how the notion of comparability is tested and taking a more functional approach. Having in mind the Netherlands and Luxembourg scenarios for cross-border donations, as well as recent court cases in different European countries, a potential approach could be for Member States to base comparability on a set of common principles around a public-benefit concept, rather than requiring comparability in all details. Recent EFC/TGE tax law mappings have revealed that the tax law requirements for tax exemptions of PBOs and their donors differ in the details but appear to be based on broadly the same principles. The 2017 report suggests that the following core public-benefit requirements could potentially form the backbone of a national comparability test:

1. Tax-exempt status in the home country
2. Pursuance of a public-benefit purpose
3. Exclusive usage of assets for the public-benefit purpose

Moving forward

It is unacceptable that, more than 10 years after the ECJ ruled that an Italian foundation is in principle comparable to a German foundation, the tax authorities of some Member States continue to maintain that no foreign charities are comparable to their domestic charities, and will continue to reject all claims of discrimination against foreign charities unless and until they are overruled by a superior court. We therefore call on EU and national policy makers to address the issue both for cross-border giving and cross-border investments by philanthropic investors.