

boosting cross-border philanthropy in europe

towards a tax-effective environment

cross-border philanthropy
operating environment
tax non-discrimination



EFC
POLICY AND
PROGRAMMES

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Setting the context



Cross-border philanthropy in Europe is growing. Philanthropic organisations are both investing more across national boundaries as part of their asset management strategy, and individual and corporate donors are increasing their philanthropic giving outside of their home countries.

But the fiscal environment for cross-border philanthropy, even within the European Union, is still far from satisfactory. Although the EU's non-discrimination

principle, which applies to all areas of activity from the economy to civil rights, clearly also must apply to philanthropy, some legislators and authorities still discriminate against comparable foreign EU-based philanthropic players. And processes to gain equal treatment - where they are indeed available - are burdensome, lengthy and costly.

This paper aims to highlight good and bad existing practice and to develop recommendations and ideas which could potentially lead to a simplification of the procedures for implementation of the non-discrimination principle. This is therefore not an academic paper but rather a practitioner-driven view on the matter, which will need to be further developed and discussed with fiscal experts and policymakers in the field of philanthropy taxation. The paper is hence a recommended read for legislators and

This paper aims to develop recommendations and ideas which could potentially ease tax-effective cross-border philanthropy.

authorities, as well as for philanthropists and the wider non-profit sector.

The analysis and recommendations contained in this paper follow on from a study released in 2014 by the European Foundation Centre (EFC) and the Transnational Giving Europe network (TGE), “Taxation of cross-border philanthropy in Europe after Persche and Stauffer - From landlock to free movement?”. The study highlighted the varied and in some cases incomplete implementation by Member States of the non-discrimination principle on the tax treatment of philanthropy, as set out in a series of key rulings by the European Court of Justice (Persche, Stauffer, Missionswerk).

According to this principle Member States must award equal tax concessions to charities based in other Member States where the foreign charities can be shown to be “comparable” to domestic organisations holding charitable tax status. However, a number of countries have been slow in adapting national regulations, and even where laws have

been changed, practical barriers and legal uncertainties often remain.

Furthermore, demonstrating comparability and seeking tax incentives can be so complex that it hinders or even deters cross border-philanthropy. The bottom line is that in only a few European countries are cross-border giving and philanthropic investment today as effective as they should be according to European law.

With this follow-up paper, TGE and the EFC, guided by an expert advisory group, aim to analyse existing and potential practical and policy solutions to improve the way that the non-discrimination principle/comparability test is implemented in national tax laws and by fiscal authorities, using data provided by national experts from across the EU, and taking into account the findings of the 2014 study. Conclusions and proposals are also based on 28 country profiles, developed in 2017, which will provide donors and beneficiaries with practical tools to obtain legal security in the case of a cross-border philanthropic transaction within Europe. These profiles will be made available on the EFC and TGE websites.

What's at stake and for whom?

Philanthropic organisations experience unfair treatment when it comes to administering their assets across borders, and so do donors - be they individuals or corporates - when carrying out philanthropic giving beyond their national boundaries.

Barriers to fair treatment in asset administration across borders

Institutional philanthropy's asset administration clearly does not stop at national borders. Good investment policy nowadays implies diversification of assets, which includes among global investments also direct or indirect investments in European markets. Following the non-discrimination principle, when investing directly in EU markets, philanthropic organisations can expect to get tax exemptions that are applicable to local philanthropic organisations (if they are considered "comparable").

A small data survey in the spring of 2016 among 7 European EFC members (all with total assets of at least €500 million) revealed that it is still not easy to claim the tax incentives institutional philanthropy is entitled to. Real-life examples spanning investments in 16 countries were received, providing information on 67 individual claims. Of these claims, 35 have been successful, while 26 were still pending and 6 were unsuccessful.

Furthermore, the way to claim 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 the examples below.

In January 2017, the Dutch Fonds 1818 received a negative decision by the German Federal Tax Authority for a 2010 tax refund claim that they submitted for the tax paid on investments in Germany. Several tax experts consider this German tax practice to be against the EU non-discrimination principle. When asked if he was considering opposing this negative decision, the foundation's director, Boudewijn de Blij, said: "I am not sure I am willing to battle this: we stand to gain € 187.000, and we already spend half of that on tax lawyers. So if I have to spend another big bill, Fonds 1818 will end up break-even, if we succeed. At some point we have to cut our losses!"

"As a small foundation we are going to have to employ specialist interpretation services in order to submit our return."

- Joseph Rowntree Charitable Trust

This sounds familiar to Paul Bater from the UK's Wellcome Trust who 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 responded to these arguments, but to date we have not heard anything further. Our advisers consider that not only is the denial of the withholding tax refund claims discriminatory but the procedure adopted by the German tax authorities is also discriminatory."

Jackie Turpin of the Joseph Rowntree Charitable Trust from the UK is experiencing particular difficulties with claims in Austria and Norway: "The Austrian form is in German and has been difficult to translate in a way which is meaningful to us. As a result it appears as if we are being expected to provide supporting documentation which is overly detailed and will be difficult to obtain. We are also required to respond in German which means that, as a small foundation, we are going to have to employ specialist interpretation services in order to submit

our return. In the case of Norway, we had to go to great lengths to prove to the authorities that in the UK trusts do not have legal personality and therefore we can only state that our trustees are resident in the UK. The Norwegian authorities argued that other UK trusts had been able to prove residency so we should be able to although, eventually, they conceded the point."

Anna Mogård from 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."

A similar experience with slow tax authority turnaround was made by the German VolkswagenStiftung with their investments in Italy, reports Sibylle Mitscherling: "In 2017 a decision is still awaited for claims filed in the year 2007. We consider high costs, need to translate documents (especially for claims in France) and length of the process as key obstacles for going ahead with refund claims."

Paul Bater of the Wellcome Trust noted that: "Some EEA countries (e.g. Austria and Denmark) have recently increased the amount of information that they require before they will authorise payment of a tax treaty based reclaim. It is understood that these changes are motivated primarily by specific concerns about certain abusive reclaims, but there is a risk that these increased checks will also be imposed on taxpayers filing EU law based reclaims."

Challenges for philanthropic giving across borders

José González Galicia from Fondazione Vita Giving Europe Onlus (Italy) and current Chair of TGE confirms the situation not being any easier for donors giving across borders within the EU: "If you are an individual or corporate donor giving/donating/legating to a public-benefit organisation based in another EU Member State you find it also hard to claim the tax incentives in income tax you are entitled to. What do you have to do? Where do you find information if you get a tax incentive? Can you clarify the situation before making the donation/legacy? No one should end up having made a donation and only then finding out that your tax authority does not consider the recipient organisation not comparable. Or you may find out that the tax authority applies a high rate of gift and inheritance tax on your cross-border donation or legacy."

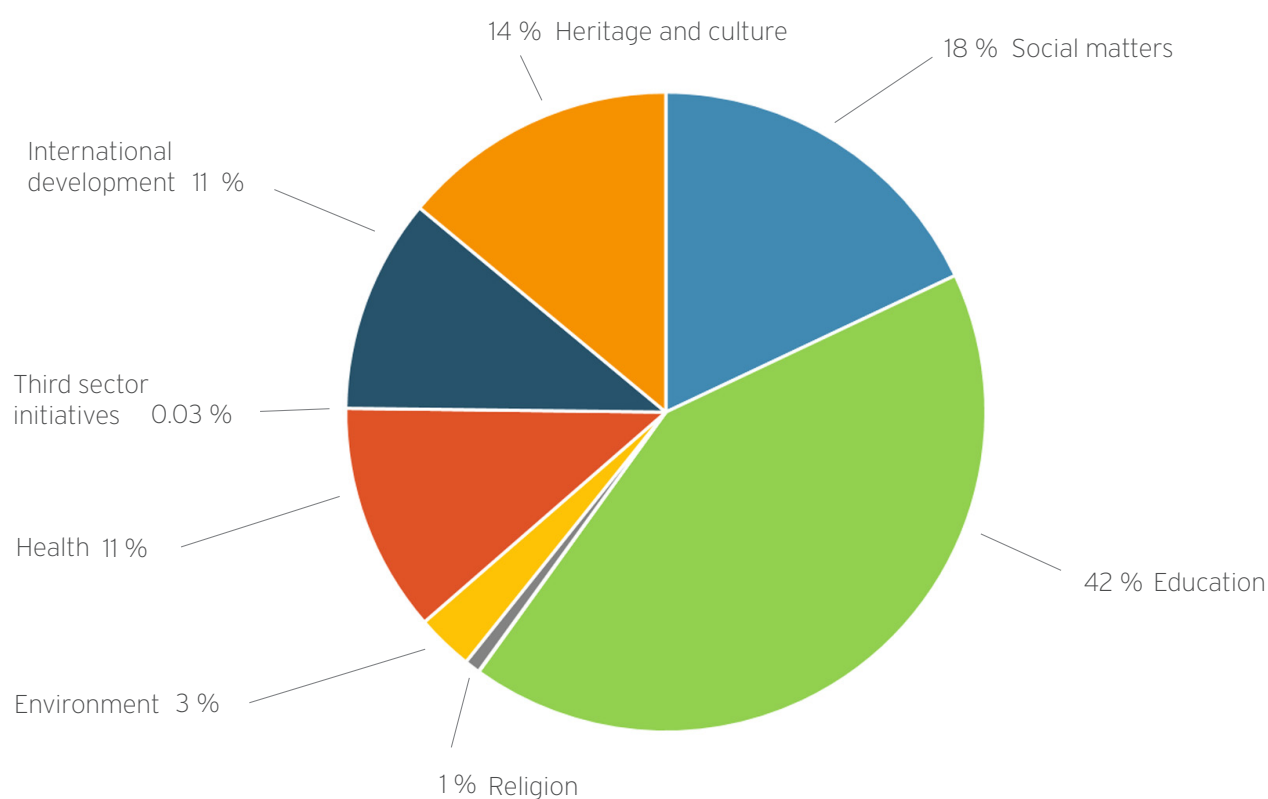
Francis Houben, Belgian Legal & Tax Management, had some recent experience with a Belgian legacy that included a donation to a UK charitable trust and stated that: "After some difficulties, mainly rooted in different concepts between common law and civil law, we finally succeeded in convincing the Belgian tax authorities to consider the UK charitable trust to be comparable to a Belgian public-benefit foundation with the consequence that an inheritance tax rate of 6.6% was applied (versus the regular tax rate of 25%)."

More European citizens are willing to make cross-border gifts and donations to help and support international causes and foreign charities. This is clearly noted by the private initiative Transnational Giving Europe (TGE) network, which provides an efficient solution for tax-effective cross-border cash donations as long as existing processes remain complex and burdensome.

The TGE network currently covers 19 countries and enables donors, both corporations and individuals, resident in one of the participating countries, to financially support non-profit organisations in other Member States, while benefiting directly from the tax advantages provided for in the legislation of their country of residence.

Non-profit organisations are increasingly using TGE as a solution for cross-border donations. In 2016 the network was approached by a record number of new European non-profit organisations wanting to use its services. And this trend is continuing in 2017.

\\ Distribution by sector of 2016 funds channelled through TGE



\\ TGE-channelled funds 2010-2016

Year	Total amount of gifts in €	Gifts/donors (individual and corporate)	Beneficiaries
2010	4,164,751	6625	174
2011	4,855,991	6547	215
2012	7,170,561	3693	241
2013	8,767,454	5001	259
2014	12,055,641	5398	333
2015	7,906,892	4487	314
2016	6,380,054	5084	334

From landlock to non-discrimination?

Just ten years ago, there were no real tax benefits for cross-border philanthropy in Europe: 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.

Foreign-based PBOs and donors giving across borders were consequently not able to obtain tax privileges. The TGE has provided a private solution to channel charitable funds in a tax-effective way across borders since 1999, but this was only ever intended as a temporary solution until the lifting of these barriers.



The Wellcome Trust's experience with foreign withholding tax claims

"The main challenge is that each country has its own system for processing claims. Whereas substantive issues relating to the withholding tax claim tend to be the same (e.g. providing comparability to a domestic foundation), the procedural issues in each country vary considerably (e.g. where, when and how to file the re-claim).

In Wellcome's experience the assistance of a local adviser is essential. Most of the countries in which Wellcome has filed

reclaims do not appear to have a standardised procedure for dealing with EU law based reclaims. It is, therefore, difficult to predict exactly what information will be required to support each claim, and the taxpayer may well be asked to supply detailed documentation within quite a short timescale. Most countries are likely to request copies of the claimant's governing instrument, its financial accounts and a certificate of residence for the year of the claim; some will also require a statement

confirming beneficial ownership of the income and whether the claimant has a permanent establishment in the country concerned. Most documents will have to be translated into the local language; for this purpose it is important to ensure that the translator understands the legal meaning of the key concepts involved in the reclaim."

- Paul Bater, The Wellcome Trust

ECJ rules that comparable foreign-based PBOs must not be discriminated against

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*¹, *Persche*², *Missionswerk*³, *Laboratoires Fournier*⁴, and *European Commission vs. Austria*⁵), developed a general non-discrimination principle as regards tax law in the area of public-benefit activities⁶ and has set the following rule for Member States' national tax laws: The "non-discrimination principle" provides that public-benefit organisations

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 public-benefit organisation can be shown to be comparable to a domestic one.

The challenges of moving from ECJ ruling to practice

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 2015/2016 follow-up research undertaken by the EFC in collaboration with national tax law experts, revealed that barriers continue to exist. Several Member States have not yet removed this discrimination, and even where they have, practical or legal problems persist.

The European Commission has issued a series of infringement procedures against Member States that appear to not yet be in line with the non-discrimination principle and the free movement of capital when it comes to taxation of cross-border philanthropy within the

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

2 ECJ, 27.1.2009 - C-318/07 (*Hein Persche/Finanzamt Lüdenscheid 07*).

3 ECJ, 10.2.2011 - C-25/10 (*Missionswerk Werner Heukelbach eV/Belgien*).

4 4 ECJ, 10.3.2005 - C-39/04 (*Laboratoires Fournier*).

5 ECJ, 16.6.2011 - C-10/10 (*Commission/Austria*).

6 Apart from these cases the ECJ has also dealt with cases of dividend withholding tax such as *EC v Germany* ECJ, 20.10.2011 - C-284/09 (*Commission/Germany*), which are also of relevance to charity investors.



EU/EEA. By the end of 2013, the EC had conducted 28 infringement procedures (see also Heidenbauer, 2013, and others in Key Resources, p. 24) and since then it has continued to issue infringement procedures against Member States with discriminatory legislation. Recent cases include:

- Germany with discriminatory inheritance tax in Case No. 2012-2159
- Greece with discriminatory inheritance tax in Case No. 2012-2091
- Italy with discriminatory inheritance tax in Case Nos. 2012-2156 and 2012-2157
- Spain with tax treatment of public benefit organisations and their donors in Case No. 2013-4086

Lack of information

There is a serious lack of information in some EU Member States about the existence of procedures for claiming equal tax treatment. On a practical level, this lack of information presents a problem - individuals/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 claim these incentives exists or how they should apply for them in practice.

Countries' different approaches to comparability lead to legal uncertainty

Public-benefit organisations and their donors encounter a serious lack of legal clarity and significant additional translation and advisory costs to show their comparability status, whether they are giving, fundraising, investing or being

CAF sees continued bureaucratic burdens for donations within the EU

"Whilst legislation has been amended to accommodate the Persche ruling, this appears to have been done to the letter of the law rather than the spirit in several EU countries. Tax authorities have seemingly used bureaucratic complexity, burdensome administrative hurdles and a lack of transparent process to limit the availability of tax incentives for donations within the EU. 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.

The situation in the United Kingdom is even more Kafkaesque. After legislating to change the definition of an exempt charity, Her Majesty's revenue and Customs (HMRC) issued a communiqué stating how eligibility would be determined for claiming Gift Aid on donations to organisations in the EU. It explained that donations could only qualify to nations that could demonstrate a suitable set of powers in regards to exchanging and recovering information. The release goes on to explain that HMRC would implement a pre-approval process that would result in a list of approved recipient organisations across the EU.

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."

- Adam Pickering, Charities Aid Foundation (CAF), United Kingdom (excerpt from a 2016 CAF analysis on giving incentives, "Donation States: International comparison on the tax treatment of donations")

otherwise active across borders. And in some countries, when PBOs try to obtain legal clarity, administrations are either unresponsive or else prone to simply refusing nearly all applications.

Furthermore, across the EU no formal or uniform approach to the comparability test exists. It is within the competence of the Member States to further define when a foreign EU-based PBO is comparable, and Member States have developed different approaches to the comparability test. In only ten countries do formal procedures exist, while in the majority of countries no such rules or even procedural guidelines for the tax authorities appear to exist. Tax authorities in some countries reported that they lack experience and have no clear guidance on how to proceed. Decisions are mostly taken on a case-by-case basis and often require inordinate amounts of time.

Generally, Member States do not grant automatic comparability as soon as the foreign organisation provides evidence that it qualifies for tax exemption in its country

of origin. The criterion/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 criterion is checked. However some countries such as Luxembourg and the Netherlands appear to have some interesting models and procedures in place (see more in next section).

To sum up, tax effective cross-border philanthropy is still very difficult due to the various different, unclear or uncertain approaches for the comparability test. At the same time, a new trend is emerging. Donors, PBOs/institutional philanthropy and beneficiaries are sometimes just going ahead and claiming fiscal advantages, even without legal certainty, and are ready when challenged by tax authorities or local courts to push it further at higher national court level, or even at European level. In many cases claimants are not challenged by tax authorities as Member States are aware of the risk of these procedures, due to existing judgements.

Pathways to a solution -

Streamlining and information provision

What can be done to enhance and clarify the fiscal framework for tax-effective cross-border philanthropy - including both asset administration and philanthropic giving - in Europe? The process of checking comparability of foreign EU-based PBOs is complex, costly, often lengthy and burdensome for users as well as the authorities.

More information and easier and if possible streamlined procedures should be considered. While the benchmark for the comparability test will always be the national tax law, looking to existing practice for the comparability test in some countries, and taking a more functional approach to the public-benefit concept, could potentially serve in the formulation of a blueprint for other countries for administering tax effective cross-border philanthropic actions faster and more cost effectively.

What probably won't work
- Treaties and automatic exemptions

The Member States could develop uniform requirements for the status of a tax-privileged PBO through a multilateral treaty of all Member States or agree by a treaty to grant each other's PBOs automatic comparability. However, such an approach shows no real prospect for gaining the unanimous approval of Member States that would be necessary for such an undertaking. That said, there is certainly room to expand the existing practice in some tax treaties to provide for mutual recognition of tax-exempt public-benefit organisations and to potentially amend the respective OECD and/or UN model tax treaties.

Member States could of course be encouraged to grant automatic exemption of any foreign EU-based organisation recognised as having tax-exempt public-benefit status for tax purposes in its country of origin. However, such an approach assumes sufficient comparability of the national laws of the Member States concerned and trust in each other's systems of checks - regrettably, this is not an approach that Member States seem to be ready to take. It seems they prefer to apply their own tests to ascertain whether the foreign PBO is indeed comparable to a local one.

Case in point – Information and training are very much needed

“Belgium is a good example of the need for tax authorities to provide better information: The possibility to get a ruling for foreign charities which intend to raise funds in Belgium and which want to get some formal confirmation about the tax deductibility for their donors is not mentioned on the website of the Ministry of

Finance, and was only mentioned in an unofficial and unpublished document of the department in charge of the recognition of charities for income tax deduction of gifts. As a result, only two or three rulings have been issued on this subject and the staff has not much experience with it. In France we have also experienced the

phenomenon of inexperienced staff of the tax authorities, which lead to procedures that lasted for months and sometimes years.”

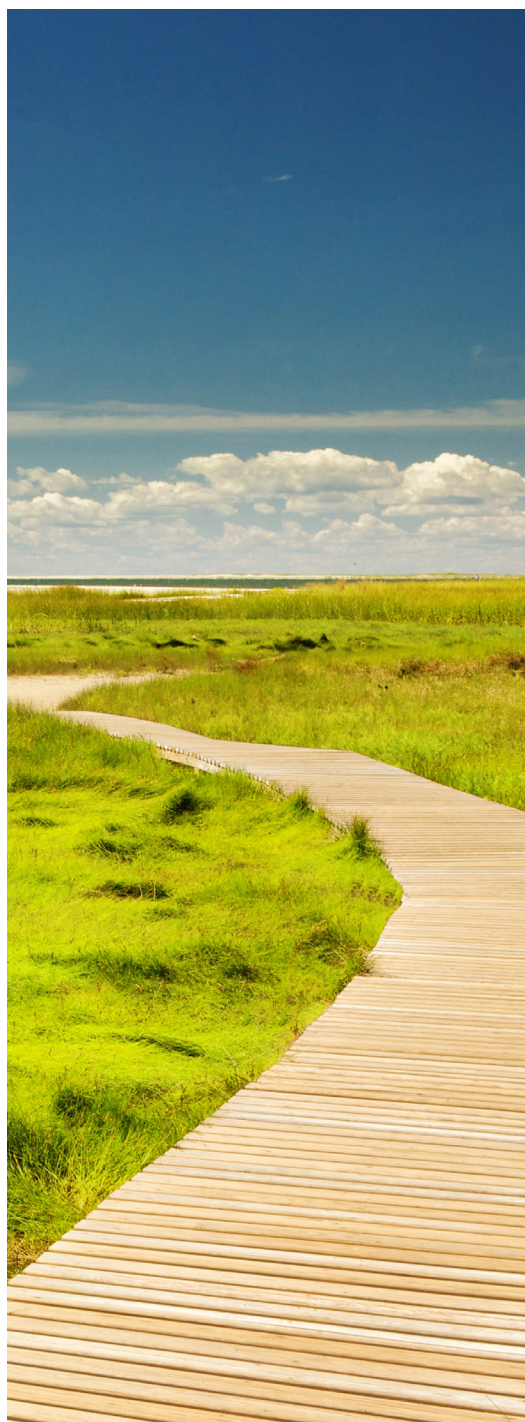
- Francis Houben, Legal & Tax Management SPRL, Belgium

The first step towards improvement - More public information and better training for tax authority staff

Even if we take into account that the procedures differ across the Member States, many experts and practitioners have reported a complete lack of publicly available information, as well as awareness on the part of tax authority staff, in some Member States about the existence of procedures to claim equal tax treatment. Hence it is clearly recommended that tax authorities should provide appropriate and easily understandable information to donors and PBOs about the existence of these procedures. Improved training of tax authority staff to be able to handle the cross-border philanthropy cases is also recommended.

Potential solutions - Streamlining processes through a comparability test

Existing practice for the comparability test in some countries 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.



Looking to Luxembourg as a model

Resident donors of Luxembourg can count themselves quite lucky when it comes to getting the same tax treatment of a cross-border gift as they would get if giving to a domestic organisation. To get the tax advantage when giving across borders, the Luxembourg resident donor must state in her tax declaration that the EU/EEA-based public-benefit organisation, which received the donation, fulfils Luxembourg tax law requirements. The Luxembourg tax authority considers in this context the fact that the EU/EEA-based organisation is recognised by its state of residence as a public-benefit body and as such is entitled to receive tax-deductible donations from residents of its state and is also exempt from income and wealth tax.

The only other requirement is that the recipient organisation must sign a model certificate, which has four requirements:

1. The organisation is a legal entity established as of (day/month/year) in accordance of the laws of (State XX).
2. The organisation directly and exclusively pursues one or more of the following nine purposes: Art, Education, Philanthropy, Worship/Religion, Science, Social issues, Sports, Tourism or Development cooperation.

3. According to the laws of the state of establishment, these selfless aims are recognised as being of general interest and fiscally favoured.
4. The organisation is exempt from income and wealth tax in its country of establishment for the year of the received donation and that such donations are fiscally deductible by donors residing in its country of establishment.

The responsible Luxembourg tax authority may ask for additional translated documents such as a receipt of the donation, the statutes of the foundation and the financial report of the recipient organisation, but it can also decide on the basis of the model certificate.

The Luxembourg approach appears to be a simple, straightforward way to process a claim since the recipient organisation only has to fill out the model certificate stating that it fulfils the four requirements listed above.

Learning from the Dutch scenario

Looking at the Dutch approach, a Dutch taxpayer enjoys the tax advantage when giving across borders if the foreign-based public-benefit organisation has been granted ANBI (Institution for the public good) status and registered as such with the Dutch tax



authority. Since it requires that the recipient ask for ANBI status and be registered as such, the approach is more complex than the Luxembourg approach. However, once the status is granted, the organisation can receive tax-deductible donations from different donors.

The list of accepted PBOs with ANBI status is kept by the Tax Authority Oost Brabant. While the list as such is not published, individual charities can be looked up here: http://www.belastingdienst.nl/rekenhulpen/giften/anbi_zoeken/. The tax authority informed us that there are currently about 300 foreign institutions registered as ANBI.

The application form lists the following requirements to determine the ANBI status:

1. What is the legal form? The institution is not a company with capital divided into shares, a cooperative, a mutual insurance society or another body that may issue participation certificates.
2. The not-for-profit part of the organisation must pursue a public-

benefit purpose. The tax authority also accepts purposes that are closely linked to the ones listed in the Dutch tax law. Furthermore, profit from commercial activities has to be spent for the public benefit.

3. The organisation's efforts must be focused on the public benefit exclusively (90%) (this must be stated in the application form and naturally in the statutes).
4. The institution and staff involved must comply with integrity requirements.
5. No one can decide on the assets as if they were his/her own.
6. Board members are not remunerated (an attendance fee and reimbursement of expenses are allowed).
7. The organisation must annually publish annual reports, activity reports, policy plan, composition of the board and other information related to the organisation.
8. In case of dissolution assets must go to a similar public-benefit purpose.

The process of checking comparability of foreign EU-based PBOs is complex, costly and often lengthy and burdensome for users and authorities.

In addition the following documents must be included:

- The statutes or another document that details the legal status of the body
- An overview of the name and address data of the board members
- An up-to-date policy plan
- If possible, a financial forecast
- If the institution has a similar status as the ANBI status in its own country, a declaration of the tax authorities about this and proof of registration at the national chamber of commerce are required
- A copy of the ID from the person who signs the application form
- A copy of the legal provisions from the home country/state

Once an entity has been registered as ANBI, it keeps this status. While the process appears quite burdensome, the Dutch scenario has the advantage that once the foreign entity is registered as an ANBI, the status is valid for all Dutch tax payers when they refer to it in their tax declaration and remains valid for as long as the organisation meets the ANBI requirements.

The Dutch scenario, asking for a true recognition, in practice has proven to be more efficient than countries that “only” ask for an agreement but that rarely recognise

any foreign public-benefit organisation (e.g. France and the UK). Also, the response time appears to be faster than in other countries.

Taking a functional approach - Broadening the notion of “comparability” to include core public-benefit principles

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’ fiscal authorities to make their equivalency determination based on a set of common principles around a public-benefit concept, rather than requiring comparability in all details.

For example, a rule regulating the remuneration of board members does not constitute a key principle in its own right but is an aspect of a broader principle that a public-benefit organisation should have a non-distribution constraint and avoid providing excessive private benefit. In a recent case a Swedish foundation obtained comparability status in Spain despite the fact that it remunerated its board members, which is not allowed according to Spanish tax law. A similar case involving board remuneration was observed by the French Conseil d’Etat (Case nos. 369819 and 369820 22 May 2015 Conseil d’État). It could

A German foundation's positive experience with the Dutch process, and others

"We consider the Dutch process for foreign withholding tax claims straightforward: Easy access to information and documents are available in multiple languages (Dutch, English and German), and claims can be easily filed by the depository bank (without having

to engage tax consultants). Full refund of foreign withholding tax was also easily granted by Finnish and Luxembourg authorities within a few months and with only a few documents necessary. Also for investments in Ireland the full refund is normally done

within a few months. And here also applications can easily be filed by the depository bank without tax consultants and only few documents necessary."

- Sibylle Mitscherling,
VolkswagenStiftung, Germany

be sufficient for comparability purposes that each state restricts the ability of a public-benefit organisation to provide private-benefit.

This kind of approach – where Member States make a broader, principle-based assessment of the public-benefit requirements for comparability purposes (as long as different national tax rules guarantee the same public-benefit concept) – could also take into account the OECD and European level concept of a PBO that qualifies as an active non-financial entity (NFE) for the purposes of the OECD's Common Reporting Standard (CRS).

(Excerpt from Section VIII, D9h of the OECD Common Reporting Standard):

An entity is an active NFE if it meets all of the following requirements:

1. It is established and operated in its Member State or other jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its Member State or other jurisdiction of residence and it is a professional organisation, business league, chamber of commerce, labour organisation, agricultural or horticultural organisation, civic league or an organisation operated exclusively for the promotion of social welfare.

2. It is exempt from income tax in its Member State or other jurisdiction of residence.
3. It has no shareholders or members who have a proprietary or beneficial interest in its income or assets.

Member States' fiscal authorities could make their equivalency determination based on a set of common principles around a public-benefit concept...

4. The applicable laws of the NFE's Member State or other jurisdiction of residence or the NFE's formation documents do not permit any income or assets of the NFE to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the NFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFE has purchased.
5. The applicable laws of the NFE's Member State or other jurisdiction of residence or the NFE's formation documents require that, upon the NFE's liquidation or dissolution, all of its assets be distributed to a Governmental Entity or other non-profit organisation, or escheat to the government of the NFE's Member State or other jurisdiction of residence or any political subdivision thereof.

In summary, this kind of "functional approach" by Member States to the complex issue of equivalency determination could ease the process for authorities and users.



A “functional approach” by Member States to the complex issue of equivalency determination could ease the process for authorities and users.

Recommended elements of a broad, national comparability test

Recent tax law mappings of EFC/TGE 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. So taking into account 1) the Dutch and the Luxembourg approaches; 2) the definitions of non-financial entity for the purposes of the OECD’s Common Reporting Standard; and 3) the 2015 EFC comparative mapping among the EFC’s network of national tax law experts, the following core public-benefit requirements could potentially form the backbone of a national comparability test:

1. Tax-exempt status in the home country

(the country of residence of the PBO), which implies regular checks/reporting. This will provide some reassurance that the PBO has been accepted as a public-benefit organisation according to national tax law in its country of seat.

2. Pursuance of a public-benefit purpose

accepted in the tax legislation in the home country or one listed below (which appear to be the ones generally required at the national level):

- Arts & culture
- Environment
- Civil or human rights

- Elimination of discrimination
- Social welfare/poverty relief
- Humanitarian/disaster relief/development
- Assistance to refugees/migrants
- Children/elderly/people with disabilities/vulnerable persons
- Science/research
- Education and training
- Health/wellbeing

3. Exclusive usage of assets for the public-benefit purpose

- Assets must be used for public benefit also in case of dissolution
- Prohibition of use of assets for private interests, except where the benefit is incidental to the public benefit
- No unreasonable remuneration of board members
- No unreasonable administration costs
- Requirement to not support a closed circle of beneficiaries
- Income should be used for public-benefit purpose within a reasonable timeframe

It is suggested that the list of public-benefit purposes would need to be a closed list if the list is to gain sufficient support from tax authorities in the Member States.

Feasibility of a functional approach and way forward

It is not clear if Member States/tax authorities would be prepared to consider such a functional approach when assessing if a foreign EU-based organisation is comparable to a tax-exempt resident organisation.

Currently, in many of the countries no clear guidance is given as to how fiscal authorities should do the comparability test. Therefore, there may be some appetite among Member States for considering an approach which is based on core public-benefit tax law principles and the rationale of existing rules in cross-border cases. This could contribute to easing their work and processes.

On the other hand, we cannot expect that the tax authorities of a country that has numerous and very demanding requirements would show flexibility and make concessions, without having the possibility of receiving something in return from other countries in the reverse

situation. Is there enough trust in each other's supervision systems and a belief in a common understanding of public benefit that could be accepted across the EU?

What we want to propose involves thinking outside the "requirement" box and considering a larger "box", which also encompasses the purpose or the rationale of the requirement/principle, rather than just its narrow legal definition.

In some countries the administrative costs of a charity may not exceed a certain percentage of the gifts (Belgium). In other countries this rule does not exist, but there might be an obligation to apply the gifts to the charitable purposes within a reasonable period of time (UK). The rationale of each of these different rules is ensuring that the funds received by the charity are effectively used for the charitable purpose which is described in the statutes. The rule that forbids the remuneration of directors/board members or at least highly limits the level of such remunerations (which exists for instance in France and Spain) could also be considered as addressing the concern of using the funds effectively for charitable purposes.

Tax authorities in the different European countries should make a comparability test, not on the detailed requirements themselves but on the rationale or principle which is behind these requirements. This



would give to the concerned countries some room for a “give and take” negotiation between country A and country B by saying for instance, “We admit that the requirement of your legislation does not exist in our legal system but, on the other hand our legal system is stricter in other respects that also relate to the control of the received funds.” The same purpose can be pursued through different means, i.e. through different kinds of requirements.

The idea should now be put forward in discussions among tax experts and various other stakeholders, including philanthropic actors and their beneficiaries; fiscal authorities; and relevant national and EU-level authorities, including the European Commission.

The EFC and TGE will continue to further develop this concept and any input from third parties is welcome. This paper should in any case conclude with a strong call on tax authorities to provide better access to information on procedures concerning the comparability of public-benefit organisations and the development of easier processes to ease tax-effective philanthropic activity in Europe. Philanthropy needs the right environment to unleash its full potential to address current and new societal challenges.

**What we propose...
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Key resources

- A study released in 2014 by the European Foundation Centre (EFC) and the Transnational Giving Europe network (TGE): "Taxation of cross-border philanthropy in Europe after Persche and Stauffer - From landlock to free movement?"
 - EFC Comparative Highlights of Foundation Laws, 2015
 - CAF 2016 international comparison on the tax treatment of donations
 - "International Charitable Giving", edited by Clive Cutbill, Alison Paines, Murray Hallam, and Oxford University Press, 2012
ISBN 978-0-19-965925-8
 - Buijze, Renate. "Approaches towards the Application of Tax Incentives for Cross-Border Philanthropy", 2016, 44 Intertax, Issue 1, pp. 14-28 Copyright © 2016 Kluwer Law International ISSN 0165-2826
 - Buijze, Renate. "Tax incentives crossing borders. Considering the example of tax incentives for charitable giving", 2017, in S. J. C. Hemels, & K. Goto (Eds.), "Tax incentives for the creative industries" (pp. 85-104) Springer
 - Heidenbauer, Sabine. "Charity Crossing Borders - The fundamental Freedoms' Influence on Charity and Donor Taxation in Europe" (2011), EUCOTAX Series on European taxation Volume 31, Kluwer Law International, Netherlands
ISBN 978-90-411-3813-2
 - Heidenbauer, S., Hemels, S. J. C., Muehlmann, B. W., Stewart, M., Thommes, O., & Tukic, T. "Cross-border charitable giving and its tax limitations", 2013, Bulletin for International Taxation, pp. 611-625
 - Koele, Ineke A. "International Taxation of Philanthropy - Removing Tax Obstacles for International Charities", 2007, IBFD, Netherlands
ISBN 978-90-8722-021-1
- Full EU country notes on the tax situation of cross-border philanthropy, including practical guidance and information, will be made available on the EFC and TGE websites in the course of 2017.

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Philanthropy for an Interdependent World

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The EFC is the platform for and champion of institutional philanthropy - with a focus on Europe, but also with an eye to the global philanthropic landscape.

With the aim of being the voice of institutional philanthropy in Europe, we communicate to stakeholders the value of organised philanthropy to society, to help nurture an environment in which it can flourish. We serve as a hub of sector exchange and intelligence, to help our members increase the impact of their added value in society.

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The TGE network covers 19 countries and enables donors, both corporations and individuals, resident in one of the participating countries, to financially support non-profit organisations in other Member States, while benefiting directly from the tax advantages provided for in the legislation of their country of residence.

By providing such a secure and tax-effective cross-border giving framework, TGE is particularly interesting for national organisations with prospective donors abroad. Receiving tax-free contributions from foreign donors, appealing to expatriates, approaching global partners such as multinational corporations, benefiting from borderless interest in a specific cause or capitalising on global exposure offered by the internet is within arm's reach. The TGE network enables organisations to extend fundraising to foreign countries, without having to set up branches or sister organisations for that sole purpose and without having to master different national laws.

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