Fair Taxation and Corporate Social Responsibility

Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen,
Axel Hilling and Matti Kukkonen (eds)

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Chapter 4

Tax Incentives for Charities in the European Union – Integration or Segregation?

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Summary: *Because of their important role in civil society, charities are often granted a special status in national tax legislation. Many charities initiate activities abroad and come in the realm of EU law, for example, because of cross border investments, fundraising activities and competition with foreign charities. Tax legislation for charities is, however, not harmonized in the EU and varies widely. EU law is an integrating force for tax legislation applicable to charities. This chapter will discuss the European developments to answer the question whether we see an integration or a segregation regarding tax incentives for charities in the EU.*

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1. Introduction

Many charitable organizations are active in the European Union (EU). It might seem a *contradictio in terminis* but these non-profit organizations are economic actors in their own right and, therefore, relevant to the European internal market. Not only do they attract funding, they also spend their funds and create jobs. Therefore, they are not only a social, but also an economic force. Raymond described the charitable sector in the US as 'an $800 billion economic engine'.[2] A 2015 report from the Observatoire de la Fondation de France estimated the total amount given to charities in Europe at €24.4 billion, expenditure at €54 billion, the relative importance of the sector at 0.45% of GDP, the total assets at €433 billion and the amount of charities at 130,000.[3] The latter figure is an underestimation, probably caused by the fact that the term 'foundation' was used and that registers that exist in some countries were not consulted. In 2018, in the UK alone there were already almost 168,000 registered charities[4] and in the Netherlands almost 43,000.[5] Various terms are used to refer to these organizations, for example, 'non-profit organizations', 'public benefit organizations' and 'non-governmental organizations (NGOs)'. This paper uses 'charities' without limiting the concept to voluntary or traditional philanthropic organizations.

Because of their role in the civil society, charities are often granted a special status in national tax legislation. Examples are tax deductions for donations to charities, exemptions from corporate income tax, capital gains tax and gift and inheritance tax and exemptions from corporate and personal income tax of winnings from lotteries organized by charities. The charity itself is not always the direct or statutory beneficiary of the tax incentives. However, the idea behind these incentives is that indirectly, or economically, the charity

2. Susan U. Raymond, Nonprofit finance for hard times, John Wiley & Sons, 2010.
3. Observatoire de la Fondation de France, *An Overview of Philanthropy in Europe* (CERPhi, 2015).
4. <https://www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission> (accessed 21 February 2019).
5. Kamerstukken II, 2017–2018, 34785, no. 84, p. 10.

benefits. For example, because the tax benefit reduces the price of giving to charities, of buying their lottery tickets or of sending children to a school. For that reason, this paper includes both categories under 'tax incentives for charities'. The question whether or not charities should be supported by governments and if so, whether this should happen through direct subsidies or tax incentives, is out of the scope of this paper. As a starting point this paper takes the empirical fact that governments support charities with tax incentives.

Traditionally, most charities had a local focus although some charities, such as missionary work, health organizations and development organizations have always crossed borders. With ongoing globalization other charities also initiated activities abroad.[6] This is, for example, a clear trend for museums with a global reach that are confronted with local subsidy cuts and a great interest from abroad, such as the Louvre in Paris and the Rijksmuseum in the Netherlands.[7] Also universities, including my kind host Lund University,[8] are raising funds abroad. European charities that do not confine themselves to the territory of their country of residence come in the realm of EU law, for example, because of cross border investments, fundraising activities and competition with foreign charities. The tax legislation for charities is, however, not harmonized in the EU and varies widely.[9] In that respect we see a segregation in the EU.

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6. Klaus Eicker, 'Do the basic freedoms of the EC Treaty also require an amendment to the national laws on charities and nonprofit organisations?', *EC Tax Review* 2005, Issue 3, pp. 140–144.
7. Renate Buijze, *Philantropy for the Arts in the Era of Globalisation. International Tax Barriers for Charitable Giving* (dissertation, Erasmus University Rotterdam, 2017).
8. For example, already in 2008 Lund University received a $ 50.000 grant from the USA through the King Baudouin Foundation (<https://kbfus.org/> 'map of grants', Accessed 21 February 2019). Furthermore, the university established a 501(c)(3) non-profit organization based in the United States, the Lund University Foundation, for fundraising in the USA and through which donors in the U.S. can donate with tax benefits (<http://lunduniversityfoundation.org/>, Accessed 21 February 2019).
9. See European Foundation Centre (EFC), Comparative highlights of foundation laws, EFC 2015, F. Vanistendael (ed), *Taxation of charities* (IBFD, 2015), and S. Heidenbauer, *Charity crossing borders, the fundamental freedoms' influence on charity and donor taxation in Europe* (Kluwer Law International, 2011).

However, in the past 20 years, EU law was an integrating force for tax legislation applicable to charities. This regards especially the fundamental freedoms included in the Treaty on the Functioning of the European Union (TFEU).[10] The impact could have been bigger if the Proposal for a Regulation on the Statute for a European Foundation[11] had been adopted. In that case, a European legal form for charities would have been introduced safeguarding a level playing field for all European charities. The Proposal obliged Member States to treat the European Foundation, its donors and its beneficiaries equal to resident charities and to grant these the same tax incentives.[12] However, the Member States could not agree on this Proposal, not even after the tax provision was omitted, and it was withdrawn.[13]

This paper will discuss the European developments to answer the question whether we see an integration or a segregation regarding tax incentives for charities in the EU. Given the focus on direct taxation, the position of charities in EU indirect taxes is not discussed.[14] Furthermore, the aim of this paper is not to give an overview of the specific situation of charities in each EU Member State. Such overviews are already available elsewhere.[15] This also means that this

10. See also Anzhela Cédelle, The Taxation of Non-Profit Organizations after Stauffer in W. Haslehner, G. Kofler & A. Rust (eds), *European Tax Law Classics* (Kluwer Law International, 2015), pp. 207–233.
11. COM/2012/035 final, 2012/0022 (APP).
12. See on the EF S.J.C. Hemels & S.A. Stevens, 'The European Foundation Proposal: A Shift in the EU Tax Treatment of Charities?', *EC Tax Review* 2012-6, pp. 293–308; J.J.A.M. Korving & L.W.D. Wijtvliet, 'A Consideration of the European Foundation: Alle Menschen werden Spender', 67 *Bulletin for International Taxation* 9 (2013), and S.J.C.Hemels, 'The European Foundation Proposal analysed from a tax point of view', *Revista de finanças públicas e direito fiscal*, volume 6, no. 3, 2014, pp. 253–288.
13. Withdrawal of Commission proposals, 2015/C 80/08, OJ 7 March 2015, C 80/17.
14. For a discussion of the position of charities in the VAT Directive I refer to S.J.C. Hemels, 'Effectiveness of EU VAT Treatment of Charities', 22 *International VAT Monitor* 5 (2011) and the extended version on SSRN: S.J.C. Hemels, 'Effectiveness of the Current VAT Treatment of Charities: Are the Objects of the VAT Exemptions in the Public Interest Being Achieved and If Not, How Can This Be Improved within the Restrictions Imposed by EU Legislation?' (2010).

paper gives a general overview and will not provide a specific Nordic perspective.

2. Restriction to residents

Historically, countries restrict the application of tax incentives to resident charities. Outside the EU this is still the norm: Japan, the USA and Australia only provide for incentives for domestic charities. The idea behind this restriction is usually that countries do not want to subsidize foreign organizations[16] and that tax incentives should benefit their own country.[17] These arguments can be traced back to the public policy rationale for tax incentives for charities. This rationale argues that charities perform functions that the government would otherwise have to perform itself for which reason government is willing to forgo tax revenue.[18] In the words of the 1939 report of the US House Committee on Ways and Means:

> 'The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of general welfare.'[19]

15. For example European Foundation Centre (EFC), Comparative highlights of foundation laws, EFC 2015.
16. Renate Buijze, *Philantropy for the Arts in the Era of Globalisation. International Tax Barriers for Charitable Giving* (dissertation, Erasmus University Rotterdam, 2017), also discusses other reasons in Chapter 2.9, but this seems to be the most important reason to restrict tax incentives to resident charities.
17. P. Bater, 'Introduction. International tax issues relating to non-profit organisations and their supporters' in P. Bater, F. Hondius & P. Kessler Lieber (eds), *The tax treatment of NGOs. Legal, fiscal and ethical frameworks for promoting NGOs and their activities* (Kluwer Law International, 2004), pp. 1–29; I.A. Koele, *International taxation of philanthropy* (IBFD, 2007); S. Heidenbauer, S.J.C. Hemels, B.W. Muehlman, M. Stewart, O. Thoemmes & T. Tukic, 'Cross border charitable giving and its tax limitations', *Bulletin for International taxation* 2013, pp. 611–625.
18. Bruce R. Hopkins, *The law of tax-exempt organizations* (John Wiley & Sons, 2011), p. 13.
19. H. Rep. No. 1860, 75th Cong., 3d Sess, 19 (1939).

Based on this rationale, it would not make sense to give incentives to foreign charities as they do not perform functions which the national government of the donor country would otherwise have to perform. Following the logic of this rationale, such activities should be funded by the government of the other country. However, countries are often not consistent in the application of the rationale.[20] Most countries allow resident charities to fund activities abroad. This is not only the case for development aid and disaster relief for which the rationale might apply, but also for other activities, such as educational and cultural activities. An exception was Australia with its 'in Australia' residency requirement contained in the tax legislation,[21] which until quite recently was interpreted very strictly by the Australian Taxation Office to require that a charity be established, controlled, maintained and operated in Australia and have its benevolent purposes in Australia with only a few exemptions such as overseas aid and environmental organizations that engage in cross-border activities to effect change for the benefit of the Australian public. The main reason for this restriction seemed to be the difficulty in monitoring the use of funds overseas and the prevention of abuse.[22] That this is not necessarily a common law tradition is already shown by the 1891 United Kingdom (UK) *Commissioners for Special Purposes of Income Tax v Pemsel* (Pemsel) case.[23] A trust that supported 'missionary activities among heathen nations' was deemed charitable notwithstanding the fact that its activities were performed outside the UK. However, the charity itself had to be resident in (or more precisely: subject to the jurisdiction of the Courts of)[24] the UK. The recently relaxed inter-

20. 'Transnational Giving Europe (TGE) and EFC, Taxation of cross-border philanthropy in Europe after Persche and Stauffer. From landlock to free movement?', EFC 2014.
21. Div 30 and 50 of Income Tax Assessment Act 1997.
22. See, for example, N. Silver, M. McGregor-Lowndes & J. Tarr, 'Delineating the fiscal borders of Australia's non-profit tax concessions', *eJournal of Tax Research*, 2016, 14(3), 741–765.
23. 1891 AC 53.
24. The Camille and Henry Dreyfus Foundation, Inc. v Commissioners of Inland Revenue(1) (1953–1956) 36 TC 126.

pretation of the 'in Australia' provisions by the Australian Taxation Office, although no longer requiring that the organization has purposes and beneficiaries in Australia, also still requires that an organization be established and operated in Australia.[25]

In the beginning of the 21st century, the European Commission started to challenge the residency restriction of EU Member states as being incompatible with the fundamental freedoms and thus with the internal market. In 2002, the Commission sent Belgium a reasoned opinion, the second stage in an infringement procedure, stating that a restriction of tax relief for gifts and legacies to Belgian charities was discriminatory and incompatible with the freedom of establishment.[26] Later, the Commission sent reasoned opinions to other countries as well.[27] Tax payers challenged the difference in treatment between resident and non-resident charities before national courts. The first case which the Court of Justice of the European Union (CJEU) decided in this respect, the *Stauffer* Case,[28] became a landmark case together with the later *Persche* Case.[29] The CJEU gave the fundamental decision that a different treatment of non-resident charities solely based on their place of residence is a restriction of the fundamental freedoms. Direct taxes are not harmonized in the EU. However, as the CJEU observed in point 15 of the *Stauffer* Case,[30] although direct taxation falls within the competence of the Member States, they must exercise that competence consistently with EU law, including the fundamental freedoms. The *Stauffer* and *Persche* cases were confirmed by the *Heuk-*

25. Draft Taxation Ruling TR 2018/D1, <https://www.ato.gov.au/law/view/document?docid=DTR/TR2018D1/NAT/ATO/00001> (accessed 21 February 2019).
26. Press release of 21 October 2002, IP/02/1527.
27. These included the United Kingdom (Press release of 10 July 2006, IP/06/964), Ireland and Poland (Press release of 17 October 2006, IP/06/1408), Estonia (Press release of 27 November 2006, IP/08/1818) and Austria (Press release of 19 March 2009, IP/09/428).
28. Case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:2006:568.
29. Case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:2009:33.
30. Case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:2006:568.

elbach,[31] *Commission v. Austria*[32] and *Commission v. France*[33] cases. In this regard there was clearly an integration in the European Union.

3. CJEU as an integrating force: prohibited restrictions of the free movement of capital

The aforementioned cases regarded the free movement of capital, art. 63 TFEU. This provision prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third countries. As the TFEU does not give a definition of 'capital movements' or 'payments', the CJEU had to interpret these terms. It is settled case law that the nomenclature in respect of 'movements of capital' annexed to Directive 88/361[34] has indicative value for the purposes of defining the notion of capital movements.[35] This non-exhaustive list includes, amongst others:

(a) Direct investments
(b) Investments in real estate (not included under a)
(c) Personal capital movements, which included:
    1. Gifts and endowments
    2. Inheritances and legacies

A movement of capital requires that its constituent elements are not confined within a single Member State.[36] This requirement is, for example, met if a donor or deceased is resident in another Member State than the charity. To quote the CJEU: this 'in no way constitutes

31. Case C 25/10, *Heukelbach*, 10 February 2011, ECLI:EU:C:2011:65.
32. Case C 10/10, *Commission v Austria*, 16 June 2011, ECLI:EU:C:2011:399.
33. Case C-485/14, *Commission v. France*, 16 July 2015, ECLI:EU:C:2015:506.
34. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. O.J. 1988, L 178/5.
35. See, for example, case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:-2006:568, point 22.
36. Case C-513/03, *Van Hilten-van der Heijden*, 23 February 2006, ECLI:EU:C:-2006:131, point 42, and case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:-2009:33, point 27.

a purely internal situation'.[37] Furthermore, in the *Commission v. France* Case,[38] the Court pointed out that Art. 40 of the European Economic Area (EEA) Agreement on the free movement of capital between nationals of States party to the EEA Agreement must be interpreted in the same way as Art. 63 TFEU.

If a restriction of one of the freedoms has been established, this does not necessarily mean that the legislation is prohibited. Member States are allowed to distinguish between taxpayers who are not in the same situation with regard to their place of residence or the place where their capital is invested.[39] However, tax legislation may not lead to arbitrary discrimination or disguised restrictions.[40]

Both Germany and the UK argued in the *Stauffer* Case that resident and non-resident charities are not in a comparable situation because a resident charity plays an active role in its country of residence.[41] They used the public policy rationale discussed in Section 2, stating that resident charities perform duties which would otherwise have to be carried out by local or national authorities, which would be a burden on the State budget. They argued that charitable activities of non-resident charities do not concern the country. This idea that preferential tax treatment of charities is a compensation for the tasks charities relieve the state from, seems to have been quite common in Germany and Austria.[42] This might explain for the fact that in the *Persche* Case, Germany, Spain and France made this argument

37. Case C 25/10, *Heukelbach*, 10 February 2011,ECLI:EU:C:2011:65, point 16.
38. Case C-485/14, *Commission v. France*, 16 July 2015, ECLI:EU:C:2015:506, point 27 and 28.
39. Art. 65(1)(a) TFEU, case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:-2006:568, point 30, case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:-2009:33, point 40, case C-10/10, *Commission v Austria*, 16 June 2011 ECLI:EU:C:-2011:399, point 28.
40. Art. 65(3) TFEU, case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:-2006:568, point 31, case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:-2009:33, point 41.
41. Case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:2006:568, point 33–34.
42. See for sources Thomas Ecker, 'Taxation of Non-Profit Organizations with Multinational Activities—The Stauffer Aftermath and Tax Treaties', *Intertax*, 2007, Issue 8/9, pp. 450–459, footnote 36–63.

again by stating that if a Member State abstains from tax revenue by granting tax incentives for gifts to resident charities, that is because such bodies absolve that Member State of certain charitable tasks which it would otherwise have to fulfil itself using tax revenues.[43]

The CJEU does allow Member States to require a sufficiently close link between charities to which they grant certain tax benefits and the activities pursued by those charities. However, for the German legislation, as is the case with most national tax incentives for charities, it was irrelevant, whether such a link existed. The German legislation only required that the activities were directed at the promotion of the interests of the general public in a manner other than for profit. It did not make a distinction as to whether those activities were carried out in Germany or abroad. The German court had already stated that the promotion of the interests of the general public did not mean that such measures had to benefit German nationals or residents. For these reasons, the CJEU held that German and foreign charities were in the same situation.[44] EU Member States are, therefore, allowed to apply the public policy rationale, but only if they do so in a consistent way. Had Australia been a member of the EU, the CJEU might have deemed the 'in Australia' requirement as being compatible with EU law.

4. Segregating forces: interpretation and implementation of case law by the member states

Even though the CJEU case law had an integrating effect, this effect must not be exaggerated. In reaction to this case law, Member States tried to restrict their legislation or imposed administrative burdens which were supposed to be in line with the CJEU case law, but had a clear segregating effect.

43. *Persche*, 27 January 2009, ECLI:EU:C:2009:33, Point 42.

44. Points 36–37.

4.1. Restriction of scope of legislation

After having lost the *Stauffer* Case, Germany tried to restrict the scope of tax incentives for charities by requiring a link with Germany.[45] Art. 51(2) of the *Abgabenordnung* (AO) now requires that if the tax-privileged purposes are realized abroad, individuals resident in Germany are supported or the activity, in addition to the achievement of the tax-privileged purposes, can contribute to the reputation of Germany abroad.[46] In my view, the latter requirement is rather vague. Should a charity show a German flag in everything it does across the border? The *Anwendungserlass zur Abgabenordnung* (AEAO) on Section 51(2) AO notes in point 7 that there is no need for any noticeable or measurable impact on the reputation of Germany abroad. Furthermore, it states that in case of charities resident in Germany, the possible contribution to the reputation of Germany abroad is already fulfilled by the fact that they participate in the promotion of charitable and benevolent purposes abroad in terms of human, financial, planning, creative or other means (indicative effect). German resident charities do not need any special proof that they meet this criterion. Foreign charities that do not work in Germany nor support Germans, must provide proof that they contribute to the reputation of Germany. The underlying idea of the AEAO seems to be that this is not fundamentally excluded, but that it will be very difficult to provide this proof.[47] I seriously doubt whether this difference in providing proof would meet the requirements of the CJEU. It might be that Germany has

45. *Jahressteuregezetz* 2009, of 19 december 2008, *Bundesgesetzblattes* part I, no. 63, p. 2794.

46. 'Werden die steuerbegünstigten Zwecke im Ausland verwirklicht, setzt die Steuervergünstigung voraus, dass natürliche Personen, die ihren Wohnsitz oder ihren gewöhnlichen Aufenthalt im Geltungsbereich dieses Gesetzes haben, gefördert werden oder die Tätigkeit der Körperschaft neben der Verwirklichung der steuerbegünstigten Zwecke auch zum Ansehen der Bundesrepublik Deutschland im Ausland beitragen kann.'

47. AEAO on Section 51(2) AO, third paragraph: 'Bei der Tatbestandsalternative des möglichen Ansehensbeitrags zugunsten Deutschlands entfällt zwar bei ausländischen Körperschaften die Indizwirkung, die Erfüllung dieser Tatbestandsalternative durch ausländische Einrichtungen ist aber nicht grundsätzlich ausgeschlossen.'

the same doubts, especially after losing the *Persche* Case as well. According to Buijze the German tax administration has not applied this requirement in practice.[48]

4.2. Administrative burden

In all cases the CJEU acknowledged that EU law does not require Member States to automatically grant charitable status to foreign foundations with charitable status in their resident Member State.[49] In this respect, there is no integration in the EU. Each Member State can determine whether it provides for tax incentives to encourage certain charitable activities, which public benefits it wishes to promote and which requirements must be met.[50] Member States must exercise this discretion in accordance with EU law, but the CJEU does not require mutual recognition of charities. Therefore, a Member State may apply a different treatment if bodies in other Member States do not meet the national requirements or pursue other objectives.[51] A charity established in one Member State which satisfies the requirements of another Member State is in a situation comparable to resident charities.[52] The Member State and its courts must determine whether the non-resident charity meets the charitable requirements.

In addition, the CJEU allows a Member State to apply measures enabling it to ascertain in a clear and precise manner whether the foreign foundation meets the conditions for obtaining the tax incentive and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report. To carry out the necessary checks, the tax administration may require from the

48. Renate Buijze, *Philantropy for the Arts in the Era of Globalisation. International Tax Barriers for Charitable Giving* (dissertation, Erasmus University Rotterdam, 2017), Section 5.4.2.

49. Case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:2006:568, point 39, case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:2009:33, point 48.

50. Case C-386/04, *Stauffer*, 14 September 2006, ECLI:EU:C:2006:568, point 39, case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:2009:33, point 48.

51. Case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:2009:33, point 47.

52. Case C-318/07, *Persche*, 27 January 2009, ECLI:EU:C:2009:33, point 50, case C-153/08, *Commission v. Spain*, 6 October 2009 ECLI:EU:C:2009:618, point 32.

tax payer relevant supporting evidence on the foreign charity. This tax payer can be the charity itself or another tax payer, such as a donor, claiming a tax incentive. Foreign charities can decide for themselves whether they want to invest resources in providing their foreign donors with the necessary documentation. They will probably be more willing to do this to secure large foreign gifts than to obtain a small one-off gift. The donor cannot oblige the charity to provide this information.

Some Member States have used this as an opening to impose strict requirements on providing proof. For example, Germany required a donation certificate in the official German form and did not accept a document of another EU Member State with the same content. This strict document requirement was rejected by the German Federal Fiscal Court.[53] Haase and Steierberg were of the opinion that donations to foreign charities are still unfavourable for the German tax payer, amongst others because of the additional administrative burden, for which reason foreign organizations will practically still be forced to establish a German charity.[54]

Heuzé reports that even though France changed its legislation in 2015 (after the European Commission started an infringement procedure in 2011), it is still difficult to use the French tax incentives for charities in other Member States.[55] Where the transfer of a legacy to a French charity is a quick and easy process, the bureaucratic process is difficult for foreign charities and takes a lot of time and is costly. Documents have to be translated into French, the French government must give permission for transferring legacies abroad and French civil

53. BFH 21 January 2015, X R 7/13, <https://dejure.org/2015,9545> (accessed 2 January 2018).

54. Florian Haase & Daniela Steierberg, 'Germany's Fiscal Court Rules on Tax Deductibility of Donations to Foreign Charities', *EC Tax Review*, 2015 Issue 5, pp. 286–288.

55. I.M.G. Heuzé, 'Legaat van een inwoner van Frankrijk aan een Nederlandse "ANBI": vrijstelling van Franse erfbelasting', *Fiscaal Tijdschrift Vermogen*, 2018, nr. 10, pp. 6–8, and I.M.G. Heuzé, 'Dispense de DMTG des dons et legs aux organismes européens d'intérêt général: expérience française', *Solution Notaire Hebdo*, 6 décembre 2018 n° 40, pp. 11–13.

law notaries and the French tax administration do not seem to be familiar with this possibility.

Lewis and Ellen point out that of the 142 charities from other Member States that applied for charitable status in the UK by 2015, only 11 were accepted.[56] They observed that it is probably still safer and easier to set up a UK charity as registering a foreign charity in the UK is still slow and lengthy. TGE and EFC were of the opinion that the fiscal environment for cross-border philanthropy was still far from satisfactory in 2017.[57] They qualify the processes to gain equal treatment as burdensome, lengthy and costly, a claim they substantiated with anecdotal and statistic evidence.

5. Failed integration (1): the European Foundation proposal

On 8 February 2012, the European Commission presented the 'Proposal for a Council Regulation on the Statute for a European Foundation (FE)' (hereinafter: the Proposal).[58] The Proposal aimed to facilitate the establishment and operation of charities in the single market, thus allowing them to channel private funds more efficiently to public benefit purposes on a cross border basis in the EU. The European Foundation (in Latin: *Fundatio Europaea*, hence the abbreviation FE) was a separately constituted entity for a public benefit purpose which had to serve the public interest at large[59] and had activities or a statutory objective of carrying out activities in at least two Member States.[60] The FE could engage in trading or economic activities provided that any profit was exclusively used in pursuance

56. Bill Lewis & Lucinda Ellen, 'Opening the door to overseas charities', *Charity and Social Enterprise Update*, Summer 2015, pp. 20–21.
57. TGE and EFC, 'Boosting cross-border philanthropy in Europe', EFC 2017, p. 4. This report builds on T. von Hippel, 'Cross border philanthropy in Europe after Persche and Stauffer: From landlock to non-discrimination?', EFC and TGE 2014.
58. COM(2012) 35 final, 2012/0022 (APP).
59. Article 5 FE Proposal.
60. Article 6 FE Proposal.

of its public benefit purpose(s).[61] An FE could only be created for the purposes mentioned in the exhaustive list included in the Proposal. Each Member State had to designate a supervisory authority to supervise FEs registered in that Member State.[62] A tax authority of a Member State where the FE would not perform any activity, for example the resident state of a donor, was not granted the right to request an investigation of the charity.

The Proposal included a chapter on the tax treatment of the FE, its donors and its beneficiaries.[63] Member States had to regard an FE as equivalent to resident charities and give them the same tax treatment as resident charities. The equivalency principle applied to natural and legal persons donating to an FE within or across borders as well.[64] Beneficiaries of an FE had to be treated as if the grants or other benefits received were given by a charity established in the Member State in which they are resident for tax purposes.

The FE would have led to a true European integration regarding charities. However, this was a bridge too far for the Member States. The main objection of various Member States seemed to have been the tax equivalency principle. However, even after the tax provisions were deleted from the Proposal in 2013, Member States still could not unanimously agree to the Proposal. Word is that there was disagreement about the minimum capital threshold and about the inclusion of religion as a charitable purpose. Apparently France insisted on not including religion because of the French principle of strict state neutrality towards religion whereas other Member States such as Ireland insisted on including religion. The European Commission concluded that there was lack of prospects that an agreement could be reached and withdrew the Proposal in March 2015.[65]

61. Article 11 FE Proposal.
62. Article 45 FE Proposal.
63. Chapter VII, articles 49–51 FE Proposal.
64. Article 50 FE Proposal.
65. Withdrawal of commission proposals, 2015/C 80/08, Official Journal of the EU, C80/17.

6. Failed integration (2): business gifts in the CC(C)TB

On 16 March 2011 the European Commission published a Proposal for a Common Consolidated Corporate Tax Base (CCCTB).[66] As the Member States could not come to an agreement, the European Commission relaunched the project on 25 October 2016 by proposing a two step process: first a CCTB without consolidation and then a full CCCTB.[67] The CC(C)TB aims to provide companies with a single set of corporate tax rules for doing business across the internal market. Both proposals included provisions on charitable gifts of companies.

Based on article 12 of the 2011 CCCTB, gifts to charities would be deductible up to a maximum of 0.5% of revenues in the tax year. This system was similar to the French system. Furthermore, only gifts to charitable bodies as defined in article 16 2011 CCCTB could be deducted. The requirements were that:

(a) the body had legal personality and was a recognized charity in its state of establishment;
(b) its sole or main purpose and activity were one of public benefit; an educational, social, medical, cultural, scientific, philanthropic, religious, environmental or sportive purpose was considered to be of public benefit provided that it was of general interest;
(c) its assets were irrevocably dedicated to the furtherance of its purpose;
(d) it was subject to requirements for the disclosure of information regarding its accounts and its activities;
(e) it was not a political party as defined by the Member State in which it was established.

66. COM(2011) 121 final. Hereinafter: 2011 CCCTB.
67. COM(2016) 685 final and COM(2016) 683 final. Hereinafter: 2016 CC(C)TB.

In a proposal for amendments[68] it was suggested to add to requirement b above that the purpose had to be included in a list in Annex III to the Proposal. The purposes included were:

1. Arts, culture or historical preservation;
2. Environmental protection;
3. Civil or human rights;
4. Elimination of discrimination based on gender, race ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination;
5. Social welfare, including prevention or relief of poverty;
6. Humanitarian or disaster relief;
7. Development aid and development cooperation;
8. Assistance to refugees or immigrants;
9. Protection of, and support for, children, youth or the elderly;
10. Assistance to, or protection of, people with disabilities;
11. Animal protection;
12. Science and research;
13. Education and training;
14. European and international understanding;
15. Health, physical well-being and medical care;
16. Assistance to, or protection of, vulnerable and disadvantaged persons;
17. The promotion of philanthropy.

The aim of including this list was to align the CCCTB definition of charitable bodies with that in the FE proposal discussed in Section 5.

The 2016 CC(C)TB Proposal differs considerably in this respect. It seems that also within the context of the CC(C)TB Member States could not come to an agreement on what constitutes a public purpose. Not including religion might, again, have been unacceptable for some Member States. Article 9(4) of the 2016 CCTB simply

68. Council of the EU, 'Presidency comments on the compromise proposal for a CCCTB', 16 April 2012, no. 8790/12, FISC 52, <http://www.uva.nl/binaries/content/documents/personalpages/n/o/m.f.nouwen/nl/tabblad-een/tabblad-een/cpitem%5B14%5D/asset?1368633253789> (accessed 21 February 2019).

provides that Member States may provide for the deduction of gifts and donations to charitable bodies. A definition of 'charitable body' is missing. Formulating such definition seems to be left to the Member States. Therefore, where the objective of the CC(C)TB is integration, for charitable business gifts the 2016 proposal leads to segregation. Member States may apply their own rules and definitions and are only restricted in their fiscal sovereignty by the fundamental freedoms. This means that the CC(C)TB will not lead to a level playing field for charities competing for business gifts, nor for businesses donating such gifts.

7. Private integrating forces

By now it is clear that Member States will not be driving forces of integration in the field of tax incentives for charities. Quite the opposite, they try to stop Commission's initiatives in this field and even seem to strive for segregation instead. Integration can, therefore, at least in the short term, not be expected from public bodies.

In the meantime private bodies have filled the gap left by the public sector and became an integrating force. In several countries the private initiative has found an intermediate solution to enable cross border charitable giving with tax benefits. These solutions make use of the inconsistency mentioned before that even though countries refer to the public policy rationale to restrict their tax benefits to resident charities, they usually allow resident charities to donate to projects and charities abroad.

Some major charities in several European countries made use of this inconsistency in the Transnational Giving Europe Network (TGE). This is a partnership between major charities in 19 European countries.[69] Its objective is to promote cross-border donations by enabling donors in any of these countries to give to charities in any other of these countries using the tax incentives for charitable giving in the resident state of the donor. The donor gives to the member charity in his home country which subsequently transfers the gift to the charity in the other country if the latter is validated by the mem-

69. <www.transnationalgiving.eu> (accessed 21 February 2019).

ber charity in the other state. For example, a resident of Belgium wants to donate to a French charity. In order to profit from the Belgium tax incentives, the Belgian donor has to contact the Belgian King Baudouin Foundation, which then checks the authenticity of the French charity with the Fondation de France. Once the reliability of the French charity has been confirmed, the Belgian resident can transfer his donation to the King Baudouin Foundation, which in turn will transfer the donation to the French charity. Five percent of each gift up to € 100,000 (1% for the amount in excess of € 100,000, the total fee is capped at € 15,000) is used to cover the costs of the network. According to Buijze, this fee is perceived as being reasonable.[70] Making use of an intermediary saves time and money and does not require much know how. Buijze concluded for arts organizations that the intermediary charity provided an effective and cost efficient solution for tax-efficient cross border giving.[71] Unfortunately, some EU Member States, such as the Netherlands, do not allow for tax-efficient giving by making use of an intermediary.[72]

However, even though the private solution does not work in all cases, it is currently a stronger integrating force than the public sector.

8. Conclusion

The answer to the central question of this paper, whether we see an integration or a segregation regarding tax incentives for charities in the EU, cannot be answered in a clear cut way. Both effects are happening simultaneously. The EU seems to be one of the few regions in the world where it is at least possible to obtain tax benefits for cross border fundraising if certain requirements have been met. This is due to the integrating effect of CJEU case law. By requiring that the same

70. Renate Buijze, *Philantropy for the Arts in the Era of Globalisation. International Tax Barriers for Charitable Giving* (dissertation, Erasmus University Rotterdam, 2017), p. 260.

71. Ibid.

72. S.J.C. Hemels & R. Buijze, 'De ANBI-intermediar: meer dan een doorgeefluik', *Weekblad Fiscaal Recht*, 2018/147, pp. 766–775.

national conditions apply to resident and non-resident charities, EU law and its interpretation by the CJEU definitely had an integrating effect in the past 20 years.

On the other hand, Schön observed that the only area where the CJEU has explicitly accepted the power of the Member States to restrict tax benefits to territorially defined purposes is the non-profit sector.[73] In addition, the failure of the FE Proposal and the inability to provide for a harmonized provision on gift deduction in the CC(TC)B show that Member States are not willing to integrate in this respect. Breen observed: '[...] multi-lateral treaty based solutions will not achieve the necessary unanimous support amongst Member States to make them a viable option. Similarly, the lack of common ground between Member States makes the provision of automatic Member States exemptions for EU foreign based tax-exempt also an unlikely starter in the current political climate'.[74] Segregating powers seem to be stronger than integrating powers.

In relation to tax incentives for charities the problem seems to be the incoherence of Member States' tax legislation and definitions as they do not mind an extra-territorial effect of the activities of resident charities.

The obligation to open tax incentives to foreign charities that meet the national requirements met resistance of several Member States. This is shown by the fact that after the 2006 *Stauffer* Case four very similar cases had to follow suit. The 2009 *Persche* Case even regarded the same country, Germany. Even after the clear case law of the CJEU, some EU Member States still try to restrict their tax incentives.[75] Buijze quotes an internal EFC document of March 2016

73. W. Schön, 'Neutrality and Territoriality—Competing or Converging Concepts in European Tax Law?', 69 *Bulletin for International Taxation* 4/5 (2015), Journals IBFD.

74. Oonagh B. Breen, 'Enlarging the Space for European Philanthropy', EFC/Dafne 2018, <https://dafne-online.eu/wp-content/uploads/2018/01/Enlarging-the-Space-for-European-Philanthropy-joint-EFC-DAFNE-study_2018.pdf>, p. 48 (accessed 21 February 2019).

75. Renate Buijze, 'Approaches towards the Application of Tax Incentives for Cross-Border Philanthropy', *Intertax*, 2016, Issue 1, pp. 14–28.

stating that Croatia, Portugal, Romania and Spain at that time still discriminated gifts to foreign charities.[76] Countries wait for the European Commission or tax payers to take action. For example, only after the Commission started an infringement procedure,[77] Germany changed its legislation which required reciprocity of the charities' Member State of residence. By the end of 2013, the Commission had conducted 28 infringement procedures on tax incentives for charities.[78] In 2015 the Commission sent a reasoned opinion to Spain in which it requested to end the discriminatory tax treatment of foreign non-profit entities and their contributors.[79] The infringement procedure is still pending. According to De Urrutia Coduras neither the main Spanish Act on Patronage nor the Spanish tax authorities took the CJEU case law on charities into account. He discusses court cases of a Swedish and German charity claiming a Spanish tax incentive.[80]

Even though, by now, the majority of the EU Member States no longer applies a residency requirement,[81] charities still deem it practically difficult to obtain access to tax incentives in other Member States. Some countries tried to formulate their legislation as restrictive as possible or make the process to obtain charitable status or tax incentives for foreign charities bureaucratic and difficult, for example by using only the national language and by not providing clear information on the process and the requirements.

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76. EFC (internal document) 'Overview of Member States' compliance with the ECJ non-discrimination principle according to the latest available information on the applicable national laws', March 2016, quoted Renate Buijze, *Philantropy for the Arts in the Era of Globalisation. International Tax Barriers for Charitable Giving* (dissertation, Erasmus University Rotterdam, 2017), footnote 86.
77. Case no. 2012/2159.
78. S. Heidenbauer, S.J.C. Hemels, B.W. Muehlman, M. Stewart, O. Thoemmes & T. Tukic, 'Cross border charitable giving and its tax limitations', *Bulletin for International taxation* 2013, pp. 611–625.
79. Case no. 2013/4086, Memo/15/6006 of 19 November 2015.
80. H.G. de Urrutia Coduras, 'Are Monetary Donations to Foreign Foundations Taxable in Spain?', 56 *European Taxation* 2/3 (2016).
81. I.A. Koele, 'How Will International Philanthropy Be Freed from Landlocked Tax Barriers?', 50 *European Taxation* 9 (2010) discusses some examples of how countries changed their legislation.

In that respect, Member States still strive for segregation, notwithstanding the integrating efforts of the European Commission. Real integration and establishing a true internal market for charities and their donors would require a harmonized solution. This seems to be even less feasible in the short term than it was before.[82] In the short term, the most important integrating force seems to be the private initiative.

82. S.J.C. Hemels, 'Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe', (2009) 37 *Intertax*, Issue 8/9, pp. 424–435.