

# Taxation of cross-border philanthropy in Europe – A Taxing Issue!

Hanna Surmatz ([www.efc.be/](http://www.efc.be/))

## 1. What's the issue?

European citizens and foundations are more and more mobile, give in various ways, fund activities in multiple locations and geographies and have international assets and interests. Philanthropy is increasingly without borders. Whether undertaking joint initiatives, implementing multi-country projects, pooling resources, seeking to reach more beneficiaries, or raising funds from a wider group of donors, large numbers of foundations and other public-benefit organisations (PBOs) want and need to be active cross-border to effectively pursue their mission.



Hanna Surmatz

The fiscal environment within the EU, however, is still far from satisfactory and hasn't moved at the same pace as philanthropy in terms of supporting its dynamism and cross-border activity. 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?'* highlighted the discrepancies in the implementation by Member States of the non-discrimination principle on the tax treatment of philanthropy, as set out in a series of 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. In practice however, a number of countries have been slow in adapting national regulations and even where laws have been changed, practical barriers can remain. *Demonstrating comparability can be so complex that it hinders or even deters cross border-philanthropy.*

As a result public-benefit organisations and their donors encounter both 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 otherwise active across borders. At the heart of the problem is that across the EU, no formal or uniform approach to the comparability test exists. Also, there is no EU body to regulate the matter. Instead it is within the competence of the Member States to define when a foreign EU-based PBO is comparable and, to add to the confusion, Member States have developed different approaches to address the question of the comparability test.

In only around ten countries formal procedures are in place, while in the majority of countries no such rules, or even procedural guidelines for the tax authorities appear to exist. The burden of proof within the comparability test generally lies with the donor or entity seeking the tax incentive. Usually it is the tax authority of the one seeking the tax incentive which decides on a case by case basis whether a foreign PBO is comparable to a domestic one. Likewise the benchmark for the comparability test is generally the national tax law of the Member State from which

the tax incentives are sought and the crucial question is always in what level of detail this benchmark has to be fulfilled.

To sum up, even when non-discrimination is removed, tax effective cross-border philanthropy is often complex due to the various different, administrative and costly approaches for the comparability test. In addition to this, lengthy waiting periods for reactions from the authority side or indeed no response at all are not uncommon.

## **2. Way forward – agreeing to a common core comparability test within the EU?**

Theoretically, a streamlined approach for the ‘comparability test’ could be reached. This could be through either binding legal avenues, for example multilateral or bilateral treaties which would enable a foreign-based PBO’s tax-privileged status to be either automatically recognised or according to legally defined requirements; or through model statutes/bylaws. However, these approaches are either not politically feasible, or would, in the case of the drafting of model statutes/bylaws, be very complex.



The EFC and TGE are currently exploring potential ways to tackle existing barriers in law and in administrative practice and have presented initial ideas on the way forward at the European Research Network On Philanthropy (ERNOP) 7th International Conference in July in Paris at the ESSEC Business School in Paris.

The ideas proposed would appear extremely feasible as an initial comparative analysis of data provided by national experts from across the EU suggests that the requirements for tax exemption have more in common than expected.

### 3. It's a matter of trust

A practical and potentially realistic approach could be to seek to convince national decision makers *to limit the checks carried out for the comparability test to some core elements with the aim to simplify the process for authorities, as well as users (rather than insisting that all detailed national rules must also be fulfilled by the foreign based PBO). Ultimately, the key issue is to ensure more trust in each other's systems of checks and balances and a belief in a common understanding of public benefit that could be accepted across the EU.* One important step forward in this regard is to demonstrate that the tax law requirements that lead to a tax exempt status do not differ significantly but actually follow some core elements or fundamental principles. During the past two years the EFC's network of national foundation law and tax law experts have provided detailed information on the tax law requirements that lead to tax exemption of a PBO and tax incentives for donors respectively. The comparative analysis identified much more common ground than expected:

- in almost all countries surveyed a public-benefit foundation must pursue its public-benefit purpose (some 12 purposes appear to be acceptable in most Member States) exclusively,
- in cases where a public-benefit foundation dissolves, remaining assets must continue to be used for the public benefit,
- greater variation exists on the questions of board remuneration and the requirement that a public-benefit foundation supports the 'public at large'. But even there a certain trend can be identified.

A 'common core' approach does not have to result in the application of a 'strict common denominator'. 'Comparable' in the context of cross-border philanthropy taxation need not mean 'identical' and fulfilment of all accurate details of respective national tax laws. Instead there should be scope for

organisations to be identified as being, in essence, comparable on the basis of commonly accepted fundamental principles. What we need in order to make progress in this field is a broader concept and definition of comparability and hence more trust in each other's systems – otherwise any attempt to simplify the comparability test will not work.

A potential solution could, for example, use as the first indicator for the 'comparability test' the fact that the foreign PBO in question is already recognised as eligible for and holds public-benefit status for tax purposes in its home country. This already provides some reassurance of the public-benefit character of the PBO – even though defined and checked according to the foreign (home of the PBO) jurisdiction. Additional 'common' indicators could be added based on the above mentioned comparative review of existing tax laws.

EFC and TGE will continue to further develop this concept to facilitate tax effective cross-border philanthropy within the EU. If you have experienced difficulties as a funder please get in touch as this provides good case study material and evidence to make progress.

*Hanna Surmatz has been the Legal Counsel for foundation law at the European Foundation Centre AISBL (EFC) in Brussels since May 2004. Her main responsibilities include monitoring and mapping/analysis of relevant national and European developments that affect foundations' operating environment; co-ordination of benchmarking exercises; and facilitating information exchange on foundation law matters through publications and events.*

<sup>1</sup> *EFC Comparative Highlights of Foundation Laws (EFC Comparative Highlights of Foundation Laws: [http://efc.issuelab.org/resource/comparative\\_highlights\\_of\\_foundation\\_laws\\_the\\_operating\\_environment\\_for\\_foundations\\_in\\_europe](http://efc.issuelab.org/resource/comparative_highlights_of_foundation_laws_the_operating_environment_for_foundations_in_europe)*