What if Gulbenkian had been Persche: taxing charitable giving in Europe

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SUMMARY

Many EU Member States only grant tax incentives to resident charities. This limits the choice of donors and restricts the free movement of capital. The paper discusses this problem and the action taken by the European Commission, the ECJ (the Stauffer and Persche cases) and private organisations.

Key words:

Tax incentive

Charity

Free movement of capital

1 Introduction

When Calouste Gulbenkian died in Lisbon on 20 July 1955, he left the major part of his enormous fortune earned in the oil industry to the Fundação Calouste Gulbenkian. This charitable foundation is active in the fields of welfare, the arts, education and science. It is based in Lisbon, the city where Gulbenkian lived the last 13 years of his life and where he felt very welcome. The head quarters of the Foundation on the Avenida de Berna include a concert hall (with its own Gulbenkian orchestra and choir) and two museums. These are the Centro de Arte Moderna (CAM) for modern art and the Gulbenkian Museum which houses the major part of the art Gulbenkian collected during his life including works by Rubens, Van Dyck, Rembrandt, Gainsborough, Lawrence, Renoir, Manet, Degas and Monet.[1]

It is of course wonderful that Gulbenkian donated his wealth to this foundation in Lisbon. But what if Gulbenkian, who was a citizen of the world, had moved to London or France, countries where he lived when he was younger, the year before he died? In that case the legacy to the foundation based in Portugal would probably have been heavily taxed with French or English inheritance tax, leaving the Portuguese charity with less funds. The reason for this is that most countries only apply tax incentives for charitable giving (including inheritances) to charities in the country of residence of the donor. Examples of such incentives are the deductibility of gifts and the exemption of charities from gift and inheritance tax.

One might argue that this was long before Portugal became a member of the European Union and that surely in a Europe without borders this is not the case any more. Unfortunately, even if Mr. Gulbenkian would have died today in Paris or London and had left his fortune to a Portuguese charity, the tax incentives of France and the UK would not apply. This was the experience German Mr. Persche had.[2] Mr. Persche was resident in Germany but owned a second home in Lagoa in the Portuguese Algave. In 2003 he donated bed-linen, towels, walking frames and toy cars worth EUR 18,180 to the Centro

[1] For more information I refer to the website of the Fundação Calouste Gulbenkian, www.gulbenkian.pt.
[2] ECJ 27 January 2009, Case C-318/07, *Hein Persche v Finanzamt Lüdenscheid*..

Popular de Lagoa, a retirement home to which a children's home has been added. The German tax authorities denied Mr. Persche gift deduction, because the charity was not resident in Germany. In the end, Mr. Persche had to turn to the European Court of Justice ('ECJ') for help.

Germany is not the only Member State of the EU which would take this position. Of the 27 Member States of the EU at least the Netherlands, Poland, Slovenia,[3] Belgium,[4] Denmark,[5] Luxembourg[6] and as of 15 April 2010 Germany[7] grant the same tax incentives for gifts and legacies to charities in other Member States.[8] France was debating a change, the Irish Finance Bill 2010 extended the tax incentives to charities in the EU and the European Economic Area (EEA)[9] and in the UK Budget 2010 it was announced that the UK would open its tax incentives to charities resident in other EU and EEA member states.[10] Many Member States, however, limit their tax incentives for charitable giving to resident charities. Such restrictions may, in effect, impede donations to foreign charities.

The adverse effect of limiting philanthropic tax incentives to domestic charities is that the choice for donors is limited to domestic charities and that these charities are limited to residents in their fundraising. This is not in line with the free movement of capital granted by the Treaty on the Functioning of the European Union (TFEU). In this paper I will discuss this problem and the action taken by the European Commission, the ECJ and private organisations.

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[3] European Foundation Centre, *Comparative Highlights of Foundation Laws*, Brussels 2007, pp. 23-24. Several other Member States only exempt foreign charities from gift and inheritance tax, but do not allow the deduction of such gifts.

[4] With retroactive effect to 1 January 2008, based on article 119 and 134 of the *Loi portent des dispositions diverses (I)* of 22 December 2008, published in B.S. 29 December 2008.

[5] Act 335 of May 7th 2008, www.retsinformation.dk/Forms/R0710.aspx?id=116867.

[6] Circular no. 112/2 LIR of 7 April 2010, http://www.impotsdirects.public.lu/legislation/legi10/Circulaire_L_I_R__n___112-2_du_7_avril_2010.pdf.

[7] Gesetzes zur Umsetzung steuerlicher EU-Vorgaben sowie zur Änderung steuerlicher Vorschriften,*Bundesgesetzblatt* 2010, Teil I, nr. 15 of 14 April 2010, page 386-397, http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id='bgbl110s0386.pdf'].

[8] Provided that certain conditions, for example, timely registration, administrative requirements and public benefit requirements, are met.

[9] http://www.finance.gov.ie/documents/publications/Finance%20Bill%202010/Bill2010.pdf.

[10] http://charterconsultation.hmrc.gov.uk/budget2010/march/bn32.pdf.

2 The European Commission takes action

Article 63 TFEU (formerly article 56 of the EC Treaty) prohibits all restrictions on the movement of capital between Member States. Annex I to Council Directive 88/361/EEC of 24 June 1988[11] (the Nomenclature of the capital movements) gives a non-exhaustive classification of capital movements, including gifts and endowments, dowries, inheritances and legacies. A different treatment of domestic and EU charities would not be in accordance with the free movement of capital. In 2002 and 2003 the Court of Brussels and the Court of Appeals of Ghent ruled that the reduced gift and inheritance tax rate for domestic charitable organisations also applied to foreign charitable organisations.[12]

In 2002 the European Commission requested that Belgium amend its legislation on inheritance and registration taxes as it considered the limitation of tax relief for gifts and legacies to charities established in Belgium discriminatory. [13] The Flemish and Brussels region responded positively to this request and changed their legislation, but the Walloon region did not. Therefore, the Commission announced on 14 July 2005 it had decided to refer Belgium to the ECJ as, in its view, the Walloon inheritance and gift tax laws discriminate against foreign charities.[14] On 10 July 2006, the European Commission also sent the United Kingdom a formal request to end discrimination against foreign charities.[15] The same happened to Ireland and Poland on 17 October 2006,[16] again to Belgium (gifts to charities resident in other Member States are still not deductible) on 21 December 2006,[17] on 27 November 2008 to Estonia,[18] on 19 March 2009 to Austria (this regarded donations made in the field of science and research),[19] on 29 October 2009 the

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[11] *Official Journal*, 1988, L 178, p. 5.
[12] Court of Brussels, 6 December 2002 and Court of Appeals of Ghent, 4 November 2003, no. 03542208 as quoted by F. Sonneveldt, The Barbier Case, *European Taxation*, 2004, p. 286, and S. Jankie and P.J. Wattel, De vestigingseis voor goede doelen in de Successiewet en in de Wetten IB 2001 en Vpb 1969 in het licht van het EG-kapitaalverkeer, *WPNR*, 2004, p. 654.
[13] Press release of 21 October 2002, IP/02/1527.
[14] Press release of 14 July 2005, IP/02/1527.
[15] Press release of 10 July 2006, IP/06/964.
[16] Press release of 17 October 2006, IP/06/1408.
[17] Press release of 21 December 2006, IP/06/1879.
[18] Press release of 27 November 2006, IP/08/1818.
[19] Press release of 19 March 2009, IP/09/428.

Commission referred Austria to the ECJ over these tax provisions[20] and on 20 November 2009 the Commission sent a request to France.[21] The Commission considered the exclusion of charities in other EU Member States from the tax relief which applies to gifts to charities discrimination contrary to the TFEU (and before 1 December 2009, the EC Treaty). Former EU Taxation and Customs Commissioner László Kovács also made a general comment in the press releases concerning the UK, Ireland and Poland: "Gifts to bona fide charities in other Member States should get the same tax treatment as gifts made to domestic charities."

On 18 March 2010 the commission went one step further in a request concerning the Netherlands.[22] This request was rather unexpected as the Netherlands opened its tax incentives for charitable giving to charities in other Member States in 2008. The Commission considered that the Dutch requirement that charities have to register themselves with the Dutch tax authorities is unnecessarily restrictive, as nothing prevents the Dutch tax authorities from requiring the tax payer to prove that the conditions for tax relief have been met. However, this registration requirement applies to resident charities as well: no distinction is made between resident and non-resident charities. Furthermore, in the Stauffer[23] and Persche[24] case, the ECJ seems to allow Member States to impose administrative requirements on charities.

3 The Stauffer case on the exemption of corporate income tax for resident charities

In its decision of 14 September 2006 in the Walter Stauffer case, the ECJ for the first time had to decide whether or not Member States are allowed to differentiate between domestic and foreign charities. Centro di Musicologia Walter Stauffer (hereinafter: Stauffer) is an Italian charity. It owned commercial premises in Germany, which were

[20] Press release of 29 October 2009, IP/09/1637, Case C-10/10, Commission v. Austria.
[21] Press release of 20 November 2009, IP/09/1764.
[22] Press release of 18 March 2010, IP/10/300.
[23] ECJ 14 September 2006, Case C-386/04, *Centro di Musicologia Walter Stauffer versus Finanzamt München für Körperschaften*.
[24] ECJ 27 January 2009, Case C-318/07, *Hein Persche v Finanzamt Lüdenscheid*.

rented out through a German property management agent. If Stauffer had been a charity resident in Germany, the rental income would have been exempt from German corporate income tax. Stauffer met all conditions for being a German charity except for the fact that it was not established in Germany, but in Italy. Therefore the exemption from corporation tax did not apply and the rental income was taxed. Stauffer disputed this taxation.

The ECJ observed that the fact that the tax exemption for rental income applies only to domestic charities places charities based in another Member State at a disadvantage which may constitute an obstacle to the free movement of capital and payments. The German government argued that this restriction can be justified, because a domestic charity is not comparable to a foreign charity. A domestic charity plays an active role in German society and performs duties which would otherwise have to be carried out by local or national authorities. This would be a burden on the State budget, whereas the charitable activities of the foreign charity only concern the other Member State. Moreover, Germany argued, the conditions under which Member States confer charitable status on a foundation, which entails tax benefits and other privileges, varies from one Member State to the other, according to each State's conception of public utility and the scope given by it to the concept of "charitable purposes". A charity which meets the Italian requirements may not be in a comparable situation to a charity which meets the German requirements.

However, the ECJ decided that non of these arguments could be upheld. It acknowledged that Member States are entitled to require a sufficiently close link between foundations on which they confer charitable status for the purposes of granting certain tax benefits and the activities pursued by those foundations. However, like most Member States Germany does not make a distinction as to whether those activities are carried out in Germany or abroad. It is not a condition for charitable status that nationals of Germany or its inhabitants benefit from the activities of the charities. Furthermore, the ECJ observed that it is not a requirement under Community law to automatically confer charitable status on foundations recognized as such in their Member State of origin. Member states are free to determine which interests of the general public they wish to promote by

granting benefits to charities. However, where a charity recognized as such in one Member State also satisfies the requirements of another Member State and where its object is to promote the very same interests of the general public, the other Member State cannot deny the charitable status. The ECJ stated that the national authorities and courts of the other state have to determine whether the foreign charity meets these requirements. However they cannot deny the foreign charity the right to equal treatment solely on the ground that it is not established in its territory.

Furthermore, the ECJ rejected the effectiveness of fiscal supervision as a justification for the restriction. The Court held that, before granting a charity a tax exemption, a Member State is authorized to apply measures enabling it to ascertain clearly and precisely whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption, and to monitor its effective management, for example by requiring the submission of annual accounts and an activity report. Where charities are established in other Member States, it may prove more difficult to carry out the necessary checks. Nevertheless, these are disadvantages of a purely administrative nature which are not sufficient to justify a refusal to grant foreign charities the same tax exemptions as are granted to domestic charities of the same kind. The Court stated that there is nothing to prevent the tax authorities from requiring a charity to provide relevant supporting evidence to enable those authorities to carry out the necessary checks. However, national legislation which absolutely prevents the taxpayer from submitting such evidence cannot be justified in the name of effective fiscal supervision. Moreover, the Court pointed out that the Mutual Assistance Directive[25] allows tax authorities to call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax, including information as to whether that person may be granted a tax exemption.

The ECJ therefore judged that the German limitation of the corporate income tax exemption of rental income to domestic charities was not in line with free movement of

[25] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (*Official Journal* 1977 L 336, p. 15) as amended by later Directives.

capital. In my opinion, the impact of the Stauffer case is not limited to corporate income tax exemptions. The wording the ECJ used may cover all forms of tax incentives for charities, including tax incentives for charitable giving. This is also the opinion of the Dutch Supreme Court. In March 2008 this Court judged that already in 2002 a UK charity could apply for the Dutch inheritance tax exemption as it deemed the limitation to charities resident in the Netherlands incompatible with the EC Treaty (free movement of capital).[26] The Supreme Court based its decision on the ECJ's judgment in the Stauffer case.

4 Only a few Member States changed their legislation after the Stauffer case

1 January 2008 the Netherlands changed its legislation regarding tax incentives for charitable giving. As of this date charities resident in other Member States of the EU can become registered charities in the Netherlands if they meet the Dutch charity requirements. Such charities are exempt from Dutch gift and inheritance tax and residents in the Netherlands may deduct gifts to these charities from Dutch income tax. Until now, not many foreign charities have used this possibility to register in the Netherlands. None of the registered foreign charities is resident in Portugal. One of the reasons that only a few foreign charities have registered in the Netherlands may be that information on charity registration is in Dutch only. Another reason may be that foreign charities are not aware of the possibility to register in the Netherlands. Some other countries that provide for tax incentives for foreign charities are Poland, Slovenia, Belgium, Denmark, Luxembourg and as of 15 April 2010, Germany. Sweden is the only Member State which does not provide for any tax incentives for gifts to charities, no matter whether these charities are resident or foreign. [27]

Many European Member States still do not treat (donations to) foreign charities in the same way as resident charities. Some of these Member States do not allow tax incentives

[26] Hoge Raad, 21 March 2008, no. 43126, BNB 2008/153.
[27] European Foundation Centre 2007, pp. 23-24.

to foreign charities under any circumstances and others give some tax incentives in limited or exceptional cases.[28]

5 The ECJ had to decide again: the Persche Case on donations to foreign charities

The Stauffer case focussed on the position of the charity. On 11 July 2007 the German Federal Tax Court raised questions which focussed on the position of the donor. It asked the ECJ whether it is incompatible with the free movement of capital to confer a tax benefit on donations in kind to charities only if the latter are resident in that Member State (Persche case, C-318/07). Germany, like many other Member States, does not provide for the deduction of direct contributions to foreign charitable institutions. As is the case in many other Member States, indirect donations, through a resident charity which has as its only activity raising funds for foreign charities, are deductible.

The reason the German Court asked for a preliminary ruling and did not rely on the Stauffer case, was that the assumption of the referring court in the Stauffer case, that advancement of interests of the community does not necessarily imply that German citizens or residents have to benefit from the measures, is highly disputed in Germany. [29] Furthermore, the German Court doubted whether the local authorities of the residence Member State of the charity are obliged to check on the charity and whether it would not be in breach of the proportionality principle if the German tax authorities would have to perform such checks. Perceived administrative difficulties therefore seem to be the main reason the German Court asked similar questions as were answered in the Stauffer case. According to Englisch the Federal Tax Court was convinced that the German restrictions were justified, but it asked questions to the ECJ because of the Stauffer decision.[30] For the German Court an important difference between the Stauffer case and the Persche case

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[28] European Foundation Centre 2007, pp. 23-24.
[29] Paragraph 20 of the opinion of Advocate General Mengozzi of 14 October 2008 in the Persche case (C-318-07).
[30] J. Englisch, ' Germany I: the Busley, Block, Commission v Germany and Persche cases' , in: M. Lang, P. Pistone, J. Schuch, C. Staringer (eds) *ECJ- Recent developments in direct taxation 2008*, Linde 2008, p.158.

was that in the Stauffer case the foreign charity had a presence in Germany (renting out a building there).

The governments of France, Greece, the United Kingdom, Ireland and Spain submitted observations in support of Germany. However, the Advocate General was not willing to deviate from the Stauffer doctrine. First of all, he pointed out that already in the Stauffer decision the ECJ decided that article 56 also applies to charities. Furthermore, he referred to the judgements Barbier (C-364/01), Van Hilten-van der Heijden (C-513/03), Jäger (C-256/06) and Arens-Sikken (C-43/07) in which the ECJ made no difference between inheritances in kind and in cash. Therefore, he was of the opinion that gifts in kind also fall under the scope of article 56 of the EC Treaty (currently, article 63 TFEU). The Advocate General referred to the Stauffer Case when he rejected the justifications for a different treatment of charities in other Member States. Furthermore, he was of the opinion that the existence of a close link between the activities and the German territory was irrelevant for this case. The Advocate General referred to the Stauffer case regarding the possibilities for control and mutual assistance regarding charities located in other Member States.

In its judgement of 27 January 2009 the EJC followed the opinion of the Advocate General. First of all the Court decided that the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, fall within the scope of the free movement of capital, even if the gifts are made in kind in the form of everyday consumer goods (para. 30). The ECJ emphasised that Member States may restrict the grant of tax advantages to bodies pursuing specific charitable purposes, but that they cannot restrict such tax incentives to charities established in that Member State. The argument that such charities relief the Member State of some of its responsibilities was not considered a justification for the restriction to resident charities, as the need to prevent the reduction of tax revenues is not a justification (para. 44, 46). In line with the Stauffer case the ECJ allows Member States to apply their own charities regulations on foreign charities (para. 48-50), except for the residency criterion. As in the Stauffer Case, the ECJ points out that nothing prevents the tax authorities from requiring a taxpayer to

provide the relevant evidence, and that the tax authorities may, pursuant to the Mutual Assistance Directive, call upon the authorities of another Member State to obtain all the necessary information (para. 51-65). The ECJ did also not accept the German argument that it is difficult to check, on the spot, compliance of the foreign charity with the requirements. During the hearing Germany admitted that even in relation to national charitable bodies, an on-the-spot inspection is not usually required since the monitoring of compliance with the conditions imposed by the national legislation is carried out, generally, by checking the information provided by the charities (para. 67). The ECJ did, however, emphasize that Member States may refuse to grant tax incentives to charities in third countries if it proves impossible to obtain the necessary information from that country, in particular, because that non-member country is not under any international obligation to provide information (para. 70). The ECJ concluded that article 56 EC precludes legislation which only allows the deduction of gifts made to resident charities without any possibility for the taxpayer to show that a gift made to a charity established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit (para. 72). The Persche case is therefore in line with the Stauffer case.

Notwithstanding these judgements of the ECJ, for the moment, tax incentives still limit the choice and fundraising possibilities of many European donors and charities. Obviously, most donors and charities do not want to spend their money on lengthy court cases and will take the national legislation granting tax incentives to resident charities only, as a given.

6 Private initiatives to enable tax friendly cross border charitable giving in Europe

Currently, in most Member States tax incentives for charitable giving are still only granted to resident charities. The Stauffer case did not change this nor did the opinion of the Advocate General in the Persche case. Furthermore, the ECJ decisions in these cases may have a restricting effect on national legislation regarding charitable giving. For

example, in Germany a reform bill was debated which would require that donations must either benefit German inhabitants or contribute to a good foreign reputation of the German nation. Englisch remarked that this bill was met with considerable scepticism.[31]

The unwillingness of most Member States to change their legislation causes a problem for donors who do not want to go to court. In several countries the private initiative has found an intermediate solution for this problem. These solutions make use of the fact that although most countries do not grant tax incentives to donations to foreign charities, resident charities are allowed to give donations to projects and charities abroad.

In the United Kingdom GlobalGiving.co.uk provides for such a solution. This charity is based on the US registered charity Global Giving Foundation. Both charities function as a kind of eBay for international charitable giving by connecting donors with small-scale development projects and by allowing donors to give to foreign projects while using the US or UK tax incentives for charitable giving. The projects have their own pages on the website of the charity (www.globalgiving.com and www.globalgiving.co.uk), with details on the amount of money they need and where the money will go. It is, however, important to note that 10% of each donation is used as a fee to cover the cost of the charity itself: operating the marketplace - finding and researching projects, attracting donors and building the website.

As the focus of Global Giving is on developing countries, this is not a solutions for donors who want to give to a charity in another Member State. Some major charities in several European countries have come up with a similar solution for giving in Europe. The Transnational Giving Europe network (TGE) is a partnership between major charities in several Member States: Fondation de France, Maecenata International (Germany), Community Foundation for Ireland, Oranje Fonds (the Netherlands), Foundation for Poland, Charities Aid Foundation (United Kingdom), Swiss Philanthropy Foundation, BCAC (Bulgaria), Fondation de Luxembourg, Carpathian Foundation

[31] J. Englisch, ' Germany I: the Busley, Block, Commission v Germany and Persche cases' , in: M. Lang, P. Pistone, J. Schuch, C. Staringer (eds) *ECJ- Recent developments in direct taxation 2008*, Linde 2008, p. 163.

International (Hungary, Romania, Slovakia), Vita.it (Italy) and the King Baudouin Foundation (Belgium). [32] The network expects to develop its services across the whole of the European Union. 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 member charity in the other state. For example, a resident of Belgium wants to make a donation 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 will in turn transfer the donation to the French charity. Again, it is important to notice that five percent of each gift is used to cover the costs of the network.

The administration costs of these solutions make that these are considered as 'next best' solutions. If it would be possible to donate directly to a charity in the other Member State, the administration costs of 5% or 10% could be used for the charitable object and not for administration costs. This makes these solutions less attractive for substantive donations. In the case of charities with a solid reputation, for example, world famous museums or the Red Cross in another Member State, the reliability check also does not provide an advantage of using these networks.

7 Proposals for a European Foundation

Almost 40 years ago, the tax obstacles to cross border charitable giving were already discussed. In 1971, the International Standing Conference on Philanthropy (INTERPHIL) presented a Draft European Convention on the Tax Treatment in respect of certain Non-Profit Organizations to the Council of Europe. In this draft the Secretary General of the Council of Europe was given the power to register charities and supervise them. The

[32] www.kbs-frb.be/philantropy.aspx?id=171742&LangType=1033.

activities of the charity had to be exclusively not for profit and for the promotion of a public benefit such as science, health, education, culture, philanthropy or similar activities. The registration with the Council of Europe had to renewed every three years. However, the contracting states were not willing to transfer part of their sovereignty in relation to charities and the convention was not adopted.

In 2004 the European Foundation Centre proposed a draft Regulation on a European Statute for Foundations.[33] This proposal was aimed at funders and foundations active in more than one EU Member State, giving them the opportunity to use one charity instead of having to establish charities in various Member States. Furthermore, it was expected to improve the cross-border activity of funders and foundations in Europe and to facilitate cross-border giving in Europe. The European Foundation would be regarded as for the public benefit if, and only if, it serves the public interest at large on a European or global level. Furthermore, its purposes would have to include the promotion of the public interest in one or more of the fields mentioned in the draft regulation or any other field determined from time to time to be of public benefit.[34] The charitable purposes mentioned in the draft Regulation are arts, culture and historical preservation; assistance to, or protection of, people with disabilities; assistance to refugees and immigrants; civil and human rights; consumer protection; international and domestic development; ecology and the protection of the environment; education, training and enlightenment; elimination of discrimination based on race, ethnicity, religion, disability, or any other legally proscribed form of discrimination; prevention and relief of poverty; health and physical well-being and medical care; humanitarian and disaster relief; European and international understanding; protection of, and support for, children and youth; protection of, and support for, disadvantaged individuals; protection and care of animals, science, social cohesion, including the promotion of respect for minorities; social and economic development; social welfare, sports and amateur athletics. These objects were found to have been widely accepted within the EU.[35]

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[33] www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf, more information can be found on www.efc.be/EuropeanFoundationStatute/Pages/EuropeanFoundationStatute.aspx.
[34] Article 2 of the draft regulation.
[35] European Foundation Centre, *Proposal for a regulation on a European statute for foundations* (version 16), Brussels,

The draft also provided for the creation of a European Registration Authority which would be required to maintain a public register of European foundations[36] and which would serve as the supervisory body for European foundations. Where the establishment of such a European Registration Authority would not be feasible, it was suggested that the registration, establishment and supervision of the European Foundation could also be exercised at the national level.[37] The European Foundation Centre warned that this would lead to (then) 25 different ways of setting up European foundations. Furthermore, a European supervisory structure would level the field and provide for better assurance that supervision would take place in a comprehensive and comparable way across the EU.'

The Regulation included three additional articles on the tax treatment of the European Foundation, its donors and beneficiaries. It was proposed that the European Foundation would be subject to the tax regime applicable to charities in the Member State where it has its registered office. Branches in other Member States would be subject to the regime in that Member State. Donors to a European Foundation would enjoy the same tax incentives as donors to a local charity. Gifts from a European Foundation would be treated as if they were given by a charity registered in the Member State in which they were received.

Both the European Parliament and the European Commission seemed to be interested in this idea.[38] However, on 21 November 2006 Internal Market Commissioner McGreevy told the European Parliament's legal affairs committee that he was not yet convinced about the ability of a European Foundation Statute to respond to the specific needs of foundations, but that the European Commission would reflect on the matter. Earlier that

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January 2005, p. 27; www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf. Also Von Hippel observes that there are 'surprising' similarities (T. von Hippel, 'Zukunftsperspektiven für grenzüberschreitend tätige gemeinnützige Nonprofit-Organisationen' In: H. Kohl et al (ed) ,*Zwischen Markt und Staat (Gedächtnisschrift für Rainer Walz)* Köln: Carl Heymanns Verlag 2007, p. 221-222.

[36] Article 6 of the draft regulation.

[37] European Foundation Centre, *Proposal for a regulation on a European statute for foundations* (version 16), Brussels, January 2005 pp. 27 and 29; www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf.

[38] G. Salole, 'The EU's wrong-headed NO to a special statute for foundations', *Europe's World*, Spring 2007, and G. Salole, 'The importance of there being a European Foundation statute', in N. Macdonald and L. Tayart de Borms (ed.) *Philanthropy in Europe*, London: Alliance Publishing Trust, 2008, pp. 290-291.

year, in March, the Commission had already withdrawn its 1991 proposal for a Regulation on the statute for a European association [39] together with various other proposals which were found to be inconsistent with the Lisbon and Better Regulation criteria, unlikely to make further progress in the legislative process or to be no longer relevant for objective reasons.[40] Nevertheless, the European Commission commissioned a feasibility study on a European Foundation statute which began in autumn 2007. The study included a comprehensive legal comparison of foundation law in the Member States, an extensive analysis of existing data about the foundation sector, and a field study of economic activities as well as barriers against international activities and their possible costs. The results of the study were made public on 16 February 2009 when the European Commission launched a public consultation on a possible Statute for a European Foundation. [41] The study both regarded the legal and the tax features of foundations in Europe and of a European Foundation. The Commission emphasised that it had not yet taken a decision as to the need for a European Foundation Statute or its content.[42] The results of the consultation were made public on 10 November 2009.[43] Most of the respondents considered the European Foundation Statute as the preferable policy option. There was a difference of opinion on the question whether the Statute should include provisions on taxation, but the respondents agreed that if tax elements were included equal treatment between national and European Foundations should be guaranteed. On 28 April 2010 the European Economic and Social Committee (EESC), a consultative body of the European Union, released an own initiative opinion on the European Foundation Statute.[44] The EESC adopted this opinion by 134 votes to 2 with 1 abstention. It urged the European Commission to present a proposal for a Regulation on a European Foundation Statute to support public benefit activities for its adoption by the Council and the European Parliament in due course (paragraph 1.4). The European Foundation should be allowed to pursue public benefits only, which, according to

[39] COM(1991) 273, 1991/0386/COD, OJ C 99, 21 April 1992, p. 1.
[40] *Official Journal* C 064 , 17 March 2006, p. 0003-0010.
[41] Both can be found on the website
http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm.
[42] Press release IP/09/270.
[43] http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm.
[44] INT/498-CESE 634/2010 EN/o,
https://toad.eesc.europa.eu/ViewDoc.aspx?doc=%5C%5Cisis%5Cdfs%5Cesp_public%5Cces%5Cint%5Cint498%5CEN%5CCES634-2010_AC_EN.doc.

paragraph 3.2.2.4 of the opinion would be the case if (1) it serves it serves the public interest at large at European or international level; and (2) the purpose for which it is established includes the promotion of the public interest in one or more fields determined to be of public benefit. In order to allow for flexibility the description of public benefit could provide for an open list of public benefit purposes. The direct tax treatment of the European Foundation is addressed in paragraph 4.1.6-4.1.8 of the opinion: the tax authority of the Member State where the European Foundation is liable to tax should determine its tax treatment. However, the European Foundation and its donors should be able to benefit from the same tax benefits as resident foundations.

Interestingly, it is suggested that under the Common Consolidated Corporate Tax Base (CCCTB) gifts to 'charitable bodies' should be deductible and that for this reason common criteria for charities are needed.[45] If it is deemed feasible to establish such criteria for CCCTB purposes, it would be difficult to give valid reasons for not using such common criteria to enable cross border giving.

8 Conclusion

Within Europe there are still fiscal barriers to cross border charitable giving. The Stauffer and Persche decisions did not cause all EU Member States to change their legislation. It remains to be seen whether a European Foundation will be introduced to allow for cross border charitable giving in all Member States. In the mean time, the private initiative has found ways to make tax deductible donations to charities in other Member States possible. However, these come at a considerable cost. Although Mr. Gulbenkians nickname was "Mr. Five Per Cent" because of his habit of retaining five per cent of the shares of the oil companies he developed, he would probably not have appreciated the fact that 5 or even 10 percent of his inheritance would not have reached the Gulbenkian Foundation. He avoided the problem by living in Portugal. Mr. Persche had to wait for the decision of the

[45] *CCCTB: possible elements of a technical outline*, Working Paper 57, 26 July 2007, p. 13 (http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/CCCTBWP057_en.pdf) and *Various detailed aspects of the CCCTB*, Working Paper 66, 27 March 2008, p.5 (http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/CCCTBWP066_various_detailed_aspects_en.pdf).

ECJ to get his generosity towards Portugal rewarded with tax incentives. The best way to avoid such problems for future cosmopolitan philanthropists would be that Member States adapt their tax legislation to accommodate cross border charitable giving within Europe.