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Non-discriminatory taxation of charitable organisations and their donors: principles drawn from EU case-law

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1. INTRODUCTION

On 9 December 2021, the Commission adopted its **Communication on "Building an economy that works for people: an action plan for the social economy" – the Social Economy Action Plan**.[1] In this Communication, the Commission committed to encourage mutual learning and provide guidance and support to Member States by publishing guidance clarifying the existing rules on the tax treatment of cross-border public benefit donations affecting foundations and associations[2] and the implementation of the principle of non-discrimination with Member States.

This document follows up to the commitment taken by the Commission by providing an overview of the application of the principle of non-discrimination as determined in the jurisprudence of the Court of Justice of the European Union (the Court), both with respect to taxation of charitable organisations and their donors. It is linked to the proposal for a Council Recommendation on developing social framework conditions[3] as well as the Commission Staff Working Document on "Relevant taxation frameworks for social economy entities".[4]

For the purposes of this document, the term "charitable organisation" or "charity" will be used for ease of reference to cover all entities with activities that aim to serve the "broader public", i.e. they are pursuing a public benefit purpose. In practice, such entities can take various legal forms, such as foundations, associations, cooperatives or mutual benefit societies. While the case-law of the Court that is discussed in this document deals with *foundations having charitable status*, *bodies pursuing charitable purposes, non-profit organisations, non-profit making bodies, bodies recognised as charitable,* this case-law applies, **by analogy**, also to other legal forms that entities pursuing public benefit purposes may take.

2. BACKGROUND

Currently, Member States are free to design their tax systems as they see fit, provided they comply with European Union (EU) law, as interpreted by the Court. EU law has important implications for Member States' national legislation when it comes to **cross-border situations** where natural and legal persons exercise **the fundamental freedoms** guaranteed by the Treaty on the Functioning of the European Union (TFEU)[5]. This is also true for

[1] COM(2021)778 final.

[2] In the context of the public consultation run by the European Commission to underpin the proposal for a legislative initiative on cross-border activities of associations in the single market, "equal tax treatment for donors in case of cross-border donation" was identified as one of the most important needs by associations that operate or wish to operate in one or more Member States, and "tax related issues" were identified as the most dissuasive restriction faced by associations when engaging in activities across borders.

[3] COM(2023) 316 final

[4] SWD(2023) 211 final

[5] The fundamental freedoms are the free movement of workers (Article 45 TFEU), the freedom of establishment (Article 49 TFEU), the free movement of services (Article 56 TFEU) and the free movement of capital and payments (Article 63 TFEU). If the constituent elements of a case are confined within a single Member State, the fundamental freedoms are not applicable.

charitable organisations and donations and bequests made to such entities. Due to the nature of EU law, i.e. its **supremacy** over Member States' national rules and its **direct effect**, charities and their donors can directly invoke the fundamental freedoms in front of national administrative and judicial authorities in case Member States apply discriminatory tax measures.

Historically, no Member State granted the same income tax benefits which they provided to domestic charities to foreign charities, even if the latter fulfilled the relevant criteria of the national law. Similarly, resident donors could not benefit from tax exemptions in their own country when they donated to a foreign charity. In addition, only a minority of Member States accepted an inheritance tax exemption for bequests to non-resident charities.

The Court started developing the **relevant legal principles that Member States should apply to avoid discriminatory tax treatment of charitable organisations, donations and inheritance/gift taxation to charitable organisations** in response to references for preliminary ruling brought under Article 267 TFEU by national courts. It concerns in particular the landmark cases ***Stauffer*** (C-386/04)[6], ***Persche*** (C-318/07)[7] and ***Missionswerk*** (Case C-25/10)[8]. They are discussed in detail in the annex to this document.

Based on the clarifications offered in those first rulings, the Commission pursued a horizontal compliance assessment of Member States' national laws in view of the legal principles set by the Court[9]. Since 2005, the Commission has opened 39 infringement proceedings against Member States under Article 258 TFEU which mirror the case-law mentioned above. The majority of the cases dealt with the refusal to grant personal or corporate income tax relief for donations to charities established in other Member States (the *Persche* type infringement). The second group of cases concerned the presence of higher succession or gift duties for legacies and gifts to charities in other Member States (the *Missionswerk* type infringement). The third group of cases concerned instances of higher taxation of income of non-resident charities (the *Stauffer* type infringement). Most of those discriminatory tax rules were resolved by Member States. Three infringement cases were eventually referred to the Court. This concerns the following cases: ***Commission v Austria*** (C-10/10)[10], ***Commission v France*** (C-485/14)[11] and ***Commission v Greece*** (C-98/16)[12].

The Court ruled in those cases that domestic tax provisions that discriminate against foreign charities or donations/bequests to foreign charities are **incompatible with the free movement of capital**. This means that non-resident charities, and donations/bequests made to charities resident in other Member States, should not be treated differently for tax purposes simply because they are resident in another Member State. While it is for each Member State to determine whether it will provide for a certain tax treatment for charitable organisations and charitable giving and, if so, what kind of general interests it wishes to promote by offering such tax treatment under national law, once a Member State decides to provide for an

[6] Judgment of 14 September 2006, *Stauffer*, C-386/04, EU:C:2006:568
[7] Judgment of 27 January 2009. *Persche*, C-318/07, EU:C:2009:33
[8] Judgment of 10 February 2011, *Missionswerk*, Case C-25/10, EU:C:2011:65
[9] For more information on the infringement procedures see: http://ec.europa.eu/taxation_customs/common/infringements/index_en.htm.
[10] Judgment of the Court of 16 June 2011, *Commission v Austria*, C-10/10, EU:C:2011:399
[11] Judgment of the Court of 16 July 2015, *Commission v France*, C-485/14, EU:C:2015:506
[12] Judgment of the Court of 4 May 2017, *Commission v Greece*, C-98/16, EU:C:2017:346

advantageous tax treatment for domestic charities and charitable giving, it should provide for **non-discriminatory tax treatment** of comparable foreign charities and donations and bequests made to such entities. This ensures that the tax autonomy of the Member States is exercised in accordance with the fundamental freedoms of the TFEU.

3. EU LEGAL FRAMEWORK APPLICABLE TO CHARITIES AND DONATIONS FROM A DIRECT TAX PERSPECTIVE

Against the background elaborated upon in section 2, this section provides an overview of the relevant provisions of the TFEU, as interpreted by the Court, that governs cross-border situations involving charitable organisations and donations.

3.1. Applicable freedom: free movement of capital

In the majority of cases regarding discriminatory taxation of charities and charitable giving, the primarily affected freedom will be the free movement of capital as guaranteed by Article 63 TFEU. This was the applicable freedom in all the Court's cases mentioned in section 2 above [13]. The Commission also invoked the free movement of capital in all the horizontal infringement cases against Member States, sometimes alongside the freedom of establishment[14] and the free movement of persons. However, the freedom that is primarily affected is, in principle, the one taken into account exclusively by the Court.[15]

Art. 63(1) TFEU provides that: *"...all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."* The TFEU does not define the notion of capital movement. However, it is established case law of the Court that the nomenclature in respect of "movements of capital" annexed to Directive 88/361[16] has an indicative value. The list set out in this nomenclature is not exhaustive[17]. Under that nomenclature gifts, endowments, inheritances and legacies are considered to be personal capital movements.[18] Gifts in kind also qualify as capital movements.[19]

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[13] According to the case law of the Court the purpose of the legislation concerned should be taken into account to determine the applicable freedom (e.g. see judgment C-35/11 *FII*, point 90, C-318/07 *Persche*, point 28.)

[14] It is to be noted that the freedom of establishment was examined by the Court in case C-386/04 *Stauffer.* The Court noted that *"in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed."* Given the facts of the case it was not found to be applicable. Namely, the foundation in this case did "*not have any premises in Germany for the purposes of pursuing its activities* and (…) *the services ancillary to the letting of the property* (…) [were] *provided by a German property management agent*."

[15] E.g. see Case C-31/11, *Marianne Scheunemann,* point 30. The case concerned an inheritance consisting of a 100 per cent shareholding in a capital company established in Canada. Given the nature of the German rule at issue the Court concluded that only the freedom of establishment is applicable, which meant that there is no protection under EU law. This could be of relevance with regard to delimitation of the freedom of establishment and the free movement of capital in case of donations and bequests consisting of a major shareholding in a company when a non-member country is involved. The freedom of establishment does not apply in relation to non-member countries and thus, there would be no breach of fundamental freedoms.

[16] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, p. 5–18.

[17] Case C-318/07 *Persche*, point 24 and the case law cited therein.

[18] Annex 1, section XI, Personal capital movements, B.

[19] Case C-318/07 *Persche*, point 30.

The free movement of capital is the only fundamental freedom that applies also beyond the EU. Thus, it provides for liberalisation of capital movements not only between Member States, but also between Member States and non-member countries (third countries). This could have positive implications for the tax treatment of foreign charities and deductions for gifts from residents of Member States to charities in non-member countries.

However, the TFEU itself also contains some limitations to the free movement of capital to and from non-member countries. Article 64 (1) TFEU contains a grandfathering clause stating that Member States may retain, in relation to non-member countries, the restrictions that existed on 31 December 1993 on direct investment – including in real estate-establishment, the provision of financial services, and the admission of securities to capital markets. For Bulgaria, Estonia and Hungary, the relevant date is 31 December 1999. These limitations might be relevant in case of gifts and bequests in the form of real estate or major shareholdings in companies. Measures on the movement of capital to or from non-member countries can also be adopted in certain circumstances on the basis of Articles 64(2) and (3), 65(4) and 66 TFEU.

Apart from those exceptions, taxpayers donating to comparable charities established in non-member countries could in principle benefit from tax advantages that Member States grant domestically. Article 63 TFEU does not vary in its content according to the movement of capital between Member States and non-member countries on the one hand and between Member States on the other hand. It prohibits all restrictions of the movement of capital regardless of the source or destination of capital movements. Equally, justifications of overriding reasons in the public interest that may justify discriminatory treatment if they meet the proportionality principle, will apply in the same manner to both types of situations and should be demonstrated on a case-by-case basis. However, as explained below, **there might be a greater scope for accepting restrictions of the free movement of capital between EU and non-member countries**.

3.2. Discriminatory treatment by a Member State of foreign charities and donations

The principle of non-discrimination is the central element that underpins the Treaty freedoms, including the free movement of capital. This means that national rules which treat cross-border movements of capital less favourably than purely domestic movements could be incompatible with the free movement of capital.

According to well-established case-law of the Court, **discrimination can result from treating differently situations which are comparable** or treating different situations in the same way. Thus, in order for a national measure providing for a difference in treatment to be compatible with the Treaty freedoms, it must concern situations that are not objectively comparable or it must be justified by an overriding reason in the general interest. Furthermore, the national measure must observe the principle of proportionality, meaning that it must be appropriate to ensuring the attainment of the objective in question and must not go beyond what is necessary to attain that objective.

3.3. Comparability of the domestic and cross-border situation

It is established case-law of the Court that: *"(…) it is not a requirement under Community law for Member States* ***automatically*** *to confer on foreign foundations recognised as having charitable status in their Member State of origin the same status in their own territory."*[20]

However, the Court has clarified that: *"(…) where a body recognised as pursuing charitable purposes in one Member State* ***satisfies the conditions laid down for that purpose in the legislation of another Member State*** *and where* ***its object is to promote the very same interests of the community at large,*** *so that it would be likely to be recognised in the latter Member State as pursuing charitable purposes – a matter which it is for the national authorities of that Member State, including its courts, to determine – the authorities of the latter Member State cannot deny that body* ***the right to equal treatment*** *solely on the ground that it is not established in the territory of that Member State (see, to that effect, Persche, paragraph 49)."*[21]

Thus, in principle, Member States can specify the requirements that must be met by foreign charitable organisations in order to be regarded as comparable to a domestic charitable organisation. However, any such requirements should not be discriminatory in themselves.

Moreover, it follows from the Court's case-law that Member States can require a sufficiently close link between charitable status for the purposes of tax exemption and the activities pursued by charitable organisation.[22] In this context, the Court clarified that a tax advantage can be limited to promoting cultural, historical or natural heritage of a particular Member State to the exclusion of such heritage of another Member State, as long as it is not limited to its territory.[23]

3.3. Justification grounds restricting the Treaty freedoms: overriding reasons in the public interest

The Court has also clarified in its case-law when a restriction to the free movement of capital in the context of charitable organisations and donations could be considered acceptable or not.

- ***Effectiveness of fiscal supervision and prevention of tax avoidance and tax evasion***

The effectiveness of fiscal supervision and prevention of tax avoidance and tax evasion is an acceptable justification ground, capable of justifying a restriction of the fundamental freedoms. However, when invoked by Member States, it has to comply with **the principle of proportionality**.

The Court has ruled that: *"[T]hus, before granting a foundation a tax exemption, a Member State is* ***authorised to apply measures enabling it to ascertain in a clear and precise manner 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****. Admittedly, where foundations are*

[20] C-386/04 *Stauffer*, point 39.
[21] Case C-25/10 *Missionswerk*, point 32.
[22] C-386/04 *Stauffer*, point 37.
[23] See case C-87/13 *X*, point 33 and C-133/13 Q, point 28.

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 on the part of the authorities of the State concerned to grant such foundations the same tax exemptions as are granted to foundations of the same kind, which, in principle, have unlimited tax liability in that State* (…). *There is nothing to prevent the tax authorities concerned from requiring a charitable foundation claiming exemption from tax* ***to provide relevant supporting evidence to enable those authorities to carry out the necessary checks****. (…)*".[24]

This justification for an interference with a Treaty freedom will be difficult to rely on for a Member State in a cross-border situation within the EU. This is because the Member States have a comprehensive system of administrative cooperation in place based on the exchange of tax information to support the administration and enforcement of domestic tax law as established in the **Directive on administrative cooperation in the field of taxation 2011/16/EU**.[25] The justification invoking the need to guarantee the effectiveness of fiscal supervision and combating tax avoidance and tax evasion will have more weight in relation to capital movements between a Member States and non-member countries that have not concluded an exchange of information agreement of sufficient scope with the Member State of a charitable organisation or of a donor (such as an information exchange clause modelled after Article 26 of the OECD Model Convention).

The Court explicitly acknowledged this in *Persche*: *"[A]s regards charitable bodies in a non-member country, it must be added that it is, as a rule, legitimate for the Member State of taxation* ***to refuse to grant such a tax advantage*** *if, in particular, because that* ***non-member country is not under any international obligation to provide information****,* ***it proves impossible to obtain the necessary information*** *from that country."*[26]

Thus, **an important issue to assess will be the ability of a Member State to verify the information and evidence** submitted by a taxpayer trying to prove that a charity resident in a non-member country meets all the requirements of domestic legislation via mutual assistance mechanisms contained in bilateral tax treaties or information exchange agreements.

- ***Abuse of charities for money laundering and terrorist financing***

The Court has ruled that a general denial of a beneficial tax treatment for fear that foreign charities might be involved in activities leading to money laundering and terrorist financing is a **disproportionate measure**, not in line with EU law.[27] The Court pointed to less severe

[24] C-386/04 *Stauffer*, points 48-49.
[25] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (on the exchange of information), OJ L 64, 11.3.2011, p. 1–12. See also Commission Implementing Regulation (EU) No 1156/2012 of 6 December 2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 335, 7.12.2012, p. 42–46.
[26] C-318/07 *Persche*, point 70.
[27] E.g. the Court ruled in *Stauffer, point 61: "[E]ven if, by granting a tax exemption only to charitable foundations that are established in its territory, the authorities of a Member State seek to combat crime, the fact remains that the fact that a foundation is established in another Member State cannot give rise to a general assumption of criminal activity. Moreover, to preclude such foundations from entitlement to a tax exemption when a number of measures are available to monitor their accounts and activities may be considered to be a measure which goes beyond what is necessary to combat crime."*

measures that would meet the proportionality test, such as **monitoring the accounts** and **activities** of charitable organisations established in other Member States.

Furthermore, in this specific context, there is police co-operation and existing EU instruments that could help counter these threats.[28] While charitable organisations are not subject to the requirements of the Anti-Money Laundering Directive[29] nor considered as gatekeepers under the international standards of the Financial Action Task Force, they are clients of banks, lawyers, tax advisors and accountants, etc., which are gatekeepers subject to AML/CFT requirements (i.e. obliged entities) themselves. Therefore, transactions of charitable organisations are monitored by obliged entities and charitable organisations themselves are subject to customer due diligence.

3.4. Reduction of tax revenue and reciprocity never considered as an overriding reason in the public interest

It is established case-law of the Court that **reduction of tax revenue** cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom.[30]

Member States have also tried to rely on **the lack of reciprocity with non-member countries as a justification for less favourable tax treatment** for relations with non-member countries given that there is no assurance that that country will give national treatment to relations with the EU Member States. The Court has rejected such a justification: "*… when the principle of free movement of capital was extended, pursuant to Article 56(1) EC, now Article 63(1) TFEU, to movement of capital between non-member States and the Member States, the latter chose to enshrine that principle in the same article and in the same terms for movements of capital taking place within the European Union and those relating to relations with non-member States.*"[31] Thus, the reciprocity requirement runs counter to the wording and spirit of Article 63 TFEU. By expressly deciding to unilaterally liberalise capital movements to and from non-member countries, the Member States specifically renounced a reciprocity requirement in the Treaty.

4. GUIDING EU LEGAL PRINCIPLES FOR MEMBER STATES' NATIONAL TAX LAWS REGARDING CROSS BORDER TAX TREATMENT OF CHARITIES AND DONATIONS

From the persepctive of the EU legal framework, as intepreted over time by the Court, a number of general EU legal principles can be deduced.

[28] See also the Commission Communication to the Council, the European Parliament and the European Economic and Social Committee – The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector (COM(2005) 620 final).

[29] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance), OJ L 156, 19.6.2018, p. 43-74.

[30] E.g. C-386/04 *Stauffer* point 59.

[31] Cases C-436/08 and C-437/08 *Haribo and Österreichische Salinen*.

The Member States **are free to decide and define whether they will provide for tax advantages** for charitable organisations and charitable donations[32] and, if they do, under which conditions and which charitable purposes they wish to promote.

However, when taking such a decision, the main principle is **the principle of non-discrimination**, i.e. Member States may not limit tax benefits to domestic charitable organisations or donations/bequests made to domestic entities, while excluding from such benefits **comparable** foreign charities or donations/bequests to comparable foreign charities.

There is **no mutual recognition** of foreign charities required under EU law, but only equal treatment or non-discrimination of comparable foreign charities.

The question arises as to what is a comparable foreign charity. There is no single answer to this question, as Member States are **free to define the public benefit purpose and other requirements** (as long as such requirements are non-discriminatory) that charities will have to meet; and the comparability test will naturally flow from such definitions. While comparability is an EU parameter, it is for each and every Member State, i.e. its national administration and courts, to implement it in its laws and administrative practices.

Thus, in order to obtain tax benefits, foreign charities and their donors will need to prove that they meet the public benefit purpose and other requirements as defined in the domestic legislation of a Member State. In other words, **the burden of proof is on charities and their donors;** and in case of charities operating on an EU-wide level, they might face 27 such comparability tests.

In this context, charities and their donors must be granted **an opportunity to provide the relevant evidence** regarding comparability of foreign charities for them to be able to claim the domestic tax treatment in a Member State.

Finally, a Member State must have a **possibility to verify the submitted information**, via the internal or external mutual assistance mechanisms applicable between Member States and between Member States and third countries. In the absence of such a possibility, which could be more likely in a EU- non-member country scenario, a Member State is entitled to refuse to grant the tax benefit at issue.

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[32] Member States can exercise this freedom within the boundaries of EU competition law, in particular the prohibition of State aids in Article 107(1) TFEU, which applies to the activities of "undertakings". In this context, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see Judgement of the Court 6 November 2018 in Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori*, ECLI:EU:C:2018:873, points 103-109 and case law mentioned therein). In case charitable organisations exercise economic activities, a tax advantage that also applies to revenues from these economic activities may constitute State aid, if i) those charitable organisations are in a similar legal and factual situation than other taxpayers in light of the objectives pursued by the tax system of reference, and ii) this difference of treatment is not justified by the nature or the general scheme of the reference system (see Commission Notice on the notion of State aid, OJ C 262, 19.7.2016, p. 1–50). In such case Member States should ensure that they fully comply with procedural and substantial State aid rules.

5. CONCLUSIONS

The established case-law of the Court in the field of direct taxation of charitable organisations and their donors is clear on the fact that discriminatory tax treatment between purely national and cross-border situations are not compatible with EU law in the absence of any objectively relevant difference between these situations or a justification linked to overriding requirements of general interest. Hence, Member States' direct tax provisions cannot, in principle, apply less favourable tax treatment for charities/donations or legacies made to a charity on the sole basis that the charity is established in another State rather than in the taxing Member State.

EU citizens and charitable organisations are entitled to seek redress from the national administrative autorities and before national courts if they are negatively affected by any incompatibility of the tax rules of a Member State with EU law. In addition, they could bring this incompatiblity to the attention of the Commission. [33]

[33] Communication from the Commission EU law: Better results through better application (2017/C 18/02) OJ C 18, 19.1.2017, p. 10.

ANNEX: THE JUDGMENTS OF THE COURT

This Annex gives a brief overview of the three main judgments on taxation of charitable bodies and donations/ gift taxation and the principles flowing from this case-law.

4.1. The *Stauffer* case (C-386/04)

In this landmark judgment the Court held that the free movement of capital precludes non-resident charities being treated differently for tax purposes simply because they are resident in another Member State. Thus, where a Member State grants an income tax exemption to domestic charities, it should extend such advantageous tax treatment to charities in other Member States which meet the same conditions as domestic charities.

In this case, an Italian charitable foundation awarded scholarships to young people from Switzerland, particularly those from Bern, to pursue studies in music. The foundation owned a building in Germany from which it obtained rental income. Under German tax law this type of income was exempt from corporate tax for domestic charitable foundations. However, the exemption was not available to non-resident charities. The main question was whether a charitable foundation benefiting from charitable status in its state of establishment, i.e. Italy, but deriving rental income in Germany should benefit from a corporate income tax exemption there in the same manner as German resident charitable organisations would.

The Court decided that

- Member States are entitled to require **a sufficiently close link** between foundations upon which they confer charitable status for the purposes of granting certain tax benefits and the activities pursued by those foundations, however, in this case no such link existed (point 37).

- It is **not a requirement** under EU law for Member States **to automatically** confer on foreign foundations recognised as having charitable status in their Member State of origin the same status in their own territory. Member States are free to define the interests of the general public that they wish to promote by granting benefits to associations and foundations which pursue objects linked to such interests in a disinterested manner (point 39).

- There is **a restriction on the free movement of capital** where a Member State grants less favourable tax treatment to rental income received by charitable foundations of another Member States solely on the ground that they are not established in the State. (points 25 to 28 in conjunction with point 40).

- Such a restriction cannot be justified by the differences between the national legal systems in the field of public benefit, when a charitable foundation established in another Member State satisfies the conditions imposed by the State of taxation on public-benefit foundations. In particular, the State of taxation cannot make the preferential treatment granted to foundations from other Member States dependent on the fact that their beneficiaries are resident in the first State where it does not apply such a criterion to national charitable foundations (points 33 to 42).

- Effectiveness of fiscal supervision is an overriding requirement of general interest capable of justifying a restriction of the fundamental freedoms under the TFEU. However, the administrative disadvantages associated with the necessary controls are not sufficient to justify discrimination against foundations established in other Member States Further, national legislation which absolutely prevents the taxpayer from submitting such evidence cannot be justified by effectiveness of fiscal supervision. A Member State may **carefully check** whether the foundation fulfils the conditions required by national law for exemption and to that end require the taxpayer to provide evidence and, where appropriate, request assistance under Directive 77/799/EEC (now Directive on administrative cooperation in the field of taxation 2011/16/EU) (points 46-50).

- Nor, in the circumstances at issue, was the need to preserve the cohesion of the national tax system an acceptable justification. The tax advantage at issue did not correspond to a disadvantage on the part of the national taxpayer (points 51-56).

- Also, the objective of favouring for tax purposes only the activities of foundations benefiting the national population cannot be accepted where the tax advantage enjoyed by national foundations does not depend on that criterion (point 57).

4.2. The *Persche* case (C-318/07)

In a subsequent judgment in case C-318/07 *Persche*, which complements the Stauffer case as regards the tax treatment of donors in respect of cross-border giving, the Court ruled that limiting the preferential tax treatment for donations to domestic charities while excluding donations to comparable foreign entities is not compatible with the free movement of capital as guaranteed by the TFEU.

Mr. Persche, was a German resident who had an additional dwelling in Portugal. In July 2003, he made a donation in kind (children toys and towels) to a charitable institution situated in the Portuguese municipality, which ran a home for the elderly as well as a children's home. Mr. Persche demanded a deduction of this amount from his German income tax base pursuant to the domestic tax provisions regarding donations to charitable institutions.

Under German income tax law such a deduction was only available if a donation was made to a charity which was resident in Germany. As the donation of Mr. Persche was made to a Portuguese resident charity, the German tax authorities refused the tax deduction.

The Court confirmed the principles established in the *Stauffer* case and decided that

- **gifts** - even if they are made **in kind** in the form of everyday consumer goods – fall under the free movement of capital (Art. 63 TFEU) and

- Article 63 TFEU precludes legislation of a Member State which allows a deduction for tax purposes only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit.

In its reasoning the Court explained first with regard to the **comparability** of resident and non-resident charities that

- it is for each Member State to determine whether it will provide for tax advantages in favour of both public and private bodies which concern themselves with charitable activities and taxpayers who make them gifts (point 43);

- it is lawful for a Member State to restrict the grant of tax advantages to bodies pursuing charitable purposes as defined by that State (point 44);

- it is not a requirement under EU law for Member States automatically to confer on foreign bodies recognised as having charitable status in their Member State of origin the same status in their own territory. Member States are free to define the interests of the general public that they wish to promote by granting benefits to associations and bodies which pursue objects linked to such interests in a disinterested manner and comply with the requirements relating to the implementation of those objects (point 48);

- it is permissible for a Member State to apply a difference in treatment between national bodies recognised as charitable and those established in other Member States if the latter bodies pursue objectives other than those advocated by its own legislation (point 47).

  Having said that, the Court made it clear

- that where **a charity of one Member State satisfies the requirements imposed for that purpose by the law of another Member State** and where **its object is to promote the very same interests of the general public**, so that it would be likely to be recognised as having charitable status in the latter Member State, the authorities of that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in its territory (point 49).

- The Court explicitly rejected the argument of Member States that a different treatment is justified because charitable bodies substitute themselves for the public authorities in assuming certain responsibilities, and that such assumption could lead to a reduction of the expenses of the Member State concerned. It is settled case-law that the need to prevent the reduction of tax revenues is neither among the objectives stated in Article 63 TFEU nor an overriding reason in the public interest capable of justifying a restriction of a fundamental freedom (point 46).

With regard to a possible justification based on the need to safeguard the **effectiveness of fiscal supervision** the Court established a well balanced equilibrium between the obligations of national tax administrations to make investigations that may be necessary in the cross-border context and to require the taxpayer to provide proof.

- A difference in treatment cannot be justified by the difficulty, for the donor's Member State, of verifying whether such bodies actually satisfy the statutory objectives for the purposes of its national legislation or by the necessity of monitoring the actual running of those bodies (point 51).

- Nothing would prevent the tax authorities concerned from **requiring the taxpayer to provide such proof** as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met (point 54);

    - As regards the administrative burden which the preparation of such documents may entail for the bodies concerned, it is for those bodies to decide whether they consider it opportune to invest resources in the establishment, distribution and possible translation of documents addressed to donors established in other Member States desirous of benefiting from tax advantages there (point 59).

    - It is for the competent national authorities, including the national courts, to establish whether, under the rules of national law, compliance with the requirements imposed by the donor's Member State for the grant of the tax advantage in question has been proved.

- Furthermore, **Directive 77/799 (now Directive on administrative cooperation in the field of taxation 2011/16/EU) does not require the donor's Member State to have recourse to the mechanism of mutual assistance under that directive each time that the information provided by that donor is not sufficient** to establish whether the recipient body fulfils the conditions laid down by the national legislation for the grant of tax advantages. Directive 77/799 provides for **the possibility** of national tax authorities requesting information but does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (point 63 et subseq.)

    - Nothing prevents the tax authorities concerned refusing the deduction applied for if the evidence that they consider they need to correctly assess the tax is not supplied (point 69).

- As regards **charitable bodies in a non-member country**, the Court added (without any relevance for the case at issue) that it is, as a rule, legitimate for the Member State of taxation to refuse to grant such a tax advantage if, in particular, because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country (point 70).

4.3. The *Missionswerk Werner Heukelbach* case (C-25/10)

The Court reaffirmed the above line of reasoning in case C-25/10, *Missionswerk Werner Heukelbach*. The case concerned the applicability of a reduced tax rate of succession duties under the condition that the charitable association had its centre of operation in Belgium or in the Member State where the deceased resided or worked. The Court ruled that a Member State granting certain tax advantages to domestic charities has to apply the same tax treatment to foreign charities that satisfy the conditions laid down in that Member State for obtaining these tax advantages.

Missionswerk was a religious association with its seat in Germany and received a legacy from Madame Renardie, a Belgium national, who resided in Belgium throughout her life. Missionswerk filed a succession duty return in the name of the deceased with the Belgian tax administration and had to pay succession duties at the marginal rate of 80%, instead of a reduced 7% rate.

The case concerned the applicability of a reduced rate of succession duty to a legacy in favour of a charitable association. The national legislation provided that the reduced rate was applicable only where the association had its centre of operations either in the taxing Member State or in the Member State in which, at the time of death, the deceased actually resided or had his place of work, or in which he had previously actually resided or had his place of work.

The Court ruled that Article 63 TFEU precludes such legislation where a charitable organisation recognised as such in its Member State of establishment fulfils also the conditions governing comparable organisations imposed by the taxing Member State. The fact that a foreign charity does not have its centre of operations in that Member State or in the Member State where the deceased had worked or resided was considered immaterial.