

Comments on EC Roadmap: Action Plan to fight tax evasion and make taxation simple and easy

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Introduction and overall comments

We take note of the European Commission's ambition to advance "An economy that works for people" and its [2020 Work Programme](#) announcing that it: "*will present a **Communication on Business Taxation for the 21st century**, focusing on the taxation aspects relevant in the Single Market. This will be complemented by an **Action Plan to Fight Tax Evasion and make taxation simple and easy.***"

We welcome that the European Commissioner for Economy, Paolo Gentiloni, introduced in this context his vision on the EU taxation policy with a strong message: "*In Europe's social market economy, we must make it as easy as possible for those that wish to benefit from the Single Market. This means adapting our tax systems, to be more in-tune with the needs of modern workers and enterprises. It means **simplifying our rules** and using new technologies, to make life easier for taxpayers. And it means intensifying our work **to remove tax obstacles in our Single Market, to facilitate businesses that work cross-border.***"¹

We trust that this clear commitment to remove tax obstacles in our single market will also pave the way for a removal of tax obstacles to cross-border philanthropy as outlined in the following sections.

Cross – borders tax barriers for philanthropy and related costs

Philanthropy and philanthropic organisations are a critical part of democratic and pluralistic societies. Institutional philanthropy in Europe includes more than 147,000 philanthropic organisations with an accumulated annual expenditure of nearly 60 billion euros.²

Increasingly, philanthropic organisations and donors work across borders (donors and foundations giving and running operations as well as foundations investing their assets across borders) and in collaboration with partners but contrary to companies, they are challenged by various legal, administrative and fiscal barriers when doing so, which are **estimated to amount € 90,000,000 to € 101,700,000 per year.....**"³

Non - discrimination principle must work in practice – a call for EU action

Cross-border philanthropy is growing, but the fiscal and administrative environment for cross-border philanthropy even within the European Union, is still far from satisfactory. While the European Court of Justice (ECJ) recognised the application of the free movement of capital to philanthropic funds along

¹ "Making Tax Work for All": Speech by Commissioner Paolo Gentiloni on the Commission's priorities for EU taxation policy. P. Gentiloni's Speech at the Policy Briefing at the European Policy Centre on 5th March 2020, Full speech available here: <https://www.epc.eu/en/Publications/taxation-fair-taxation-think-tank-Brussels-European-Policy-Centre-2fd03c>

²Philanthropy Advocacy, European Foundation Centre (EFC) and Donors and Foundations Networks in Europe (DAFNE), European Philanthropy Manifesto, Private Resources for Public Good, 2019, https://www.philanthropyadvocacy.eu/wp-content/uploads/2019/03/20190321-Philanthropy-Manifesto_420x210_WEB.pdf

³ Hopt, Klaus J et al. Feasibility Study on a European Foundation Statute Final Report, 2009, <https://archiv.ub.uni-heidelberg.de/volltextserver/18688/> , p.1 Executive summary

with ensuring that the principle of non-discrimination applies to donors and public benefit organisations in the EU, this does not yet work in practice and we call on EU and national policy makers to improve the situation.

A series of ECJ cases examined the tax treatment of public benefit entities and their donors including: Stauffer: C-386/04 Centro di Musicologia Walter Stauffer/Finanzamt München für Körperschaften [2006] ECR I-8203; Hein-Persche: C-318/07 Hein Persche/Finanzamt Lüdenscheid [2009] ECR I-359 and Missionswerk: C-25/10 Missionswerk Werner Heukelbach eV/Belgien [2011] 2 C.M.L.R. 35.⁴ Member States are hence under an obligation to treat comparable foreign EU-based philanthropic organisations and their donors not discriminatory to domestic organisations and their donors and a series of EU infringement procedures have helped “encourage” Member States alignment with the Treaty of the Functioning of the EU.

However, some Member States still have not introduced the non-discrimination principle and the free flow of capital but continue to discriminate comparable foreign EU based public benefit organisations and their donors from local ones. Those that have formally removed discrimination often provide for very complex rules and procedures under which circumstances Member States consider a foreign EU based organisation comparable to a resident one.⁵ **For cross-border philanthropy and investments the single market freedom of capital does not yet work in practice** (see more details on the two scenarios of tax treatment of philanthropic giving and investments in the ANNEX).

Tax effective cross-border philanthropy is still very difficult due to the various different, unclear or uncertain approaches for the comparability test and it still remains complex for philanthropic organisations and donors to operate within the Single Market with its 27 different sets of tax rules. There is room for simplification and a move towards a more modern tax environment that would help philanthropy sector to reap the benefits of the Single Market and therefore sustain the Union economic growth.

In this context we welcome the European Commission’s initiative to tackle tax barriers that are faced by cross-border businesses and taxpayers and efforts to enhance tax certainty in both direct and indirect taxation. We also subscribe to the idea of simplification and modernisation of tax rules in the Single Market with a view to removing administrative burdens that hamper the work of both larger endowed foundations investing their assets cross-border as well as donors giving tax effectively across-border.

**In the context of the 2020 EC Roadmap on taxation, we call on EU policy makers to consider:
Own EU legislation/policy to define in a straightforward way when a foreign based public benefit organisation is considered comparable to a local one. The EU could consider developing guidance for the national level via a code of conduct with regard to the tax comparability test, see more details in the ANNEX.**

⁴ The impact of the ECJ cases on national level regulation and practices was analysed in the 2014 EFC/TGE commissioned report on taxation of cross-border philanthropy in Europe: <http://efc.issuelab.org/resource/taxation-of-cross-border-philanthropy-in-europe-after-persche-and-stauffer-from-landlock-to-free-movement.html>

⁵ European Foundation Centre (EFC) and Transnational Giving Europe (TGE), Taxation of Cross- Border Philanthropy in Europe After Persche and Stauffer. From landlock to free movement? 2014, <http://efc.issuelab.org/resources/18545/18545.pdf>

ANNEX: Cross-border philanthropy taxation barriers and potential solutions

Cross-border giving and cross-border asset allocation

Donors give across borders and philanthropic foundations invest their endowment across borders.

1. CROSS BORDER PHILANTHROPIC GIVING

The level of international philanthropic giving has grown, with more European citizens willing to make **cross-border gifts and donations** to support international causes and foreign charities. But these donors also find it hard to claim the tax incentives they are entitled to.

As regards cross-border giving, the key barrier is the ability of the foreign charity to meet the **comparability test**. This is a problem that is mainly faced by philanthropic donors, be they individuals or corporate donors.

Example 1 – France

Whilst legislation has been amended to accommodate the Persche ruling, this appears to have been done to the letter of the law rather than the spirit in several EU countries. Tax authorities have seemingly used bureaucratic complexity, burdensome administrative hurdles and a lack of transparent process to limit the availability of tax incentives for donations within the EU. In order to claim tax credits in France, the recipient organisation must have either gained accreditation by French tax authorities or the donor must be able to prove its equivalency.

Example 2 - Germany

In Germany, the spirit of the Persche ruling has been sidelined in favour of insular national interest: In order to deduct charitable donations to EU- or EEA based organisations that have no activities in Germany, the activities “either have to support individuals which have their permanent residence in Germany or the activities could benefit Germany’s reputation.”⁶

Foreign-based PBOs and donors giving and investing across border are encountering 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. And in some countries, when PBOs try to obtain legal clarity, administrations are either unresponsive or else prone to simply refusing nearly all applications.

Furthermore, across the EU no formal or uniform approach to the comparability test exists. It is within the competence of the Member States to further define when a foreign EU-based PBO is comparable, and Member States have developed different approaches to the comparability test. Tax authorities in some countries reported that they lack experience and have no clear guidance on how to proceed. Decisions are mostly taken on a case-by-case basis and often require inordinate amounts of time.

As a private solution to channel charitable funds in a tax-effective way across borders **the Transnational Giving Europe (TGE)** has been created in 1999 but this was only ever intended as a temporary solution until the lifting of these barriers.⁷

⁶ Adam Pickering, Charities Aid Foundation (CAF), United Kingdom 2016 CAF analysis on giving incentives, “Donation States: International comparison on the tax treatment of donations), <https://www.cafonline.org/docs/default-source/about-us-publications/fwg4-donation-states>

⁷ For more information on work of Transnational Giving Europe, <https://www.transnationalgiving.eu/>

2. ASSET ADMINISTRATION CASE

Institutional philanthropy's asset administration clearly does not stop at national borders. A small data survey of European EFC members (all with total assets of at least €500 million) in 2016 revealed that claiming back foreign withholding tax is often lengthy and very costly – in the majority of cases, foundations are using some form of external advice and have been struggling with individual cases for several years as illustrated by a number of examples⁸.

Example 1 – the Netherlands

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

Example 2 – United Kingdom

The UK's Wellcome Trust has had some of its dividend withholding tax refund claims rejected by the same Federal Tax Office in Bonn: *"The main reason given for the rejection of the 2008 claims was that the claims were not filed on the correct form. We submitted an objection in 2013 but have heard nothing further to date. In November 2015 we received a further response from the authority concerning claims for the years 2004-2006, arguing that Wellcome Trust would not be subject to unconditional taxation in the UK on the basis that it is tax exempt. . Our advisers consider that not only the denial of the withholding tax refund claims is discriminatory, but the procedure adopted by the German tax authorities is also discriminatory"*. The Wellcome Trust after awaiting 10 years since they submitted the first claim has now been informed that all tax refund claims have been formally rejected. The Trust has now had to start court proceedings in Germany. They also have court proceedings pending in Italy, Portugal and Spain.

Example 3 – Sweden

Swedish Riksbankens Jubileumsfond also reported: *"We have finally given up our claims in Germany for the years 2003-2005. First there has been confusion as to whether the federal or regional tax authority level was responsible. We then handed in our application for refund at the federal level in 2007 and nine years [!] later the authority has sent us a letter asking for complementary information. In Spain, however, our case was dragging for a long time but turned out to be successful in the end. But it took five years from the day we handed in our claim to the final judgements."*

The **tax treatment of philanthropic investments**, and in particular the discriminatory taxation of dividends and interest paid to foreign foundations and other foreign charities, **raises the same concerns about the delays and other difficulties encountered by foreign portfolio investors in general** when making similar investments within the EU. In this context we support the December 2017 EU withholding tax code of conduct, containing some very useful elements, which are key also for philanthropic investors in particular the call for a *reliable and effective timeframe for tax authorities for the granting of withholding tax relief* and the ask for a *single point of contact in Member State tax*

⁸ Examples are taken from European Foundation Centre (EFC) and Transnational Giving Europe (TGE) Boosting cross-border philanthropy in Europe towards a tax-effective environment, 2017 <https://www.efc.be/uploads/2019/03/Boosting-Cross-Border-Philanthropy-in-Europe-Towards-a-Tax-Effective-Environment.pdf>

administrations to deal with questions from investors on withholding tax. The [Code of Conduct](#) offers solutions for different types of investors who, as a result of how withholding taxes are applied, end up paying taxes twice on the income they receive from cross-border investments. Foundations have however reported that the withholding tax code of conduct does not really work in practice since the time it takes EU tax authorities to refund tax withheld in excess of the rates permitted by bilateral tax treaties has increased significantly over the last two years. There is also little public information available e.g. about which countries have signed up for it.

Philanthropic investors/endowments however face additional difficulties where their refund claims are based on EU law (rather than a bilateral tax treaty) because they then have to show that they are **COMPARABLE to a domestic charity** in order for the discrimination to be unjustified. Moreover, some Member States have not adapted their internal systems to provide an appropriate procedure for dealing with EU law based claims. Thus, for example, a foreign charity may be asked to complete the same form that is used for a tax treaty claim, even if it seeks information that is irrelevant to the merits of an EU law based claim.

These comparability question issues are not unique to philanthropic investors since foreign pension funds and collective investment funds face similar issues of comparability. We hence hope that the Commission appreciates that this is a widespread problem and agree that there is **a good case for its 2017 code of conduct approach to withholding tax procedures to be extended and adapted to EU law based claims of withholding tax discrimination with the aim to simplify and streamline the comparability test for such EU law based claims.**

Streamlining the comparability test

What can be done to enhance and clarify the fiscal framework for tax effective cross-border philanthropy in Europe? Firstly, what probably will not work are treaties and automatic exemptions, for a variety of reasons.

However, in addition to more and clearer information sharing – a simplification and streamlining of processes for the comparability test should be considered. The existing practice for the comparability test in some countries such as Luxembourg and the Netherlands is clear and straightforward, and could potentially serve as a blueprint for other countries with the aim of administering tax effective cross-border philanthropic actions faster and more cost effectively.

If there was appetite among Member States, we recommend shifting how the notion of comparability is tested and taking a more functional approach. Having in mind the Netherlands and Luxembourg scenarios for cross-border donations as well as recent court cases in different European countries, a potential approach could be for Member States to base comparability on a set of common principles around a public-benefit concept, rather than requiring comparability in all details. Recent EFC/TGE tax law mappings have revealed that the tax law requirements for tax exemptions of PBOs and their donors differ in the details but appear to be based on broadly the same principles. The [report](#) suggests that the following core public-benefit requirements could potentially form the backbone of a national comparability test:

1. Tax-exempt status in the home country
2. Pursuance of a public-benefit purpose
3. Exclusive usage of assets for the public-benefit purpose

Moving forward – our call for action

It is unacceptable that, more than 10 years after the ECJ ruled that an Italian foundation is in principle comparable to a German foundation, the tax authorities of some Member States continue to maintain that no foreign charities are comparable to their domestic charities and will continue to reject all claims of discrimination against foreign charities unless and until they are overruled by a superior court. We hence call on EU and national policy makers to address the issue both for cross-border giving and cross-border investments by philanthropic investors.

In the context of tax barriers to cross-border philanthropy, we welcome the European Commission's initiative to tackle tax barriers that are faced by cross-border businesses and taxpayers and efforts to enhance tax certainty in both direct and indirect taxation. We also subscribe to the idea of simplification and modernisation of tax rules in the Single Market, as administrative burdens continue to hamper the work of both larger endowed foundations investing their assets cross-border as well as donors giving cross-border. As for cross-border philanthropy and investments, the single market freedom of capital does not yet work.

In this context we would like to call on the European Commission:

- **To draft own EU legislation/policy to define in a straightforward way when a foreign based public benefit organisation is considered comparable to a local one.**
- **To consider developing guidance for the national level via a code of conduct with regard to the tax comparability test.**
- to streamline the comparability test, to shift how the notion of comparability is tested and taking a more functional approach like to base comparability on a set of common principles around a public-benefit concept, rather than requiring comparability in all details,
- to call on Member States to provide for tax incentives in cross-border scenarios and for introducing easy processes,
- to prepare any new policy proposals in wide consultation with all relevant stakeholders, including the philanthropy sector. It is also of crucial importance that any new policy options would follow the full procedure laid down in Better Regulation rules, including the appropriate impact assessment.
- welcome an opportunity to meet in person with the representatives of the European Commission, particularly with the DG TAXUD, which is taking the lead on developing the policy communication to further discuss the issues raised.