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„REMOVING THE BARRIERS TO CROSS-BORDER CHARITABLE ACTIVITIES VIA EUROPEAN FOUNDATIONS: A STUDY OF ONE LEGISLATIVE INITIATIVE"

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CONTENTS

ABBREVIATIONS

ECJ	The European Court of Justice
EFC	The European Foundation Centre
EFS	The European Foundation Statute
EU	The European Union
FE	The European Foundation
FS	The feasibility study on a European Foundation Statute
TFEU	Treaty on the Functioning of the European Union
TGE	Transnational Giving Europe

INTRODUCTION

According to the last available study on the economic scale of the foundation sector of the EU (2009), the sector consists of approximately 110 000 foundations and demonstrates a growth potential.[1] The estimation of its assets varies between € 350 billion and approximately € 1000 billion, its annual expenditures – between € 83 billion and € 150 billion.

The more up-to-date data (2016) shows that there are more than 147 000 registered public benefit foundations in Europe, with combined annual expenditures of nearly € 60bn.[2] The figures are, however, not comparable since they are based on the data from 24 countries of the "large Europe" (including, among others, Russia, Ukraine, and Turkey), and only 18 of them are the EU Member States.

The figures highlight that the European foundation sector represents a major economic force.

The European foundations operate for the variety of purposes, such as art, culture and historical preservation, environmental protection, civil or human rights, humanitarian or disaster relief, education and training, science, research, and innovation. They serve the public interest at large and contribute to the fundamental values and objectives of the EU. The role they play in our society is difficult to overestimate.

Over the last decades, the European foundation sector faced a growing interest in cross-border activities. In the globalized society, people and businesses have assets and interests abroad. They are no longer bound to one country and their operations do not stop at the national borders.

At the same time, the legal barriers to cross-border charitable activities can be found both in civil law and in tax law. They hinder the international expansion of the charity.

Some of the barriers can be overcome by foundations and their donors. However, it leads to additional costs for the respective actors (e.g. costs of legal and tax advice, translation services, administrative support). The costs are estimated to be between € 90 million and € 101,7 million per year.[3] Such costs clearly demonstrate the market inefficiencies. Had there been no such costs, the additional funds could be channeled to the public benefit purposes pursued by the

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1 Klaus J. Hopt and others, 'Feasibility Study on a European Foundation Statute: Final Report' (2009) 18 <http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf> accessed 1 June 2018.

2 Lawrence T. McGill, 'Number of Registered Public Benefit Foundations in Europe Exceeds 147,000' (2016) <https://dafne-online.eu/wp-content/uploads/2016/10/PBF-Report-2016-9-30-16.pdf> accessed 1 June 2018.

3 The FS (n 1) 1.

foundations and reach people who need them most.

Removing the barriers to cross-border charitable activities has been on the European agenda for more than a decade.

In September 2001, the High Level Group of Company Law Experts (the *Group*) was set up by the European Commission to make recommendations on a modern regulatory framework in the EU for company law. Among other things, the Group discussed the harmonization of national laws on the foundations in the Member States and the need and the feasibility of the Regulation on the European Foundation.[4] In the report dated 4 November 2002, the Group concluded that the Regulation on the European Foundation may be difficult to achieve, and it should not be the top priority in the short or medium term.[5]

Nonetheless, the idea of a European Foundation – a supranational legal form for public benefit purposes – has been actively discussed since then.

In 2004, the European Foundation Centre (the *EFC*) introduced a draft Regulation on a European Statute for Foundations.

In 2007, the European Commission launched a feasibility study (the *FS*) on a European Foundation Statute (the *EFS*).

In 2009, the European Commission organized a public consultation on the same.

In 2012, the European Commission came up with a proposal for a Council Regulation on the Statute for a European Foundation (FE) (the *Proposal*).

The European Commission viewed FEs (as defined in the EFS) as 'the most appropriate option, removing cross-border obstacles for foundations and donors and facilitating the efficient channeling of funds for public benefit purposes'.[6] The initiative was strongly supported by the non-profit sector.[7] The EFC called the Proposal 'a major step towards having a new legal tool

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4 Sigrid J.C. Hemels, 'Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe' (2009) 8-9 Intertax 14 <https://ssrn.com/abstract=1959837> accessed 1 June 2018.

5 Jaap Winter and others, 'Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe' (2002) <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf> accessed 1 June 2018.

6 The European Commission, 'Proposal for a Council Regulation on the Statute for a European Foundation (FE)' COM(2012) 35 final explanatory memorandum 5 <http://ec.europa.eu/internal_market/company/docs/eufoundation/proposal_en.pdf> accessed 1 June 2018.

7 The European Commission, Internal Market and Services DG, 'Synthesis of the Comments on the Consultation Document of the Internal Market and Services Directorate-General on a Possible Statute for a European Foundation' (2009) 3

that will make it easier for foundations to support public-benefit causes across the EU'.[8]

However, in 2015 the European Commission withdrew the Proposal seeing no prospects for reaching an agreement among the 28 Member States.

As of today, the barriers to cross-border charitable activities still exist.

This paper discusses the barriers in more detail and reviews the mechanisms which can be employed to remove them on the different levels: the Member State level, the EU level and the level of private solutions (Section 1).

It also overviews the FE according to the EFS, analyses to what extent its introduction could remove the barriers to cross-border charitable activities and summarizes the provisions of the EFS which caused the most criticism (Section 2).

Finally, it addresses the current situation of cross-border charitable activities, elaborates on the lessons that can be learned from the failure of the Proposal and offers a solution for making the European non-profit sector more efficient (Section 3).

It should be noted that there is no single definition of the term "foundation" in the EU. The foundation laws of the Member States provide for multiple definitions. The same is true for "public benefit purposes" and other related notions. However, it is necessary to define the term "foundation" in this paper since it is one of its key notions.

The solution for the universal term "foundation" has been proposed by the FS. It is worth considering since the FS developed it based on all definitions applied in the Member States. It represents 'a lowest common denominator of the legal definition of a foundation'[9] (i.e. nothing in the description is contrary to the national laws of the Member States). It reads as follows:

> an independent organization (generally with its own legal personality), which has no formal membership, is supervised by a state supervisory authority, and serves a public benefit purpose (in some Member States: any lawful purpose), for which a founder has provided an endowment, and determined the foundation's purpose and statutes.[10]

So, for the purposes of this paper, the term "foundation" will be understood in line with this compound definition. The legal definitions of the term applied in the Member States will be

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<http://ec.europa.eu/internal_market/consultations/docs/2009/foundation/summary_report_en.pdf> accessed 1 June 2018.

8 Renzo Rossi, 'The Proposal for a European Foundation Statute and Its Influence on Italian Legislation' (2014) 16 1 International Journal of Not-for-Profit Law 24, 25 <www.icnl.org/research/journal/vol16iss1/proposal-for-a-european.pdf > accessed 1 June 2018.

9 The FS (n 1) 45.

10 The FS (n 1) 45.

disregarded.

The terms “foundation”, “charitable organization”, “non-profit organization”, “charity”, “public benefit purpose organization” and similar will be used interchangeably.

1. THE BARRIERS TO CROSS-BORDER CHARITABLE ACTIVITIES BEFORE THE EFS AND THE MECHANISMS FOR THEIR REMOVAL

1.1. The barriers to cross-border charitable activities before the EFS

1.1.1 Introduction

A colossal preparatory work has been done before the introduction of the EFS. Multiple consultations with practitioners and legal scholars took place to assess the need of the EFS and get a better notion of what it should include to address the problems of the sector.

The FS was a solid stepping stone for the introduction of the EFS.

In 2007, the European Commission commissioned it to Max Planck Institute for Comparative and International Private Law and Heidelberg University. Among other things, the FS examined the main regulatory differences in the legal treatment of foundations across the EU, defined the barriers to their cross-border activities and explored possible modalities of removing them. The FS justified the need for the EFS and effectively shaped it.

The FS also presents an extensive research on the barriers to cross-border charitable activities. Therefore, the description of the barriers in this Section is based on the FS.

Having said that, it should be noted that the FS was finalized in 2009 and has not been updated since then. It provided for an accurate analysis of the non-profit sector and its problems as of 2009. It is unclear to what extent it remains accurate as of 2018.

For this reason, this paper will avoid concrete examples from the FS and focus on more general conclusions. Also, when discussing the current situation in further Sections, the latest available data will be used. However, it is important to mention that only fragmentary studies with respect to the non-profit sector appeared after 2009.

The FS distinguished three types of the barriers to cross-border charitable activities:

(1) legal barriers, including recognition procedures and tax discrimination,

(2) psychological barriers, e.g. lower acceptance by foreign donors because of the unknown legal form, and

(3) other barriers, e.g. different languages.[11]

This paper focuses on legal barriers and just marginally touches upon the other types.

[11] The FS (n 1) 105.

The legal barriers can be further divided into two groups: civil law barriers and tax law barriers. The civil law barriers are mostly applicable to non-profit organizations, whereas the tax law barriers also affect their donors and beneficiaries.

1.1.2. Civil law barriers

As a general rule, Member States allow domestic foundations to engage in activities abroad. The forms in which foundations can do so are the following:

- operate in a host state[12] as a foreign foundation;
- operate in a host state through independent subsidiaries (e.g., foundations);
- operate in a host state through representatives, agents or branches;
- transfer its center of administration from their home state to a host state;
- transfer its statutory seat from its home state to a host state.[13]

Depending on the form of cross-border activities selected by a foundation, various obstacles may arise. The FS gives the examples below.[14]

(A) Foundations may face barriers to their recognition, should they decide to operate in a host state.

As a general rule, the Member States recognize legal personality of a foundation that has been validly formed in accordance with the laws of one Member State. At the same time, national laws of a host state may provide for additional requirements which have to be met before a foreign foundation starts operations in the territory of the host state. It can be the requirement to register a branch with local authorities, establish a formal delegation or a representative office. In any of these cases, the foundation is required to get a formal permission from the local authorities to operate.

Additionally, non-profit sector representatives note that there is a legal uncertainty about the recognition of a foundation *as a public benefit organization* in the other Member State.[15]

Indeed, as already mentioned in the introduction, there is no universal understanding of a recognized public benefit purpose for foundations. It varies from state to state.

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12 The Member State of a foundation's formation will be referred to as a *home state* and the other Member State in which it operates or intends to operate will be referred to a *host state*.

13 The FS (n 1) 106.

14 The FS (n 1) 106-112.

15 Synthesis (n 7) 5.

Examples can be found in the research paper of the European Foundation Centre (2015) that indicates which purposes are accepted for public benefit tax status in the Member States.[16] It demonstrates that only four purposes are accepted in all 28 Member States. They are (1) social welfare, including prevention or relief of poverty, (2) education and training, (3) health, well-being and medical care, and (4) assistance to, or protection of vulnerable and disadvantaged persons. Interestingly, such common purposes as arts, culture and historical preservation or environmental protection are not on the list.

The recognition difficulties can also arise for trusts, should they wish to operate in a civil law country. The FS suggests that some Member States do not recognize the trust form as such. The Hague Convention of 1985 on the Law Applicable to Trusts and on their Recognition was ratified by only few Member States (8[17] as of 9 September 2017).

For this reason, charitable trusts may have to undergo lengthy court proceedings to get benefits provided for non-profit legal entities in civil law countries.

For instance, in 2009, the Court of Appeal of Brussels decided on the case relating to the taxation of a cross-border legacy made by a Belgian national to a UK charitable trust.[18] The trust was seeking a reduced tax rate applicable to Belgian non-profit organizations. The court found that where a UK charitable trust is in a comparable situation with the *legal entities* mentioned in the Belgian tax laws the reduced rate should apply. Yet the UK charitable trust did not have a legal personality.

Nonetheless, the court decided in favor of the trust.

The key element of this decision is the fact that the registration of the charitable trust by the Charity Commission and additional specific characteristics 'confer to this trust a legal identity which could be compared with the legal personality in Belgium'. This decision is remarkable, since it does not limit itself to a strict and literal interpretation of the law.[19]

(B) Foundations may face difficulties relating to the cross-border transfer of the seat.

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16 Ludwig Forrest and others, 'Comparative Highlights of Foundation Laws: the Operating Environment for Foundations in Europe' (2015) 58-61 <www.efc.be/publication/comparative-highlights-of-foundation-laws-the-operating-environment-for-foundations-in-europe-2015/> accessed 1 June 2018.

17 Status Table of the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (last update 9 September 2017) <www.hcch.net/en/instruments/conventions/status-table/?cid=59> accessed 1 June 2018.

18 Case 2006/AR/2935 Court of Appeal of Brussels, 9 September 2009.

19 Thomas von Hippel and others, 'Taxation of Cross-Border Philanthropy in Europe after Persche and Stauffer: from Landlock to Free Movement?' (2014) 47 <www.transnationalgiving.eu/wp-content/uploads/2014/10/Taxation-of-cross-border-philanthopy-in-Europe-after-Persche-and-Stauffer.pdf> accessed 1 June 2018.

In the Member States adhering to the real seat doctrine[20], the "real seat" or the principal place of business of a legal entity will determine which state shall have the authority over it. So theoretically, large-scale cross-border activities of a foundation can trigger the effective transfer of its real seat.

If the foreign activities of a foundation in a Member State other than its home Member State become so dominant that the principal place of business or "real seat" of such a foundation is effectively abroad, the foundation may be legally considered as having in fact transferred its seat which, under the real seat doctrine, will usually give rise to certain legal issues.[21]

Such legal issues may be the requirement to liquidate the foundation in its original home state and reincorporate it in the host state in question. The procedure for that is unclear since such situations are not purely domestic and the Member States do not regulate them.

It is highly likely that in case of the transfer both Member States would view such situations as domestic ones and apply the general rules on liquidation of foundations (the home state) or the rules on their incorporation (the host state). Accordingly, the transfer of the seat may require two state approvals from two Member States. Notably, the actions of the Member States in this regard will not be coordinated.

The concern is also valid for voluntary transfers of the seat.

There is an open discussion on whether the civil law barriers described above infringe the fundamental freedom of establishment.

Under Article 49 of the TFEU, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Freedom of establishment shall include, among other things, the right to set up and manage undertakings under the conditions of the law of the country where such establishment is effected, and subject to the TFEU provisions on the freedom of capital.

Pursuant to Article 54 of the TFEU, the provisions on the freedom of establishment shall also apply to companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EU. The notion of "companies or firms" in the same Article expressly excludes non-profit-making legal entities.

The legal scholars express the opinion that, despite the exclusion, the freedom of establishment

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20 Austria, Belgium, France, Germany, Italy, Poland, Romania, Slovakia and Spain are among such states.

21 The FS (n 1) 108.

shall be applicable to foundations, at least when they carry out economic activities.[22] The FS also mentions that 'there are good arguments that some foundations can enjoy the right of establishment'.[23]

The ECJ, however, has not yet commented on the question to what extent foundations may rely on the rules relating to the right of establishment.

Interestingly, in *Stauffer* (see the facts of the case in Section 1.1.3 below), the ECJ examined the facts of the case to decide on whether the freedom of establishment shall apply to a foundation.[24] The ECJ never mentioned that the freedom of establishment would not apply (or the application would be limited) only because of the foundation's non-profit-making status. On the contrary, the ECJ underlined that 'the concept of establishment within the meaning of the Treaty is a very broad one'.[25]

The ECJ ruled out the application of the freedom of establishment in that case. However, the reason was that the foundation had no secured and permanent presence in the host Member State which would be required in order for the provisions relating to freedom of establishment to apply. So, in the case in question, the ECJ made no distinction between foundations and "companies or firms" with respect to which the freedom of establishment applies.

This gives the non-profit sector a hope that someday the ECJ will recognize the application of the freedom of establishment to the non-profit-making organizations in some way.

Should the ECJ recognize the right of foundations to enjoy the freedom of establishment, the existing civil law barriers could be viewed as restrictions to it. They would have to pass the four-step test set forth in *Gebhard*[26] to be justified. If they fail to do so, they will have to be removed.

1.1.3. Tax law barriers

The majority of states provide government support to charitable organizations. One of the instruments of the support is granting tax benefits (tax exemptions, reduced tax rates, etc.).

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22 Stefano Lombardo, 'Some Reflections of Freedom of Establishment of Non-profit Entities in the European Union' (2012) 14 European Business Organization Law Review 225 <https://ssrn.com/abstract=2115107> accessed 1 June 2018.

23 The FS (n 1) 2.

24 *Stauffer* (n 28) paras 16-20.

25 *Stauffer* (n 28) para 18.

26 Case C-55/94 *Gebhard v Consiglio dell' ordine degli avvocati e procuratori di Milano* [1995] ECR I-04165; Restrictions to the fundamental freedoms are only permissible if (1) they are applied in a non-discriminatory manner, (2) are justified by imperative requirements in the general interest, (3) are suitable for achieving the objective which they pursue, and (4) do not go beyond what is necessary to achieve this objective.

Historically the government support was only granted to resident charitable organizations and donors making gifts locally. It was reasonable in the situation where charitable activities were limited to the territory of one state and resulted in the public benefit only there. Today, in the situation where the national borders within the EU are "erased" and foundations are involved in the greater number of cross-border operations, the approach no longer holds.

However, the tax law barriers remain to exist.

The FS provides for a dichotomy of tax law barriers:

- barriers on the *level of substantive tax law*, e.g. a Member State only grants tax benefits to resident foundations but not to foreign foundations, and
- barriers on the *bureaucratic level*, e.g. a foreign foundation must increase compliance costs to achieve the same level of taxation as resident foundations.[27]

Pursuant to the FS[28], the types of situations where tax barriers (both on the substantive and on the bureaucratic level) may arise may be divided into the following eight groups:

(1) income taxation of foreign foundations,

(2) income taxation of domestic foundations operating abroad,

(3) income taxation of domestic donors of foreign foundations,

(4) income taxation of foreign donors of domestic foundations,

(5) income taxation of foreign donors of foreign foundations [29],

(6) income taxation of affiliated beneficiaries,

(7) inheritance taxation,

(8) further taxes.

Three of these situations have already been scrutinized by the ECJ (namely, situations (1), (3) and (7)). The ECJ decisions on the respective cases have become landmark decisions in the field of taxation of non-profit activities in the EU.

This Section looks into the cases in more detail.

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27 The FS (n 1) 112-113.

28 The FS (n 1) 112-121; Synthesis (n 7) 7.

29 Around the half respondents replied that barriers in the situations mentioned in (5) and (6) appear to be theoretical in nature. See Synthesis (n 7) 7.

(A) Case 1 – income taxation of foreign foundations – *Stauffer*[30]

Centro di Musicologia Walter Stauffer was a foundation with a charitable status under Italian law. It operated in the field of musical education and training. It owned commercial premises in Munich and derived rental income from them. The premises were managed by a German property management agent. German charitable foundations were exempt from corporate income tax with respect to the rental income. Centro di Musicologia Walter Stauffer, however, was refused such tax exemption since its seat and management were in Italy.

Did this infringe the fundamental European freedoms?

The ECJ states that the direct taxation falls within the competence of the Member States. Nonetheless, they must exercise that competence consistently with the EU law.

Member States are allowed to apply their tax provisions which distinguish between taxpayers who are not in the same situation with regard to their place of residence or the place where their capital is invested. However, the real estate ownership is protected by the free movement of capital. All restrictions on the movement of capital shall be prohibited unless justified.

In this case, the ECJ established that the unequal treatment of foreign foundations by German legislation could only be consistent with the EU law if the difference in tax treatment concerned situations which were not objectively comparable, or such treatment was justified by overriding reasons in the general interest.

The ECJ made several crucial conclusions in this case.

The ECJ established that the EU law does not require the Member States to *automatically* confer a charitable status in the own territory on foundations having the charitable status in their country of origin. The Member States are free to determine which interests of the general public they wish to promote by granting tax benefits. However, if a foundation:

(1) is recognized as having charitable status in one Member State (home state), and

(2) satisfies the requirements for obtaining charitable status in the other Member State (host state) and has an object to promote the very same interests of the general public as determined by the competent authorities of the host Member State (in other words, if a foreign foundation is *comparable* to domestic foundations in the host Member State),

the host Member State can't deny the foreign foundation's right to equal tax treatment solely

[30] Case C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* [2006] ECR I-08203

on the ground that it is not established in its territory.[31]

Also, the ECJ explained that before granting a foreign foundation a tax exemption, the host Member State is authorized to ascertain whether the foundation requesting the exemption is entitled to it in accordance with the law of the host Member State (the so-called "comparability test").

The host Member State is also authorized to monitor the foundation's effective management. For these purposes, the submission of annual accounts, activity reports or other relevant supporting evidence can be requested.

German authorities have not carried out the comparability test. They lost the case.

(B) Case 2 – income taxation of domestic donors of foreign foundations – *Persche*[32]

A German national Mr. Persche made a gift-in-kind in favor of the Centro Popular de Lagoa, a Portuguese retirement house which was entitled to all exemptions and tax benefits conferred by Portuguese law on charitable organizations. He requested the deduction of the gift in his personal income tax declaration in Germany. German tax law provided for a deduction for a gift made to a public benefit organization. However, Mr. Persche's request for deduction was rejected since the receiver of the gift was not established in Germany.

Did this infringe the fundamental European freedoms?

The ECJ established that charitable gifts (including in-kind gifts) are protected under the free movement of capital. Therefore, the situation at issue constituted a restriction to it. The ECJ largely cited *Stauffer* and used the same line of arguments deciding on whether the restriction could be justified.

It came to the conclusion that the EU law precludes a Member State to provide tax benefits only with respect to gifts made to domestic charitable organizations. If a taxpayer proves that a gift made to a foreign charitable organization satisfied the requirements imposed by this Member State for the grant of tax benefits, the Member State can't refuse to grant him such benefits.

Accordingly, the refusal to grant tax benefit, in this case, could only be justified if Mr. Persche failed to prove that the Portuguese charitable organization was comparable to German ones (notwithstanding its seat). Yet in this case, the German tax authorities have not initiated the

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31 *Stauffer* (n 28) para 40.

32 Case C-318/07 *Hein Persche v Finanzamt Lüdenscheid* [2009] OJ C 69.

comparability test.

(C) Case 3 – inheritance taxation – *Missionwerk*[33]

Missionswerk was a religious association with its seat in Germany which was named as a residuary legatee in the will of Madame Renardie. She was a Belgian national who lived in Belgium her whole life and died in 2004. Missionwerk was appointed as heir and paid succession duties at the rate of 80 %, as claimed by the Belgian tax authorities. Missionwerk sought to get a reduced rate of 7 % applicable to legacies to charitable organizations having a center of operations either in Belgium or in the Member State in which the deceased had resided or had his place of work. The tax authority rejected the request since Madame Renardie had never lived or worked in Germany.

Did this infringe the fundamental European freedoms?

Inheritances are protected under the free movement of capital. The situation at issue constituted a restriction to the free movement of capital. Again, the ECJ largely cited its previous case law (*Stauffer* and *Persche*) and used the same line of arguments deciding on whether the restriction could be justified.

The conclusion was that the EU law precludes a Member State from applying the succession duties at the reduced rate only to charitable organizations with the center of operations in that Member State or in the Member State in which the deceased resided or worked.

Again, the refusal to apply the lower rate, in this case, could only be justified if Missionwerk failed to prove its comparability with Belgian charitable organizations (notwithstanding its seat). Yet in this case, the Belgian tax authorities have not initiated the comparability test.

As can be seen from the cases above, the ECJ developed general non-discrimination rules with respect to cross-border charitable activities.

Following these cases, the Member States, voluntarily or under the pressure of the European Commission, have taken actions to bring the national laws in line with the ECJ jurisprudence.[34]

However, it is still an open discussion whether the ECJ cases provide a satisfactory solution for the foundation sector, even if all Member States amend their laws accordingly.

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33 Case C-25/10 *Missionwerk Werner Heukelbach eV v Belgium* [2010] OJ C 100.

34 Between 2005 and 2014, the European Commission initiated 28 infringement procedures relating to tax treatment of foundations and donors as the result of which the Member States concerned changed their legislation. See Taxation of Cross-Border Philanthropy (n 19) 21.

Indeed, following the approach developed in the cases, a foundation or its donor involved in a cross-border operation are only eligible for tax benefits if they pass the comparability test. Needless to say, it may be a burdensome exercise for private actors.

As a matter of practice, foundations must comply with two or more set of national rules to rely on the tax benefits in host Member State or Member States. Also, in case the requirements applicable to foundations in a home Member State conflict with the same requirements in any host Member State, passing the test in such host Member State becomes impossible.

Given all the facts above, there are good arguments that the ECJ jurisprudence resulted in the "migration" of the tax barriers from the category of substantive law barriers to the category of bureaucratic ones rather than in removing them. This is further discussed in Section 3 below.

1.2. The mechanisms for the removal of the barriers to cross-border charitable activities

The removal of the barriers can take different forms and can be initiated by different actors. This Section presents the system of the mechanisms employed for their removal based on the legal level on which they are regulated and/or managed. The level of the Member States (both national and international solutions), the EU level and the level of private initiatives are analyzed.

1.2.1. The Member State solutions

Each Member State can unilaterally recognize charitable organizations with the seat in the other Member State validly formed under the laws of such Member State. It can also decide to automatically apply tax incentives to such foreign charitable organizations. Alternatively, the Member States can enter into bilateral or multilateral agreements on the mutual recognition and application of tax incentives to cross-border activities.

The state solutions are efficient instruments. The application of the national legal acts and international treaties of the Member State should not raise any questions by law enforcement officers. The persons willing to take advantage of such legal acts should be able to rely on them in any dispute.

However, the state solutions usually require much time to be implemented. The decisions can be politically motivated and the interests of the private sector (especially the interests of smaller players) can be disregarded.

Also, creating a common regulatory regime in 28 Member States using only the Member State solutions (unilateral, bilateral or multilateral) seems unrealistic.

1.2.2. The EU solutions

The EU's potential to remove the cross-border barriers lies in the fundamental freedoms stipulated by the TFEU. The ECJ plays an important role by providing guidance and enforcing the freedoms.

The EU mechanisms can take a form of (1) a legal act (the Proposal would have become a Regulation had it been implemented) or (2) the judicial practice of the ECJ.

The Proposal is analyzed separately in the next Sections. The overview of the landmark ECJ cases regarding the cross-border taxation was given in Section 1.1.3 above.

Unlike most state solutions, the EU solutions are applicable in all Member States and introduce a level of harmonization to the national legal systems. They introduce a common legal framework for the Member States and create a level playing field for charitable activities within the EU.

In the situations such as at issue where the problem can't be properly addressed at the national level because of its cross-border character, the EU solutions can deliver the best results.

However, one should not forget that the EU decisions are limited to the issues which fall within the scope of its competences. Outside of the scope of its competence, it can do nothing without the support of the Member States. Tax issues are a perfect example for that. The Member States are sovereign over their tax systems. For that reason, tax harmonization in the EU is generally viewed as a complicated (sometimes even unrealistic) exercise.

1.2.3. Private solutions

Private solutions aim at circumventing the situations when the cross-border barriers arise. In fact, the solutions help to avoid the cross-border element in a charitable operation and make it purely domestic. The solutions may be the following:

- establishing in a host state a legal entity which carries out charitable activities and qualifies in that host state as a charitable organization with a respective legal and tax status;
- establishing in a host state a legal entity for fundraising purposes which is entitled to receive charitable gifts with tax benefits in that host state (also known as a "friends of" organization);

– establishing a network of organizations with charitable status located in multiple states and acting as intermediary charitable organizations.

The first solution helps to avoid both civil law barriers and tax law barriers. The other two are primarily used for tax reasons to reach potential donors residing in a host state. Needless to say, that all the described private solutions imply significant costs and efforts for foundations.

Transnational Giving Europe (*TGE*) is an interesting example of a private solution.

It is a network of charitable organizations operating in Europe. It connects 334 European charitable organizations from 19 countries. TGE acts as an intermediary. Using the network, a donor makes gifts to a domestic charitable organization and then the gifts are transferred to the charitable organization of the donor's choice located abroad. For each gift, TGE charges up to 5 % of its value (not more than € 6500).

TGE introduces itself as 'a network of organisations that have come together to facilitate cross-border philanthropy in Europe'.[35] It also adds:

> We enable donors and beneficiaries to enjoy the same tax benefits when giving/receiving cross-border as they would if they were active domestically.
>
> We exist precisely because the current operating environment for cross-border philanthropy is not meeting the needs of citizens. TGE's aim is to grow faster to disappear sooner, which we intend to do once all the pieces of the EU puzzle for cross-border philanthropy have been collected and assembled.[36]

In 2016 TGE channeled 5084 donations with a total worth of € 6,38 million from one Member State to another.[37] It demonstrates that some donors still prefer to pay for intermediary services rather than rely on the tax legislation and the ECJ jurisprudence.

The fact that charitable organizations and donors resort to private initiatives to circumvent the cross-border barriers clearly indicates the inefficiency of the existing mechanisms for the removal of the barriers on the Member State level and on the EU level.

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35 Taxation of Cross-Border Philanthropy (n 19) 7.

36 Taxation of Cross-Border Philanthropy (n 19) 7.

37 2016 Annual report Video of TGE <www.transnationalgiving.eu/2016-annual-report-video.htm> accessed 1 June 2018.

2. THE EFS

2.1. Introduction

The EFS was the European Commission's attempt to remove the barriers to cross-border charitable activities on the EU level. In the Explanatory Memorandum to the Proposal, the main ground for it and the main problem which it targets is described as follows:

> Foundations cannot channel funds efficiently on a cross-border basis in the EU. When they decide to operate across borders, foundations have to spend part of the resources they collect on legal advice and fulfilling legal and administrative requirements laid down by the different national laws.[38]

The Explanatory Memorandum to the Proposal also notes that the problem is not properly addressed at the national level and its cross-border character requires a common framework to enhance foundations' mobility.[39] It adds that 'Action by Member States alone would not allow the single market to deliver optimum results for EU citizens'.[40]

The EFS presented a solution to this problem.

The FE is a new supranational legal form such as a European Company (SE), a European Cooperative Society (SCE) and a European Economic Interest Grouping (EEIG). However, unlike the previous forms, the EFS additionally regulates the tax issues.

The FE would be optional and additional to the existing national legal forms. The existing national rules on foundations and the applicable tax rules would remain unchanged. At the same time, foundations across the EU would be given a chance to operate under the similar regime.

The two key approaches underpin the EFS.

The first one targets the civil law barriers to the cross-border charitable activities. It does so by equipping the FE with a legal personality recognized in every Member State and by allowing it to enjoy the freedom of establishment[41] and the right to transfer its registered office from one Member State to another.[42]

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38 The Proposal (n 6) explanatory memorandum 3.

39 The Proposal (n 6) explanatory memorandum 5.

40 The Proposal (n 6) explanatory memorandum 5.

41 Recital 12 of the Regulation reads as follows: 'To allow the FE to pursue its cross-border activities, it should enjoy, where necessary, a right of establishment within the meaning of Article 49 of the Treaty on the Functioning of the European Union.' The addition "where necessary" is, however, not explained. So, the question to what extent foundations should enjoy the freedom of establishment remains open.

42 The Proposal (n 6) recital 18 of the Regulation.

The second approach targets the tax law barriers. It implies that the FE should be *automatically* (i.e. without the need to prove its comparability to domestic foundations) entitled to the same tax benefits which the Member States grant to their domestic foundations. Such non-discriminatory approach should also apply to donors and beneficiaries of the FE.[43]

Apart from combating legal barriers, the FEs would have "further effects" such as the wider recognition and acceptance of the legal form by the general public. The rules applicable to FEs would be available to any interested person at no cost. The legal framework in which FEs operate would be similar in all Member States. This will lead to better fundraising opportunities for the foundations opted for the FE legal form and, respectively, the increased interest to the international charitable activities.

The provisions of the EFS[44] are discussed in more detail below.

2.2. General provisions on FEs

2.2.1. Public benefit purpose

The FE shall be a separately constituted entity for a public benefit purpose (Article 5).

The Regulation gives no legal definition of the term "FE" but provides for the list of public benefit purposes. The list is exhaustive.

It includes, among others, arts, culture or historical preservation, environmental protection, civil or human rights and social welfare. There are 20 recognized public benefit purposes in total.

Interestingly, the list does not include religion. The Regulation gives no explanation as to the rationale behind it. This omission has been criticised.

For instance, Hemels doubts that the non-inclusion of the religion is justified since religion has been recognized as a public benefit purpose in all Member States.[45] She interprets Article 5 and assumes that, theoretically, religion could be included under the heading "civil or human rights". Having said that, she sums up that the discussed provisions create legal uncertainty, and the notion of religion must be explicitly included in the list unless the satisfactory

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43 The Proposal (n 6) recital 21 and Chapter VIII of the Regulation.

44 The references to the Regulation in this Section will mean the references to the draft Council Regulation on the Statute for a European Foundation (FE) as provided for in the Proposal. All references to the Articles will mean references to the Articles of the Regulation.

45 Sigrid J.C. Hemels, 'The European Foundation Proposal: an Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?' (2012) 13 <https://ssrn.com/abstract=2046993> accessed 1 June 2018.

explanation to the contrary is given.

Rossi also adds that '…the omission of religion appears to go against the substantive law of all Member States and the common history of our continent'.[46]

However, the current draft of the EFS seems to preclude religious charities from enjoying the benefits of FEs. The clarification would be required.

2.2.2. Rules applicable to FEs

Under Article 3, the FE shall be governed by:

- the Regulation and the statutes of the FE *or*, to the extent not regulated,
- the provisions adopted by the Member States to ensure the effective application of the Regulation *or*, if not applicable,
- the provisions of the national law applicable to public benefit purpose entities.

Also, some provisions of the Regulation do not provide for any rules for FEs but refer to the existing rules of the Member States. For example, under Article 4, the information concerning the FE (the scope is defined by the Regulation) would be disclosed in accordance with the applicable national law in such a way that it is easily accessible to the public.

These rules demonstrate that the Regulation aimed at regulating only the most important issues. Indeed, the main goal of the EFS was to create a legal framework that allows foundations from different Member States be comparable to one another, not identical. Also, leaving the regulation of the details to the Member States would facilitate the easier incorporation of the rules on FEs in the existing national legal systems.

2.2.3. Cross-border component

At the time of registration, the FE shall have activities or a statutory objective of carrying out activities in at least two Member States (Article 6).

The rule adds an extra qualifier to the notion of the FE, i.e. the actual or potential involvement in the activities in at least two Member States. The rule was designed to outline the situations with the cross-border element and exclude entirely domestic situations.[47]

However, the rule does not catch all the situations where the cross-border element may arise. The example may be found in *Persche*. In this case, the cross-border tax situation arose in

[46] Rossi (n 8) 26.
[47] The Article is named "Cross-border Component".

connection with the donation of a German national Mr. Persche to the Portuguese retirement house. There is no information in the case as to whether the retirement house had any activities abroad or a statutory objective to do so, but it is safe to assume that the answer to both questions would be negative.

Thus, according to the literal interpretation of the rule, such foundations as the Portuguese retirement house could not convert to the FE, should they wish to do so to attract the foreign funding. Their foreign donors would still have to pass the comparability test in their home Member States to receive tax benefits in connection with the donations.

It is doubtful whether such omission is justified.

At the same time, the rule permits to register the FE only on condition that its statute provides for an objective to operate abroad. In this case, no actual activities are required. This leaves the room for those foundations which have no intention to operate abroad but crave for receiving the benefits of the FE status.

The rule will need some interpretation at the EU level. The main question is for how long the FE may keep its status if it remains domestic. Absent of the clarification, it would be the task of the national supervisory authorities to decide in such cases.

2.2.4. Assets and liability

The FE shall have assets equivalent to at least €25000 and its liability shall be limited to its assets (Articles 7 and 8).

In the public consultation on a possible Statute for a European Foundation, the respondents indicated that the minimum amount of assets required must be between €5000 and €300000.[48] So, one can argue whether the chosen minimum amount of assets would be sufficient to enable the FE to operate on a permanent basis and to protect the interests of its creditors in case of its inability to pay debts.

2.3. Corporate issues

2.3.1. Legal personality and legal capacity

According to Articles 9 and 10, the FE shall have legal personality and full legal capacity in all Member States. It acquires legal personality on the date on which it is registered as the FE.

Unless restricted by its statutes, the FE shall have all rights necessary to pursue its activities. It

[48] Synthesis (n 7) 13.

includes the right to own movable and immovable property, to make grants, to raise funds, to receive and hold donations of any kind, including shares and other negotiable instruments, inheritances and gifts 'in kind' from any lawful source including from third countries.

The FE can also enjoy the right of establishment in any Member State, *where it is necessary for the pursuance of its activities*.

It is not clear whether an FE would be allowed to establish the office in a host Member State exclusively for the purposes of collecting donations in that Member State. The conservative interpretation would be that it is not allowed to do so. The explanation would be needed.

2.3.2. Economic activities

Under Article 11, unless restricted by its statutes, the FE shall have the capacity and be free to engage in trading or other economic activities provided that any profit is exclusively used in pursuance of its public benefit purpose(s). Economic activities unrelated to the public benefit purpose of the FE are allowed up to 10 % of the annual net turnover of the FE provided that the results from unrelated activities are presented separately in the accounts.

It should be noted that not all Member States allow public benefit foundations to engage in unrelated economic activities. In Austria, Bulgaria, Greece, Hungary, Portugal, Sweden and the UK such activities are prohibited.[49] So, in such countries, the provision allowing unrelated economic activities for public benefit foundations may be seen as contrary to the traditional understanding of the allowed scope of activities of foundations.

2.3.3. Methods of formation

The FE may be formed by one of the following methods (Article 12):

- testamentary disposition of any natural person;
- notarial deed or written declaration of any natural and/or legal person or public body in accordance with the applicable national law;
- merger of public benefit purpose entities legally established in one or more Member States (in case of a cross-border merger, the formation process is supervised by the competent authorities in both Member States); or
- conversion of a national public benefit purpose entity legally established in a Member State into the FE.

[49] Comparative Highlights of Foundation Laws (n 16) 23.

The FE shall be set up for an indefinite period of time or, where expressly laid down in its statutes, for a specified period of time of not less than two years.

It is important to note that all the listed mechanisms are subject to formalities provided for in the national laws of a host Member State (or the Member States, in case of a cross-border formation). So, in practice, the formation process may be complicated on the national level.

2.3.4. Transfer of the seat

The FE shall have its registered office and its central administration or principal place of activities in the EU (Article 35). The FE may transfer its registered office from one Member State to another following the procedure specified in the Regulation (Articles 36 and 37).

The main practical value of the mentioned set of rules is that foundations operating as FEs would be allowed to transfer the seat without the winding up of the FE in one Member State and the creation of a new legal entity in the other Member State. The rights and obligations of the FE existing before the transfer would not be affected.

Also, the process of the transfer would be viewed as one single process in which the FE concerned, its original home Member State and the new home Member State coordinate their actions.

2.3.5. Other corporate issues

The other corporate law provisions of the Regulation focus on the requirements to the statutes of the FE, registration and dissolution procedures, and the management structure of the FE.

Some of these provisions have also been criticised. For instance, the fact that provisions on the management structure do not address the remuneration of the governing board. Hemels says:

> This opens a possibility for abuse of tax incentives: the FE is funded using tax incentives and without a cap on the remuneration of the board, the board can drain the funds of the FE by deciding on a high remuneration for members of the board. This risk is increased because the Proposal lacks a provision on the amount of operating costs allowed in relation to spending on the public benefit. This should be addressed as well.[50]

2.4. Tax issues

The tax law provisions in Chapter VIII of the Regulation are concerned with the tax treatment of the three categories of actors: FEs, their donors, and their beneficiaries.

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50 Hemels 2012 (n 45) 10.

Article 49 sets forth the rules with respect to FEs:

- the Member State where the FE has its registered office shall subject the FE to the same tax treatment as is applicable to public benefit purpose entities established in that Member State;[51]
- Member States other than those in which the FE has its registered office shall subject the FE to the same tax treatment as is applicable to public benefit purpose entities established in those Member States;
- for the purposes of the rules above, the FE shall be regarded as *equivalent* to public benefit purpose entities established pursuant to the law of the Member States concerned.

Article 50 provides for the rules relating to donors to FEs:

- any natural or legal person donating to the FE within or across borders shall be subject to the same tax treatment that is applicable to donations made to public benefit purpose entities established in the Member State where the donor is resident for tax purposes;[52]
- for the purposes of the rule above, the FE receiving the donation shall be regarded as *equivalent* to public benefit purpose entities established pursuant to the law of the Member State where the donor is resident for tax purposes.

Finally, Article 51 establishes that beneficiaries of the FE shall be treated, with respect to the grants or other benefits received, as if they were given by a public benefit purpose entity established in the Member State in which the beneficiary is resident for tax purposes.

It is crucial to understand how the approach to the tax issues taken in the EFS differs from the one taken by the ECJ in its previous case law.

The differences can be found in two aspects: (1) the set of requirements which foundations (or FEs, in case of the EFS) must meet in order to qualify for tax benefits in a host Member State and (2) the authorities competent to decide on whether foundations (or FEs) comply with these requirements.

Pursuant to the ECJ approach, foundations must meet the requirements of a host Member State to be eligible for tax benefits in that Member State. They must pass the comparability test. The

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[51] According to Article 49, the first two rules apply to income and capital gains taxes, gift and inheritance taxes, property and land taxes, transfer taxes, registration taxes, stamp duties and similar taxes.

[52] According to Article 50, the rule applies to income taxes, gift taxes, transfer taxes, registration taxes, stamp duties and similar taxes.

administrative and judicial authorities of the host Member State are competent to decide on whether the test has been passed. By doing so, they exercise control over the foundations seeking tax benefits in that Member State. This approach will be further referred to as the *host state approach*.

According to the EFS, FEs must meet the requirements of their home Member State[53] to be automatically recognized as public benefit entities eligible for tax benefits in any host Member State. The control over the FEs is exercised domestically (see Section 2.5 below). This approach taken in the EFS will be referred to as the *home state approach*.

The host state approach of the ECJ fits the interests of the Member State's authorities best. The ECJ let them exercise full control over the tax benefits they provide with respect to cross-border charitable operations. In fact, they must not even provide such benefits, unless a person seeking them passes the comparability test.

Obviously, for private persons seeking tax benefits in a cross-border situation, the host state approach represents a major obstacle. The fact that every Member State has its own set of requirements means that foundations must meet 28 sets of requirements to be able to get tax benefits across the EU.

The home state approach, on the other hand, best fits the interest of private persons. In this case, the receipt of tax benefits in a cross-border operation is only conditioned on the FE's compliance with the national requirements. The requirements of the host Member State are irrelevant.

Under such circumstances, the host Member States are left with no control. Obviously, the approach causes much discomfort for the host Member States since they are obliged to grant tax benefits without having an authority to prevent potential abusive practices. In fact, they are put in the situation where they must *trust* that the other Member States exercise control over their FEs good enough to prevent tax abuse in all Member States.

Thus, the effectiveness of the domestic supervision over FEs is a major issue for the home state approach and, accordingly, the EFS. Koele describes the problem as follows:

When states open their borders for cross-border philanthropy without considering measures to effectively control the ultimate destination of the funds, this can easily lead to abuse of the charitable status, which ultimately may be disadvantageous for the philanthropic sector as a

[53] The Member State requirements, in this case, include the rules provided for in the Regulation and in the statutes of the FE.

whole. [54]

2.5. Supervision of FEs

2.5.1. General rules on the supervision of FEs

Under Articles 45 and 46, the compliance of the FE with its statutes, the Regulation, and the applicable national law shall be supervised by the national supervisory authority of a Member State where the FE is registered.

The Regulation ensures that the national supervisory authorities have the supervisory powers. The supervisory authority is entrusted with the power to approve the change to the purpose of the FE and the winding up of the FE. Also, it shall have the following powers:

- where the supervisory authority has reasonable grounds to believe that the governing board of the FE is not acting in accordance with the statutes of the FE, the Regulation or the applicable national law, to inquire into the affairs of that FE and, for that purpose, to require the directors and employees of the FE as well as its auditor(s) to make available all necessary information and evidence;
- where there is evidence of financial impropriety, serious mismanagement or abuse, to appoint an independent expert to inquire into the affairs of the FE at the expense of the FE;
- where there is evidence that the governing board has not acted in accordance with the statutes of the FE, the Regulation or the applicable national law, to issue warnings to the governing board and to order the governing board to comply with the statutes of the FE, this Regulation, and the applicable national law;
- to dismiss a member of the governing board or where provided for in the applicable national law, to propose the dismissal to a competent court;
- to decide to wind up the FE or, where provided for in the applicable national law, to propose the winding up of the FE to a competent court.

In order to exercise its supervisory functions, national supervisory authorities, where necessary, shall cooperate with supervisory and tax authorities in the other Member States where the FE carriers out its activities (Articles 47 and 48).

It should be noted that host Member States have a very limited influence on the supervision of

[54] Ineke A. Koele, 'How Will International Philanthropy Be Freed from Landlocked Tax Barriers?' (2010) 50 9 European Taxation 409, 415 <www.koeletaxlegal.com/en/publications/how-will-international-philanthropy-be-freed-from-landlocked-tax-barriers.html> accessed 1 June 2018.

the FEs registered abroad.

The Member States where the FE carries out its activities have no authority to investigate the activities of the FE on their own. It remains a prerogative of the Member State where the FE is registered. Such Member States are only entitled to request the investigation from the supervisory authority of the Member State where the FE is registered. So, they left in a weak position in this case.

The Member States where the FE carries out no activities have neither an authority to investigate the FE's activities nor the right to request the investigation from the FE's home Member State. This may potentially lead to major negative consequences.

For example, Hemels illustrates this as follows:

(…) if a UK resident would spontaneously donate to an FE registered in Malta with activities in Cyprus, the UK would not have any means to make sure that the gift is justly tax deductible. This would, in my view, be very undesirable and should be amended as it would open many ways for abuse of the gift deduction in Member States. [55]

Also, the Regulation provides the national authorities with the minimum set of powers to ensure the effective supervision of the FEs. However, the effectiveness of the supervision remains a matter of practice, not the law.

This leads to the conclusion that the tax provisions of the Regulation could only be acceptable if the Member States chose to trust each other's supervisory authorities. This may be not an easy task given the risks of abuse.

There might be a fear that some FEs will be incorporated in countries with weak supervisory authorities. One could imagine that for Member States that are very small or that have huge budget deficits (or both) supervision of FEs might not have the highest priority, especially not if FEs receive most of their gifts from other Member States. A Member State that has a very strict supervision of charities and many wealthy residents that might try structures to reduce their income tax burden, would probably not be too happy if it would have to grant tax incentives for donations to an FE in another Member State with a weak supervisory system. This might become a means of abusing tax incentives for charitable giving. It is incomprehensible that the Proposal does not address these very obvious risks of abuse.[56]

2.5.2. Penalties

Article 53 leaves it to the Member States to lay down rules on penalties applicable to infringements of the provisions of the Regulation.

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55 Hemels 2012 (n 45) 16.

56 Hemels 2012 (n 45) 19.

The Regulation specifies that such penalties must be effective, proportionate and dissuasive. However, this guidance is rather vague, and, in fact, the Member States are free to decide how strictly they wish to punish those who infringe the discussed provisions. The efficiency of the enforcement proceedings relating to such penalties may also vary from state to state.

This adds to the discussion on the effectiveness of the national supervision above.

It is reasonable to suggest that different approaches to the liability and enforcement rules may lead to "the jurisdiction shopping" and the abuse of the rules of the Regulation. The issues of the financing of terrorism and money laundering have also been raised in connection with the analyzed situation.

Hemels illustrates this with the following example.

> For example, if 30000 wealthy English residents all form an FE in Lithuania to claim UK tax relief for gifts to those FEs, Lithuania will probably not have the means to supervise and penalize those FEs. The UK might have the means to supervise these FEs (…) but the UK is not allowed to supervise or penalize these Latvian FEs, even though these are primarily used to reduce the UK income tax burden.[57]

This represents a major practical problem.

The Regulation provides for transparency and accountability rules for FEs (Article 34). The FE must keep full and accurate records of all financial transactions and report to the supervisory authority on an annual basis. The annual accounts of the FE shall be audited and disclosed.

One could argue to what extent such provisions prevent the risk of tax abuse. There is no doubt that these provisions could prevent the abuse by FEs which depend on the funding from the general public. It is, however, unclear which effect they would have with respect to other FEs. Some additional instruments may be required in such cases.

2.5.3. The costs of setting up national supervisory structures

The national supervisory model has also been discussed in the context of the potential funding it would require from the Member States.[58] There is a point of view that setting up a supervisory structure at the national level would be too costly at least for some Member States.

The EFS establishes a supervision at the national level. However, it does not provide for any guidance as to whether it is possible to entrust the existing authorities in the Member States with the supervision of FEs. So, in it unclear whether the domestic tax authorities or any other

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57 Hemels 2012 (n 45) 17.

58 Sigrid Hemels and others, *Tax Incentives for the Creative Industries* (Springer 2017) 96.

authorities in charge of supervising of the domestic foundations could undertake this function with respect to FEs.

If the EFS requires the Member States to create new separate supervisory authorities for FEs, the costs of implementation of the initiative could be substantial indeed.

2.6. Entry into force and the effective application

The Regulation would enter into force on the twentieth day following that of its publication in the Official Journal of the European Union (Article 55). It would apply from 2 years from the entry into force.[59] So, the institutions involved had time to get necessary clarifications and set up the infrastructure at the national level for the application of the Regulation.

Pursuant to Article 54, the European Commission would report on the application of the Regulation and present the proposals for its amendments, where necessary, to the Council and the European Parliament in 7 years after the Regulation's entry into force.

These provisions indicate that the European Commission expected that some issues relating to the implementation of the Regulation would arise after its entering into force. It equipped the Regulation with the mechanisms to solve these issues as they arise.

Clearly, the approach had a potential to overcome technicalities and minor issues arising in connection with the implementation of the Regulation. It is, however, doubtful whether it would have worked with respect to significant disagreements on the Proposal.

2.7. To what extent would the EFS remove the barriers to cross-border charitable activities?

It is important to understand that the Regulation would only be a partial solution for the sector and not the final one. The barriers to cross-border charitable activities would be effectively removed only for FEs. For domestic foundations not transformed into FEs, the situation would not change.

Some authors point out that the limited effect of the Regulation is its weakness. For instance, as shown below, Rossi compares the effectiveness of the Regulation with the harmonization.

> In fact, in countries such as Italy, where legislation on foundations is considered obsolete or otherwise in need of reform, it probably would have been more effective to harmonize disciplines rather than to introduce a new legal form, which may remain poorly applied.[60]

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59 The term was not final since it was left in square brackets and formatted in italics in the Proposal.

60 Rossi (n 8) 27.

Indeed, the harmonization could have more positive effect on the national laws on foundations. However, the studies show that harmonization in the area of foundation laws, including the related tax aspects, does not seem to be realistic.[61] There is no consensus between the Member States on these issues.

Hence, the fact that the Regulation offers a solution without harmonizing the national laws of the Member States can be viewed one of its strengths.

Further, even though the Regulation would not harmonize the national laws directly, it would have a certain harmonizing effect. This would be achieved, for instance, by the introduction of the common understanding of the term "foundation".

2.8. The rejection of the EFS

The Proposal would be based on "catch-all" rule of Article 352 of the TFEU since no other provision in the TFEU gives the EU necessary powers to adopt this measure.

The previously adopted European legal forms (the European Company (SE), the European Cooperative Society (SCE), and the European Economic Interest Grouping (EEIG)) were also based on Article 352 of the TFEU. The ECJ confirmed that that was the correct legal basis.[62]

According to Article 352 of the TFEU, measures are adopted in the following procedure: (i) the European Commission presents a proposal, (ii) the European Parliament consents to it and (iii) the Council adopts it unanimously.

In case of the Proposal, it never managed to get to the second stage of the procedure.

By November 2013, tax provisions have been deleted from the Proposal.[63]

In December 2014, the European Commission decided to withdraw it from the legislative agenda for 2015 seeing no prospects for reaching an agreement among 28 Member States.

The decision caused much disappointment in the non-profit sector.

'This decision sends a signal that goes completely against the concept of building a citizen-led Europe,' said Gerry Salole, EFC Chief Executive. 'If EU institutions together cannot uphold a Regulation which aims to facilitate public interest work by and for the citizens, they will have to find other avenues, with the sector, to address the issue. Foundations will continue to hold the European Commission to account in finding solutions to serving the public interest across

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61 The FS (n 1) 4.

62 Case C-436/03 *European Parliament v Council of the European Union* [2006] I-03733.

63 Council of the European Union, '3295th Council meeting: Competitiveness (Internal Market, Industry, Research and Space (Press Release)' (2014) 20 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141115.pdf> accessed 1 June 2018.

borders.'[64]

In such circumstances, the European Commission's decision indicates that the disagreements on the Proposal between the Member States were significant.

Eight Member States reportedly rejected the Proposal in November 2014.[65] These Member States are Austria, Denmark, Estonia, Germany, the Netherlands, Portugal, Slovakia and the UK.

The EFC explains the refusal of the mentioned Member States as follows.

> Among them, some wished to see further changes in the EFS text but given the somewhat secretive character of the negotiations it is difficult to assess what these suggested changes were. Of the 28 EU Member States, 3 said they doubt the value of an EFS per se, as the benefits would not outweigh the potential costs implied in terms of registering or supervising the new entities.[66]

The European Commission has not given any official explanations as to why it saw no prospects of an agreement with respect to the Proposal.

However, the analysis of the EFS, the related materials, and the relevant legal literature, suggests that the tax provisions of the Proposal were the main reason for its withdrawal. The opposition to the tax provisions by public authorities in the Members States made it impossible to agree on the Proposal unanimously.

It looks quite reasonable even though by the time the European Commission decided to withdraw the Proposal the tax provisions had been deleted. Indeed, the value of FEs with no tax recognition would probably not outweigh the costs of creating the national supervisory systems for FEs.

Weitemeier shows that the German Bundesrat and Austrian Finance Ministry have spoken out against the compulsory tax recognition of FEs as public benefit purpose entities as early as in 2012, the year in which the EFS was introduced.[67]

Hemels discussed the negative impact of the tax provisions on the feasibility of the Proposal as follows.

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64 Emmanuelle Faure, 'European Commission Halts Negotiations on the European Foundation Statute – What's Next?' (2014) <http://intranet.fundaciones.org/EPORTAL_DOCS/GENERAL/AEF/DOC-cw54ca3047d55b1/EFSPressRelease16_12-0-2014_Final.pdf> accessed 1 June 2018

65 Ibid.

66 Ibid.

67 Birgit Weitemeyer, 'Fundatio Europaea – risk of abuse by tax shopping?' (2013) 14 ERA Forum 277, 278-279.

The inclusion of the tax treatment in the Proposal makes the FE Regulation very different from the SE and SCE Regulation. On the one hand it is necessary to provide for a solution for cross border charitable fundraising. An FE Regulation which would not address tax issues would not provide for a better solution for the issues related to cross border charitable giving than the current host-state control solution of the ECJ. On the other hand, it can be expected that the inclusion of the tax treatment and the mutual recognition of each other's supervisory authorities will make it more difficult to get the agreement of all Member States on the Proposal and therefore, has a negative effect on the feasibility of this solution.[68]

The reason for the opposition is also clear. The Member States lacked trust in the effectiveness of each other's supervisory authorities. The risks of abuse were too high.

[68] Hemels 2012 (n 45) 19.

3. WHAT IS THE CURRENT SITUATION WITH THE BARRIERS TO CROSS-BORDER CHARITABLE ACTIVITIES?

3.1. Introduction

The failure of the EFS is definitely a missed opportunity for the European non-profit sector.

However, the EFS itself and the related materials (the FS, the materials of the public consultations and conferences, various opinions, etc.) still have practical relevance today since the barriers to cross-border charitable activities in the EU remain to exist.

At this stage, we should analyze the mistakes of the past and learn from them.

For this reason, this Section overviews the existing barriers to cross-border charitable activities in the EU and elaborates on how the knowledge accumulated to date could be applied to remove the obstacles.

It should be noted that scarcely any extensive legal studies on the removing of the legal barriers to cross-border charitable activities were published after the withdrawal of the Proposal in 2015. It looks like this topic has been out of the research focus in the last years.

The latest available full-scale studies were undertaken by the EFC and TGE in 2014 – 2015.

The paper "Taxation of cross-border philanthropy in Europe after Persche and Stauffer. From landlock to free movement?" (2014) focused on how the Member States achieve the non-discriminatory tax treatment of cross-border charitable activities established by the ECJ. The paper "Comparative highlights of foundation laws. The operating environment for foundations in Europe" (2015) gave an overview of civil law and tax law issues relating to foundations in the EU.

This paper bases the description of the current situation on the barriers to cross-border charitable activities on these studies. Even though some data from the above sources can already be outdated as of 2018, there are indications that general problems of the sector have not been solved since 2015. It still needs reforms.

In February 2018, the CEO of the EFC, Mr. Gerry Salole, posted a very artistic reflection on this on the EFC's site:

> The EFC and others have argued long and loud that the institutional philanthropy sector in particular, and the non-profit industry in general, remain a much neglected periphery on the sidelines of the standardisation of European laws.

Sometimes it seems like we are that guest at a wedding who hardly anyone talks, listens, or pays any attention to. While other guests (such as Money, Personnel and Goods) move more freely about and enjoy the Single Market, philanthropy has been somewhat overlooked, undervalued, and left sitting alone in the corner. Attempts to remedy this (such as the many years work on a European Foundation Statute) to date may not have prevailed, but efforts to ensure that European lawmakers do justice to the non-profit sector are just as needed as ever. We continue to insist that philanthropic endeavours should not be neglected as the EU standardises the way in which organisations from one country are treated in another. Lonely we might well be, but we aren't leaving the party.[69]

3.2. Civil law barriers

The civil law barriers described in Section 1.1.2 above remain to exist. There are no indications of significant changes in this field since the withdrawal of the Proposal. Only one issue should be noted in this context.

One of the international instruments for the removal of the barriers to the legal recognition of foreign foundations is the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. It entered into force 1 January 1991.

The Convention facilitates the mutual recognition of the legal personality and capacity of the foundations established in the states ratified the Convention.

There are twelve parties to the Convention to date (including 11 Member States). The last one to join was Liechtenstein. The Convention entered into force in Liechtenstein on 1 January 2018.[70]

This is a small step towards the removal of the obstacles to the recognition of European foundations' legal personality across the EU. However, it should not be disregarded. In the absence of more comprehensive solutions, even such small steps should be celebrated.

3.3. Tax law barriers

As of today, the ECJ case law remains the primary instrument for combating tax barriers to the cross-border charitable activities on the EU level.

In *Stauffer*, *Persche,* and *Missionwerk*, the ECJ has developed a general non-discrimination rule with respect to taxation of comparable foreign foundations. Hence, the Member States

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69 Gerry Salole, 'The Ballad of a (Not So) Thin Man "Be Careful What You Wish For"' (*EFC*, 20 February 2018) <www.efc.be/operations/be-careful-what-you-wish-for/> accessed 1 June 2018.

70 Chart of signatures and ratifications of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (last updated 1 June 2018) <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/124/signatures?p_auth=Egu1DhOq> accessed 1 June 2018.

were supposed to remove the conflicting rules from the national laws and give foreign foundations a green light to prove their comparability to the domestic ones and claim respective tax benefits.

The European Commission actively facilitated the process of bringing the national laws in the Member States in line with the ECJ case law by initiating the infringement proceedings against them.[71]

However, the EFC's study shows that by 2014 the non-discrimination principle has not been implemented in the text of the national tax laws of all the 28 Member States.

If we take the three ECJ cases referred to above as the basis for three key cross-border scenarios involving PBOs[72] and consider whether the non-discrimination principle has been implemented in the laws applying to each of these situations in each of the 28 Member States, we find that in 22 of a possible 84 cases the wording of Member States' laws discriminates.[73]

It is clear that in theory even where the Member States have not yet amended the discriminatory laws, such laws must be interpreted in conformity with the ECJ's position, i.e. as providing for a comparability test for foreign foundations. However, in this scenario, the problems may arise on the practical level. The foundations and their donors may be not informed of it or discouraged from claiming tax benefits because of the lack of clarity as to whether they are entitled to them and, if so, on what conditions.

The situation is not much better in the Member States which have removed discriminatory rules and practice comparability tests as guided by the ECJ.

The major problems are the diversity and the uncertainty of the comparability requirements.

As discussed in previous Sections, each Member State is authorized to establish comparability requirements for foreign foundations. There is no single approach to this issue among the Member States.

Further, the EFC reports that the majority of the Member States have no formal or uniform comparability requirements. As a matter of practice, the competent authority decides whether the comparability test has been passed on a case by case basis. The practice can even vary from one authority to the other within one Member State. [74]

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71 For instance, case C-10/10 *The European Commission v Republic of Austria* [2011] I-05389.
72 In the cited source, PBOs mean public benefit organisations.
73 Taxation of Cross-Border Philanthropy (n 19) 8.
74 Taxation of Cross-Border Philanthropy (n 19) 8.

In the situation where the burden of proof in the comparability test lies with a person seeking for tax benefits (a foundation or its donor), the diversities and uncertainties represent a major obstacle. The procedure becomes costly and lengthy.

The EFC defines five options as to how the situation can be improved:

(1) establishing the uniform requirements for the tax exempt status of foreign foundations by multilateral or bilateral treaties;

(2) granting the tax-exempt status automatically to foreign foundations having tax-exempt status for tax purposes in their countries of origin;

(3) identifying the strictest common denominator of the national tax laws of the Member States, i.e. the set of all national requirements to the tax-exempt status in all Member States and drafting model statutes compliant with such set of rules;

(4) focusing on common principles rather than exact rules for comparability determination (for example, 'a rule regulating the remuneration of board members need not constitute a key principle in its own right but can be considered as an aspect of a broader principle that PBOs should have a non-distribution constraint and avoid providing excessive private benefit'[75]);

(5) the simplification of the procedure in which the comparability tests are carried out, e.g. by way of introduction uniform model certificates for submission to the competent authorities.[76]

The EFC views options (1) and (2) as not realistic. It is hard to disagree. The failure of the EFS additionally confirms that option (2) is not a feasible option.

Option (3) provides for a challenging exercise for lawmakers but it has a potential for a success. In theory, the foundations compliant with the strictest common denominator could enjoy the tax-exempt status in every Member State. However, when a foundation only wishes to operate in some Member States and not in all of them, the compliance with such strictest common denominator could be a burden.

It is not clear, however, how option (4) would facilitate the introduction of the legal certainty. The rationale behind the idea is clear but the practical use of it seems to leave much room for the discretion of the competent authorities deciding on a comparability case.

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75 Taxation of Cross-Border Philanthropy (n 19) 43.

76 Taxation of Cross-Border Philanthropy (n 19) 42-43.

The simplification of the procedural requirements described as option (5) would be beneficial for those seeking for benefits. However, it would have a limited effect in the absence of legal certainty as regards to the substantial comparability requirements.

Thus, the suggested options do not seem to be able to solve the problems of the sector individually. The more complex solution is needed.

The EFC paper does not discuss the FEs. It only focuses on the issues related to the implementation of the ECJ non-discrimination principle in the Member States. The omission can be easily explained. The paper of the EFC had a practical focus and by the time of its publication, the Proposal had been "sentenced" to the withdrawal.

Since this paper is more of an analytical nature, the next Section also discusses how the EFS concepts could contribute to the finding of effective solutions for removing the tax barriers.

3.4. What could be offered as a solution?

3.4.1. Prerequisites to the effective solution

First, it is necessary to stress that both civil law barriers and tax barriers should be addressed by the next solution for the non-profit sector.

It may be tempting to exclude the tax issues from the next initiative given the foreseeable difficulties in reaching an agreement on them. This option has already been discussed before the introduction of the EFS.

During the public consultations relating to the possible Statute for a European Foundation (2009), the participants were asked for the opinion on whether they would consider an EFS without tax elements as a useful/attractive instrument.[77]

Almost two-thirds of the respondents agreed that an EFS without tax elements would be a useful/attractive instrument. The view was supported by the arguments as to the positive effect on cross-border activities it could have even without tax elements. The other approach was that taxation should be left with the Member States, therefore only an instrument without any tax elements would be attractive. The rest of the respondents argued that such an instrument 'would have little practical relevance and be only a partial'.[78]

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77 Synthesis (n 7) 10.

78 Ibid

The result is not surprising. However, the answers give little information as to the real preferences of the respondents.

Would the EFS without tax elements have a positive effect on the cross-border activities? It definitely would. Would it be a final solution to the problems of the non-profit sector without tax elements? No, it would only be a partial one. So, the Proposal without tax elements would be a useful instrument for the sector. However, the Proposal *with* tax elements would be a better one. There are two problems and both of them should be solved.

Second, the tax element of the next solution targeting the barriers should determine its form.

The civil law issues do not seem to cause so many disagreements among the Member States, so they could simply follow the lines designed to address the tax law issues.

Based on these two prerequisites, the method for identifying the possible solutions for the existing tax barriers could be the following.

3.4.2. Finding a solution

There are currently two approaches for the removal of the tax barriers to cross-border charitable activities which have been substantially studied. This Section looks at these approaches again and creates a new solution based on them.

The approaches are the *home state approach* provided for in the EFS and the *host state approach* established by the ECJ in its case law. The merits and the drawbacks of the both were previously discussed in this paper.

The two key differentiating aspects of the approaches were identified:

(1) RULES – which Member State (a home state or a host state) establishes the rules for foundations (or FEs, in case of the EFS) and

(2) CONTROL – which Member State controls the compliance with these rules.

In previous Sections, this dichotomy was left with no comments as to the role of the EU in both cases. It was made on purpose to better demonstrate how different the approaches are in their essence.

At this stage, the EU will be introduced in this system as the third actor. It is clear that the EU is the primary lawmaker in case of the FEs.

So, in both aspects of RULES and CONTROL the actors will be (a) a home state – a Member State where a foundation (or an FE) is formed, (b) a host state – a Member State where the foundation (or the FE) seeks for tax benefits and (c) the EU.

The table below demonstrates where the two approaches locate in terms of RULES and CONTROL.

RULES

CONTROL		***home state***	***EU***	***host state***
	home state	FE approach* *subsidiary rules	FE approach	
	EU			
	host state			ECJ approach

As was shown in the previous Sections, the Proposal was apparently not a feasible solution for public authorities. At the same time, the ECJ approach does not fully remove the tax barriers for foundations.

Bearing that in mind, the next step will be to identify the zones of potential agreement for the authorities and the foundations and find a solution which could be acceptable for everyone.

The method represents a simulation exercise. It is based on the analysis of the facts available for public use. It is clear that not all the facts are available for a general public. Some of such facts could even influence the simulation results. However, this exercise will be limited to very general issues and avoid technicalities. It is safe to assume that the results will be reasonably accurate in any case. Obviously, a further research and public consultations will be required to test the results before proceeding with their implementation.

Public authorities

The main concern of the public authorities of the Member States was the effectiveness of the control over the foundations (or FEs) and the prevention of tax abuse.

So, the main preference in terms of control would be to leave the control function with the Member States where tax benefit is sought (host Member States).

The option of transferring the control to the EU level has also been discussed in the context of the Proposal. It is, however, not clear whether the option is viable as of today. Further studies and consultations on this issue are needed.

In terms of the rules, the probable options would be the rules of the host state or the EU rules.

The more probable options are highlighted in dark blue, less probable – in light blue.

RULES

CONTROL		***home state***	***EU***	***host state***
	home state	FE approach* *subsidiary rules	FE approach	
	EU			
	host state			ECJ approach

Foundations (FEs)

From the point of view of foundations (FEs), the situation is different.

The main concern lies in the area of the rules. The foundations (FEs) would prefer to comply with one set of rules instead of many. This set of rules may be established on the national or the European level.

The issue of control looks not that important for foundations (FEs). Even though they would be more comfortable with local supervision by the national or the EU authorities, the option of the host state supervision does not seem a no-go for them.

The more probable options are highlighted in dark pink, less probable – in light pink.

RULES

CONTROL		***home state***	***EU***	***host state***
	home state	FE approach* *subsidiary rules	FE approach	
	EU			
	host state			ECJ approach

Now, if we leave only those boxes which have been highlighted in both tables, we will see the green area which defines a zone of potential agreement for public authorities and foundations (FEs).

RULES

CONTROL	***home state***	***EU***	***host state***
home state	FE approach* *subsidiary rules	FE approach	
EU		**ZOPA**	
host state			ECJ approach

Summary

Summarising our findings, (1) the rules applicable to foundations (FEs) must be created on the EU level, and (2) the supervision must be exercised on the EU level (the better option for foundations (FEs)) or in the host state (the better option for public authorities).

Rules

The solution provides for the unified rules on foundations applicable in all Member States and established by a EU legal act. There may be modalities as to how to create such rules. The European lawmaker may opt for a Regulation or a Directive.

A Regulation may provide for the introduction of the FEs (as it was suggested by the Proposal) or establish the set of requirements for domestic foundations directly applicable in the Member States. The Regulation would require the Member States to recognize and grant tax benefits to FEs or foreign foundations which meet the requirements provided for in it. Most importantly, the requirements should include the list of recognized public benefit purposes.

It should be noted that domestic foundations which have no interest in acting cross-border should not be required to comply with such Regulation.

A Directive would be a milder mean to establish the set of European-wide requirement to foundations. However, it well may be enough to harmonize the national rules to the extent necessary to remove the existing border to cross-border charitable activities.

Hemels notes the following:

> Removing the barriers to cross-border giving in Europe does not mean that EU member states have to harmonise their tax incentives for charitable giving. In order to remove these barriers, harmonisation of the requirements for registration (most importantly, the definition of charitable activities) and supervision of charities operating on a European scale are sufficient.[79]

The relevant provisions of the EFS could be used as a starting point for creating the unified rules on foundations (FEs).

Control

The control should be exercised in the host Member State (as proposed by the ECJ) or at the European level. In this context, it should be noted that the concept of the automatic mutual recognition as provided for in the Proposal will not be upheld in any case.

The national supervision over foundations (FEs) raises almost no questions. With respect to foundations, it has a practical implementation as of today.

The idea of the single European entity supervising foundations (FEs), on the other hand, is still only a theoretical model. However, it was discussed in connection with FEs before the EFS was introduced in its latest version.

The draft Regulation on a European statute for Foundations proposed by the EFC in 2004 provided for the creation of a European Registration Authority as a registration and supervisory authority for European foundations.[80] In case the creation of the single European authority would not be feasible, it was suggested to transfer its functions to the level of the Member States. The EFC noted that in such a case the procedures for registering and supervising European foundations would not be comparable across the EU.

On the conference "Towards a European Framework for Public Benefit Foundations" organized by the Academy of European Law and the European Foundation Centre in Brussels (2006) the EFC took the following position:

> The EFC believes that a European Registration Authority, which should also function as a supervisory authority, would be the most appropriate solution for a transparent and well-functioning European foundation sector. The European Registration Authority should be established under European law and should be fully independent. It must act independently of political influence and cannot refuse to register an applicant foundation which fulfils the legal requirements. Where the establishment of a European Registration Authority would not be seen as feasible, the registration and establishment of an EF could also be exercised at the national

79 Hemels 2009 (n 4) 17.
80 Hemels 2009 (n 4) 15.

level. One has to bear in mind, however, that this would lead to 25 different ways of setting up EFs and also 25 different supervisory systems.[81]

In the public consultation on the possible Statute for a European Foundation (2009), the participants had a chance to express their opinion on how the FEs must be supervised.[82] The dominant view of the respondents from the non-profit sector was that the supervision could be best arranged at the European level or alternatively be delegated to the national level. The respondents from the public authorities preferred national supervision.

As can be seen from the above citation, the non-profit sector preferred the option of the single European authority supervising all European FEs. This seems like a reasonable option for creating a single set of standards for the registration and supervision of FEs. This would prevent the possible national discrepancies.

However, it seems that the opposition by public authorities in the Member State forced the European Commission to follow the second best option which was the national model of the supervision.

The new research is required to learn whether this solution for the existing problems of the sector would be feasible in 2018. It appears that the Member States should have more trust in the European authorities than the authorities of each other. The issue is, however, if they are ready to transfer their authority in the fiscal matters at all in order to achieve the common goal of barrier-free charitable activities across the EU.

In case the Member States are not ready to give up its fiscal authorities in this field, the option of a host state supervision of foundations (FEs) will be the only feasible option.

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81 Hanna Surmatz, 'Towards a European Framework for Foundations in Europe' (2006) 7 ERA Forum 398, 403.

82 Synthesis (n 7) 4.

CONCLUSION

The European foundation sector significantly contributes to the promotion of the fundamental values and attainment of the citizen-oriented objectives of the EU. Also, it represents a major economic force.

Over the last decades, the European foundation sector faced a growing interest in cross-border activities. In the globalized society, people and businesses are no longer bound to one country, and their operations do not stop at the national borders.

In the meantime, the legal barriers to cross-border charitable activities can be found both in civil law and in tax law. The barriers cause additional costs for foundations and their donors and hinder the international expansion of the charity.

This paper looked into the legal barriers to cross-border charitable activities.

It outlined the main civil law barriers which come into play when a foundation decides to operate abroad: the barriers to its recognition as a public benefit legal entity in a host Member State and the barriers relating to the cross-border transfer of its seat. There is an ongoing discussion on whether (some of) these barriers infringe the freedom of establishment. There are arguments that they do. However, the ECJ has not taken a position on this issue yet.

It also identified the tax law barriers which generally concern the unequal tax treatment of the foreign foundations and the domestic ones.

The paper studied three landmark cases of the ECJ with respect to tax treatment of foundations and their donors: *Stauffer*, *Persche*, and *Missionwerk*.

In *Stauffer*, the ECJ established the general non-discrimination principle: no Member State is allowed to refuse a foreign foundation the tax benefits it grants to its domestic foundations if the foreign foundation is comparable to the domestic ones.

Even though the non-discrimination principle established by the ECJ can be viewed as a positive outcome for the non-profit sector, its practical implementation is burdensome. For the foundations, that means that they must pass the comparability test before the host Member State's authorities every time they wish to get tax benefits in that Member State. If they wish to get tax benefits in every host Member State, they must prove the comparability with 27 sets of rules to 27 local authorities. This represents a major obstacle.

In *Persche* and *Missionwerk*, the ECJ applied the same non-discrimination approach to donors and legacies to the foundations.

Further, the paper reviewed the mechanisms for the removal of the barriers to cross-border charitable activities on the Member States level (national and international solutions), the EU level and the level of private initiatives.

The main focus of the paper was placed on the legislative initiative of the European Commission designed for the removal of the barriers to cross-border charitable activities on the EU level, namely a European Foundation (FE) – a supranational legal form for public benefit purposes.

The European Commission introduced a proposal for a Council Regulation on the Statute for a European Foundation (FE) (the *Proposal*) in 2012. In 2015, it withdrew the Proposal seeing no prospects for reaching an agreement among the 28 Member States.

The Proposal provided for two key instruments for the removal of the barriers.

(a) First, it granted an FE a legal personality recognized in every Member State and allowed it to enjoy the freedom of establishment.

(b) Second, it *automatically* (i.e. without the need to prove the comparability to domestic foundations) entitled the FE to the same tax treatment in a host Member State as such Member State accords to its domestic foundations. What is crucial, it left the supervision of FEs to the Member States where they were registered.

While the civil law provisions of the Proposal did not seem to cause much disagreement, the tax law provisions have been actively criticized. Furthermore, the legal scholars suggest that the main reason for the Proposal's withdrawal was a failure to reach an agreement on the tax issues.

Indeed, the approach effectively removes the tax barriers for the FEs. However, the automatic tax recognition of FEs, as specified above, would mean that the Member States would be obliged to grant tax benefits to FEs without having the authority to supervise them. This could lead to the tax abuse. The Member States would have to trust each other's supervisory authorities to agree on the Proposal. That did not happen.

Lastly, the paper aimed at finding a feasible solution for removing the barriers to cross-border charitable activities which could be efficient for foundations (FEs) as well as acceptable to the competent authorities in the Member States. Having compared the approaches to the tax issues taken by the ECJ and offered in the Proposal, the paper came to the following conclusions.

The next solution aiming at the removal of the barriers to cross-border charitable activities in the EU should provide for (1) the unified set of rules applicable to foundations (FEs) in all Member States and established on the EU level, and (2) the supervision of the foundations (FEs) exercised on the EU level or in the host Member States.

The Proposal can be used as a starting point for the next solution. The elaboration on its details, however, will require a new feasibility study and consultations with legal scholars and practitioners.

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ANNEX

Abstract in English

The European foundation sector significantly contributes to the promotion of the fundamental values and the attainment of the citizen-oriented objectives of the European Union. It also represents a major economic force.

Over the last decades, the European foundation sector faced a growing interest in cross-border activities. In the globalized society, people and businesses are no longer bound to one country, and their operations do not stop at the national borders.

However, the legal barriers to cross-border charitable activities can still be found both in civil law and in tax law. The barriers cause additional costs for foundations and their donors and hinder the international expansion of the charity.

This paper looks into the legal barriers to cross-border charitable activities and reviews the mechanisms for removing them on the Member States level, the EU level and the level of private initiatives.

In this context, it focuses on the legislative initiative of the European Commission aimed at the removal of these barriers, namely the introduction of a European Foundation or *Fundatio Europaea* (FE) – a new supranational legal form for public benefit purposes.

The European Commission introduced a proposal for a Council Regulation on the Statute for a European Foundation (FE) (the *Proposal*) in 2012. In 2015, it withdrew the Proposal seeing no prospects for reaching an agreement among the 28 Member States.

This paper provides an overview of the Proposal and analyses to what extent the introduction of FEs could remove the barriers to cross-border charitable activities. It also identifies the most probable reason for the Proposal's failure – its tax provisions.

Finally, the paper addresses the current situation of cross-border charitable activities. It elaborates on what we can learn from the Proposal's failure and what we can take away from it to make the European foundation sector more efficient in the future.

Abstract in German

Der europäische Stiftungssektor hat eine bedeutsame Mitwirkung bei der Promotion der Grundwerte und der Erreichung der bürgerorientierten Ziele der Europäischen Union. Er stellt auch eine große wirtschaftliche Kraft dar.

In den letzten Jahrzehnten war der europäische Stiftungssektor einem wachsenden Interesse an internationalen Aktivitäten ausgesetzt. In der globalisierten Gesellschaft sind Menschen und Unternehmen nicht länger an ein einzigen Land gebunden, und ihre Tätigkeit hört nicht an den nationalen Grenzen auf.

Jedoch lassen sich die rechtlichen Barrieren für grenzüberschreitende karitative Aktivitäten sowohl im Zivilrecht als auch im Steuerrecht immer noch finden. Ferner verursachen diese Barrieren zusätzliche Kosten für Stiftungen und ihre Spender und erschweren die internationale Erweiterung der Wohltätigkeit.

Diese Diplomarbeit befasst sich mit der rechtlichen Barrieren für grenzüberschreitende wohltätige Aktivitäten und beschreibt die Mechanismen für deren Beseitigung auf der Ebene der Mitgliedstaaten, der EU und der privaten Initiativen.

In diesem Zusammenhang liegt der Schwerpunkt auf der Gesetzesinitiative der Europäischen Kommission, nämlich der Einführung einer Europäischen Stiftung oder *Fundatio Europaea* (FE) – einer neuen supranationalen Rechtsform für gemeinnützige Zwecke.

Ebenfalls hat die Europäische Kommission im Jahr 2012 einen Vorschlag für eine Verordnung des Rates über das Statut der Europäischen Stiftung (FE) (der *Vorschlag*) vorgelegt. Im Jahr 2015 hat sie aber den Vorschlag zurückgezogen, weil keine Einigung zwischen den 28 Mitgliedstaaten vorliegen würde.

Darüber hinaus gibt diese Diplomarbeit einen Überblick über den Vorschlag und analysiert, inwieweit die Einführung von FEs die Barriere für grenzüberschreitende wohltätige Aktivitäten beseitigen könnte. Ferner erkennt sie auch den wahrscheinlichsten Grund für das Scheitern des Vorschlags – seine Steuervorschriften.

Abschließend behandelt sich die Diplomarbeit mit der aktuellen Situation grenzübergreifender karitative Aktivitäten. Weiterhin erläutert sie, was wir aus dem Scheitern des Vorschlags lernen und daraus ableiten können, um den europäischen Stiftungssektor in Zukunft effizienter zu machen.