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DOTTORATO DI RICERCA IN
"DIRITTO DELL'UNIONE EUROPEA"

CICLO XXX

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Taxation of nonprofit organizations in the European Union:
Problems and experience for the Eurasian Economic Union
(The case of direct taxation)

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Content

List of Abbreviations

AEO(s) – Autonomous educational organization(s)
AG – Advocate General
ARD – EU Audit Regulation and Directive
ASEAN – Association of Southeast Asian Nations
BONGO(s) – business organized NGO(s)
CAF – Charities Aid Foundation
CES – Common Economic Space / Eurasian Economic Space or Single Economic Space
CIS – Commonwealth of Independent States
CIT – corporate income tax
CJEU / ECJ – European Court of Justice
CoE / CE – Council of Europe
CSO(s) – civil society organization(s)
CSTO – Collective Security Treaty Organization
CU – Custom Union
DAFNE – Donors and Foundations Networks in Europe
DONGO(s) – donors organized NGO(s)
EAEU – Eurasian Economic Union
EATLP – European Association of Tax Law Professors
EC – European Commission
ECNL – The European Center for Not-for-Profit Law
ECOSOC – United Nations Economic and Social Council
EEA – European Economic Area
EEC – Eurasian Economic Commission
EESC – European Economic and Social Committee
EFC – European Foundation Centre
EU – European Union
EurAsEC / EAEC – Eurasian Economic Community
FATF – Financial Action Task Force
FE – European Foundation *(Fundatio Europaea)*
GDP – gross domestic product
GONGO(s) – governmentally organized NGO(s)
IBFD – International Bureau of Fiscal Documentation
ICNL – International Center for Not-for-Profit Law
ILO – International Labor Organization
INTERPHIL – International Standing Conference on Philanthropy
KGS – Kirghiz som (national currency of Kyrgyzstan)
KR – Kyrgyz Republic
LOB – limitation on benefits
MBO(s) – mutual benefit organization(s)
MTL (of RF) – Ministry of Taxes and Levies (of the Russian Federation)
NAFTA – North American Free Trade Agreement
NCO(s) – noncommercial organization(s)
NFPO(s) – not-for-profit organization(s)
NGO(s) – non-governmental organization(s)
NPO(s) / NPI(s) – nonprofit organization(s) / institution(s)
OECD – Organization for Economic Co-operation and Development
ONLUS - Organismo Non Lucrativo (di) Utilità Sociale (a type of Italian NPOs)
OSCE – The Organization for Security and Co-operation in Europe
PBO(s) / PBE(s) – public benefit organization(s) / public benefit entity (-ies)
PE – permanent establishment

PVO(s) – private voluntary organization(s)
QUANGO(s) – quasi-public private NGO(s)
RA – Republic of Armenia
RB – Republic of Belarus
RF – Russian Federation
RK – Republic of Kazakhstan
SCE – European Cooperative Society
SE – European Company
SNA – System of National Accounts
SSOs – social sphere organizations (type of NPOs in Kazakhstan)
TEC – Treaty establishing the European Community
TEEC – Treaty establishing the European Economic Community
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
TGE – Transnational Giving Europe
UK – United Kingdom
UN – United Nations
UNESCO – United Nations Educational, Scientific and Cultural Organization
USA – United States of America
USAID – United States Agency for International Development
USSR – Union of Soviet Socialist Republics
VAT – Value Added Tax
VSO(s) – voluntary support organization(s)
WTO – World Trade Organization
€ - Euro
$ - U.S. dollar

INTRODUCTION

Relevance of research. Non-profit organizations (NPOs) are one of the most important institutions of the economy and society, which for many centuries played an important role in the life of countries around the world. NPOs have an important part to play in both the communities they serve and in national economies through their economic contribution. NPOs are active and provide a lot of social services, which often do not have analogs either in the public or in the private business sector.

Over the past few decades the size and weight of the non-profit sector have grown significantly and it has become an influential factor in international development. Despite the fact that the full statistics of the total number of non-profit organizations around the world are inaccessible, according to various estimates the number of NPOs in different countries varies from 6 000 to 30 000. The range of NPOs' activities includes preservation of the natural environment, protection of human rights, the development of tourism, physical education and sports, the provision of social support and assistance to certain categories of the population and much more.

Due to their specific social functions, non-profit organizations historically have been supported by governments, including through tax incentives.

The trend of expansion of the non-profit sector has developed in parallel with another comprehensive trend - the globalization of the world's economic and legal systems. Due to globalization, cross-border activities around the world became a new standard of interaction. Influenced by globalization, NPOs' activities also cross-national borders and cease to be a national phenomenon: whether grant-making or operating, implementing multi-country projects, pooling resources, seeking to reach more beneficiaries, or raising funds from a wider pool of donors, NPOs have become more active across frontiers.

The expansion of geographic boundaries did not change the importance of public benefit activities, so NPOs crossing borders continue to expect tax benefits in all countries in which such activities are carried out. However, taxation of international NPOs' activities is an area where discrimination as to residence is still very obvious. Whereas, throughout the world, domestic NPOs enjoy substantial tax privileges, the same privileges often are not available in cross-border situations. This so-called problem of "landlocked" tax regimes is a serious obstacle for international cross-border NPOs' activities. This problem is especially relevant for NPOs operating in international integration grouping with a high level of integration of national economies and significant cross-border flows of capital within the organization.

The most successful integration grouping to implement the principle of non-discrimination concerning non-profit activities is the European Union. EU law, even 10 years ago, stated that European NPOs can enjoy tax incentives in their cross-border activities throughout the EU, on a par with comparable domestic NPOs of the EU Member States. Although, to date, the problem of discriminatory taxation has not yet been fully resolved and the fiscal environment within the EU is still far from satisfactory, European tax law offers a number of options for its improvement.

The Eurasian Economic Union (the EAEU), which started its work on January 1, 2015, repeats many tasks and directions of the EU: the EAEU countries have proclaimed the same four fundamental freedoms of the single market and the general principle of non-discrimination. Despite the early stage of formation of the EAEU and some imperfections in its institutions, the Member States, based on the EU experience, have already agreed upon tax policies in many areas. Nevertheless, the issue of harmonization of tax regimes for cross-border activities of NPOs in the EAEU has not yet been raised.

Currently, the countries of the Eurasian region are also an example of a growing non-profit sector. The end of the 20th and beginning of the 21st century were marked for these countries as a period of crucial transformations, contradictory events, and changes that

have affected all spheres of society life. Prior social institutions have shown their inefficiency, due to new ideological approaches, lack of a resource base, changed social conditions. As a result, the number of NPOs in all post-Soviet countries, including the EAEU countries, increased significantly.

Considering the growth of the non-profit sector in the EAEU countries, as well as gradual extension of their activities beyond national boundaries, we can assume that scientific ideas on the improvement of tax regimes for NPOs' cross-border activities within the EAEU will become more relevant. From this point of view, the study of EU experience in implementing the non-discrimination principle in NPOs' tax treatment can be useful. This is a reason to undertake this study.

Shortcomings in the Literature. European researchers study the tax regimes of NPOs in a broad context. A high level of integration in the EU naturally triggered research on the inter-country taxation of NPOs and examinations of the compliance of national tax regimes with the requirements of EU law. In the sphere of NPO taxation in the EU, the most important are the writings of S. Lombardo, S. Hemels, O. Breen, H. Jochum, D. Moore, G. Salole, L. Forrest, H. Surmatz, I. Koele, K. Eicker, L. Faulhaber, M. Helios, R. Rametta, R. Buijze, R. Rossi, S. Stevens, T. Ecker, T. van Hippel, D. Rutzen, A. Yevgenyeva, S. Heidenbauer, P. Bater, A. Dehne and others. Individually, as well as in the framework of joint research projects, these scientists focused on studying the intra-European legal aspects of the taxation of non-profit organizations in accordance with EU law.

In the legal literature of the Eurasian region, non-profit organizations are studied primarily from a practical point of view. As a purely practical issue, taxation of NPOs is also the subject of numerous studies. Most of these studies are limited to internal, national regimes of NPO taxation, and their recommendations are aimed at improving national tax legislation.

The creation of the EAEU gave an impetus to the development of research. A great contribution was made to the understanding of the nature of the EAEU, as well as its peculiarities and political and legal status, by A. Kapustin, L. Muzaparova, E. Molchanova, N. Kotova, N. Ziyadullaev, E. Panina, K. Bekyashev, O. Butorina, A. Zakharov, V. Balytnikov, D. Boklan, and E. Ratushnyak. Issues of current tax policy, and an assessment of potential tax and legal reforms in the EAEU are discussed in the writings of N. Mambetaliev, A. Mambetalieva, I. Kucherov, E. Ziatdinov, M. Boboev. Problems and perspectives of harmonization and unification of EAEU tax legislation are highlighted by A. Mamaeva, A. Kazakova, O. Zaharova, M. Zelenkevich, V. Tyutyuryukov, N. Pavlova, K. Kurtser, R. Zorina, H. Petrosyan, M. Boboev, D. Naumchev, O. Golovchenko, B. Ermekbaeva, E. Ratushnyak, Y. Ranchinskaya.

Writings devoted to the study of the European experience of integration and the possibilities of its use in the Eurasian Economic Union are also very important. General legal aspects of European integration are studied by E. Vinokurov, I. Pelipas, I. Tochickaya, N. Ivanova, K. Aleksandrov, B. Irishev, M. Kovalev, L. Nikolajchuk, A. Eliseev, S. Grigoryan, A. Grigoryan; harmonization of tax legislation in EU is a subject of research of M. Sarsembaev, Y.Golodova, Y.Ranchinskaya.

Despite the theoretical and practical importance of these scientific studies, the problems of taxing NPOs involved in cross-border activities within the EAEU remain unexamined. Therefore, the issue of harmonization of tax legislation regarding NPOs, and optimization of tax regimes for NPOs operating in cross-border format in the EAEU, has not yet been raised. In our opinion, this is due, first, to underestimation of the non-profit sector as a subject of the EAEU single market; secondly, to incomplete formation of the EAEU institutions; and thirdly, to lack of a methodology for examining the tax regimes of NPOs acting in an inter-country scope. The lack of a reasoned approach for organizing an effective tax regime for NPOs involved in cross-border activities within the EAEU led to the choice of this topic of research.

Research objective. The objective of this research is to study and to summarize the European theory and practice of laws regulating direct taxation of NPOs operating in cross-border intra-EU level and, on that basis, to develop recommendations for improving the same processes in the EAEU.

Research Tasks. In accordance with the goal, the following tasks are set in the thesis:

- To substantiate the necessity of providing tax benefits and a privileged tax regime for non-profit organizations;
- To study the concept of NPO taxation in the EU countries, in particular tax regimes for domestic and foreign (EU-based) NPOs and their donors; its compliance with the principle of non-discrimination adopted in the EU law;
- To determine whether the EU fundamental freedoms are applicable to NPOs; to study the ECJ position on this issue and its role in implementing the non-discrimination principle in taxing cross-border incomes of NPOs;
- To systematize the solutions to the problem of discriminatory tax regime of EU-based NPOs operating in cross-border scope;
- To carry out a comparative analysis of the income tax regimes established by Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia for domestic and foreign NPOs, as well as for their donors;
- To identify the most promising solutions to the landlocked tax regime problem, acceptable for use in the EAEU, given its specific features and level of integration.

The Scope of the research is tax-law relations, mainly involving the non-profit organizations and their donors.

The subject matter of the research is a set of tax-law acts regulating the tax treatments of non-profit organizations operating at national and cross-border level in the EU and the EAEU.

Theoretical basis of research includes:

- Concepts of classic writings on tax law and on the theory of taxation relating to the topic of the dissertation;
- Scientific papers of European scientists and scientists of the EAEU countries in the field of NPO taxation both at the national level in targeted countries, and at the EU/EAEU level;
- Comparative legal studies conducted by research centers of non-commercial law (ICNL, CAF, etc.).

The empirical basis of research includes:

- Acts of primary and secondary legislation of the EU law; European Policy documents; acts of primary legislation EAEU law;
- Tax and civil laws of the Member States of European Union and the Eurasian Economic Union, establishing the legal status and tax regime of non-profit organizations;
- The case law of the ECJ regarding the cross-border taxation of NPOs.

Research Methodology. The methodological basis of the research is the system approach, which allowed considering the studied processes in evolution. In addition, synthesis, analysis (in particular, theoretical analysis of scientific literature and empirical analysis of legal documents), abstract logical method and comparative legal analysis were used.

Scientific novelty of research consists in developing recommendations for improving the legal regime of taxation of the EAEU-based NPOs involved in cross-border activities.

The theoretical and practical contribution of the research is determined by a number of circumstances. First, the findings of this research serve to overcome the fragmentation of scientific knowledge in the field of taxation of the NPOs operating in a cross-border scope, and can be used to justify the tax policy regarding NPOs in international integration grouping, such as the EU. Secondly, the conclusions of the thesis can be used to improve

both the NPOs' tax legislations of the EAEU countries and law-making activities at the EAEU level. Third, the research provisions can be useful in practical activities of the executive and judicial EAEU authorities. Fourth, the materials and conclusions of this thesis can be used in further scientific research, as well as in the teaching of non-commercial and tax law training courses.

Publications. The main results of the thesis have been published in 6 papers.

Structure of the thesis. The thesis manuscript consists of a List of abbreviations, Introduction, 6 Chapters, Conclusion, Bibliography, 4 annexes. The main part is set out on 302 pages; it contains 10 figures, 21 tables.

Overview of the thesis. The thesis consists of three parts. The first part (Chapter 1) is devoted to a review of the theory of taxation and tax law in relation to NPOs. The second part (chapters 2-4) aims to study the EU experience in organizing effective taxation of NPOs operating in a cross-border scope and implementing the principle of non-discrimination - one of the basic principles of European law. The third part (Chapters 5-6) contains a comparative analysis of different aspects of the NPOs' tax legislation of the EAEU countries that, together with the explored EU experience, makes it possible to offer some recommendations for using in the EAEU practice.

The first chapter of the thesis examines the essence of NPOs and theoretical aspects of taxation of NPOs. The goal of section 1.1 is to clarify legal traditions and the terms used for non-profit organizations in different countries (also for tax purposes), and to determine how the terms used in different legal traditions relate to each other. This part of research provides an opportunity to present the sector in more abstract terms and gives a base for comparative legal analysis of the tax legislation on non-profit organizations in different countries (and in particular, in the countries of the EU and the EAEU). Paragraph 1.2 focuses on justifying tax incentives for NPOs provided by national legislations. This section aims to find out why states so widely use tax methods to support NPOs. Answering this question, the chapter shows the role of NPOs in the community, cites some insights on the need for state support for NPOs, and describes measures the states can use to stimulate NPO activities. The paragraph also examines the arguments of adherents of using tax incentives in financing NPOs and the objections of their opponents.

The second chapter observes peculiarities of the tax regimes of EU countries for NPOs and donors, and their compatibility with the principle of non-discrimination established in EU law.

A literature survey and analysis of the documentation focused on the comparative treatment of NPOs by fiscal authorities in targeted countries. When analyzing the tax regime of NPOs and their donors, we focused on recorded laws, rather than the practicality and implementation of them. This chapter, however, does not intend to provide an exhaustive and complete description of the current situation and tax regimes of NPOs and their donors in EU.

In paragraph 2.1, the task is to study the European approaches to the issue of conferring on NPOs the public benefit status, providing special tax privileges. First and foremost, this concerns the similarity or difference in the mechanisms for granting public benefit status. Conclusions of the paragraph are used for subsequent comparison the EU experience with conditions that currently exist in EAEU countries.

Paragraph 2.2 describes domestic cases of tax treatment of NPOs and their donors in EU countries: Section 2.2.1 provides an overview of the national taxation regimes of European NPOs in relation to various incomes: gratuitous receipts (2.2.1.1) and incomes from economic activity (2.2.1.2). In Section 2.2.2, an overview of the tax benefits for individual (2.2.2.1) and corporate (2.2.2.2) donors of domestic NPOs is presented. Section 2.2.3 presents an overview of the taxation regime on inheritance and gift tax for domestic NPOs.

In paragraph 2.3, we discuss whether foreign-based NPOs are or are not discriminated against, where domestic NPOs and their donors have tax benefits. To these ends, we con-

sider the following questions: What is discrimination according to the provisions of the European law with regard to the taxation of NPOs? What is the mechanism for the emergence of circumstances discriminating against the activities of the foreign (EU-based) NPOs? Which legal developments led to the development of the non-discrimination principle? How do the Member States handle the requirements of this principle in practical terms?

The third chapter aims at providing a detailed account of ECJ case law on the tax treatment of non-profit organizations and offering some reflections on the Court's position on the applicability of fundamental freedoms and principles of EU law to the taxation of NPOs operating within the EU. Paragraph 3.1 is designed to answer the question of whether NPOs are users of the four European freedoms and the principles of EU law under the EU Treaties, and, accordingly, whether they can rely on protection against discriminatory taxation regimes. To this end, we examine academic legal debates, as well as the position of the European Court of Justice on this issue.

Paragraph 3.2 deals with landmark cases in the ECJ case law in the field of NPO taxation. In this section, we run through the essence of the disputable situations, intermediate deductions and the final decision of the Court regarding the discriminatory regime and infringement of the Treaty freedoms for each of these cases. Based on the researches of European scientists, the description of the parties' arguments and the decisions of the ECJ, in paragraphs 3.2.1-3.2.5 we find out under what heading NPOs and their benefactors are entitled to the advantages of the EU Treaties; in other words, what aspects of the four freedoms (the free movement of goods, services, people and capital) that are foreseen under the EC Treaty are most likely to apply to NPOs?

In paragraph 3.3, we present the arguments of governments in justifying national landlocked regimes and the Court's reaction, expressed during the trials. Paragraph 3.4 covers several unresolved issues and offers some broader comments on the implications of judicial intervention for improving the taxation of non-profit organizations operating across borders.

The fourth chapter contains an overview of the most realistic solutions to the problem of discriminative tax treatment of NPOs' cross-border activities. In this chapter, we also evaluate the effectiveness of each solution, taking into account the degree of necessary integration for its implementation. Special attention is given to studying the so-called "host-country control" solution, a solution proposed by the case law of the European Court of Justice. In Section 4.1, we focus on the peculiarities of this solution in comparison with other solutions, as well as on its impact on the stakeholders. In the course of the study, we conclude that the host-country control solution has quite tangible shortcomings, both from the point of view of national governments, and from the perspective of other stakeholders (i.e., non-profit organizations and their donors). Therefore, in Section 4.2, we list several alternative solutions to the problem of landlocked tax provisions. One of the most effective, efficient and feasible solutions, according to many European experts on taxation of NPOs, is the Proposal for a Council Regulation on the Statute for a European Foundation, developed by the European Commission. The features of this solution and an evaluation of its effectiveness are discussed in paragraph 4.3.

The fifth chapter aims at drawing up the most complete view of the fiscal environment of the NPOs in the EAEU. For this purpose, a comparative analysis is carried out of the tax legislation with regard to NPOs in each of the five EAEU countries.

It should be noted that comparability is rendered difficult by differing structure, as well as legal and social contexts of national legislations. Rules which seemingly have the same wording may have different meanings. It can also be the case that, in one country, a rule is explicitly codified, while in another, no such rule is codified but it is nonetheless applied in practice, the practice having been developed through the interpretation of undefined legal terms. This study focuses on the rules and requirements that comparative expe-

rience in the field has revealed as being the most central and fundamental in cross-border scenarios. A comprehensive and exhaustive account of all existing rules in all Member States is not intended and, due to the current state of comparative legal research, is not possible. Assessment of national legislations and recommendations for their improvement are also not among the objectives of this chapter.

To maintain a consistent framework for analysis and to organize a great deal of fairly complex information, each of the country profiles has been structured under this series of headings:

- The peculiarities of assigning the public benefit status to NPOs and the tax consequences of this status (5.1);
- Tax regime and tax incentives for domestic non-profit organizations
- National tax regimes for foreign (EAEU-based) NPOs acting within the EAEU (5.3)
- Legal restrictions for foreign funding of NPOs (5.4).

The sixth chapter analyzes the applicability of solutions developed in the European Union to the Eurasian Economic Union. Paragraph 6.1 examines the general issues of the creation of the EAEU, and lists the current and prospective approaches to tax harmonization in the Member States. In paragraph 6.2, we assess the relevance of the harmonization of direct taxation of NPOs in the EAEU, as well as the applicability of the EU experience in this process. The paragraph contains a critical analysis of all the solutions proposed in the EU to address the problem of landlocked tax-privileged regimes. Based on this analysis, as well as generalizing the intermediate results obtained from the previous chapters, we identify a number of the most promising options for solving the landlocked tax incentives in the EAEU.

CHAPTER 1. THE NON-PROFIT ORGANIZATIONS IN TAX LAW THEORY

1.1. Legal definitions of "nonprofit organizations" and their application in tax law

Non-profit organizations are an integral part of any society. They are social development indicators and often initiate social changes. There are over three million such organizations around the world, employing more than 48 million people, with a limited budget of $1.9 trillion annually. The cumulative budget of all such organizations in the world is equal in size to the world's fifth most important economy[1]. The sector is regulated by a great many universal and regional treaties, soft law instruments and political undertakings by states around the globe (Annex A).

However, until recently, relatively little was known about the asset-holding component of the third, or not-for-profit, sector in a systematic way. These organizations are commonly referred to as "organizations holding assets, financial or otherwise, dedicated to serving a public purpose of their choice"[2].

Even though this sector is growing, it is hugely fragmented, difficult, with very diverse, at times divisive players[3]. The rich tapestry of foundations speaks to us in different languages and uses a highly complex, sometimes confusing, terminology. In order to designate such organizations, many terms are used: "public/community-based organizations", "voluntary organizations", "organizations of social policy", "noncommercial organizations", "non-governmental organizations", "civic organizations", "civil society organizations", "charitable organizations", "tax privileged organizations", "foundations", "philanthropic organizations", "third sector's organizations", "non-profit organizations", "not-for-profit organizations", "public benefit organizations", "public purpose organizations", "public interest organizations", "independent organizations", "social sector organizations", "associations", "social purpose associations", "social enterprises", "private-public sector enterprises" etc.[4]

Collective names came into use; the name "third sector", the British term "non-statutory sector", and the American term "informal sector". There are a large number of slang names, contracted words/abbreviations and even metaphorical notation: "another hidden hand", "vita activa", "space for social entrepreneurship" (Ashoka fund's term) or "space for socially-inspired individuals" (Michael Novak, American philosopher's term)[5].

In practice, nonprofit organizations are even more manifold than the terms used to describe them. This is due to historical, legal, political as well as the sheer cultural complexity and richness of this phenomenon. Indeed, among the first impressions one can gain from a cursory glance across foundation world, is the great variety and diversity, and diversity not only in terms of type, size, activities and role but also in the prevailing "philanthropic culture" of particular countries[6], and, as a consequence, in the terminology used.

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[1] Domrin, A. *Byudzhet NKO sostavlyaet pyatuyu ehkonomiku v mire* (in Russian) / URL: http://rodina.ru/novosti/EHkspert-Stalnogo-ehfira-Byudzhet-NKO-sostavlyaet-pyatuyu-ehkonomiku-v-mire

[2] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p.

[3] Cheng, W., Mohamed, Sh. *The World that Changes the World: How philanthropy, Innovations and entrepreneurship are transforming the social ecosystem* / Jossey-Bass, 1st edition. – 2010. – 408 p.

[4] Jack, W. *Public Policy toward Non-Governmental Organizations in Developing Countries* (June 28, 2001) / World Bank Policy Research Working Paper No. 2639 / URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=632707; Boris, E., Steuerle, C. *Nonprofits & Government: Collaboration and Conflict* // Rowman & Littlefield Publishers / Urban Institute, – 372 p.; Hines Jr., J. *Nonprofit Business Activity and Unrelated Business Income Tax* / NBER Working Paper Series. Working Paper 6820. – Cambridge. – 1998. – 42 p.

[5] Ondrushek, D., et al. *Reader for non-profit organizations* (in Russian) / Center for Conflict Prevention and Resolution / Partners for democratic change, Slovakia. Open society foundation Bratislava. – Bratislava. – 2003

[6] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p.

During the last quarter of the twentieth-century, however, there have been increasingly formalized attempts to organize the study of these institutions through the development of a language and set of theories which delineate a distinctive sector. The problem has been that, as new scholars enter the field, they have brought alternative definitions of the subject area with them. In such a case, scant attention has been given to how these various and competing definitions relate to one another[7].

Even in Europe, the various legal traditions and systems define and treat foundations rather differently; and registration, legal practices and oversight regimes vary accordingly, sometimes even within the same country, as is the case in Germany or Switzerland.

The end result is a complicated terminological tangle: what is defined as a foundation in one country may not qualify as such in another. The Swedish "company foundations" like the Knut och Alice Wallenberg Foundation and the Norwegian "commercial foundations" would find it difficult to get past the English Charity Commission, the independent public agency overseeing voluntary associations and foundations; likewise, many English foundations could not exist as such according to French law, nor would the Charity Commission itself for that matter. The Austrian "private foundation" and the Liechtensteinian "family foundation" could hardly expect the approval of the Belgian Ministry of Justice; and many Danish foundations would expect long-drawn out and uphill legal battles in Italian courts should they ever decide to re-establish themselves south of the Alps. In contrast, they would receive a much warmer welcome in Spain or the Netherlands.

The definition of foundations varies from one country to another, not along one primary axis, but frequently along several dimensions. There are legal definitions that reflect either common law traditions with an emphasis on trusteeship (Britain), or civil law traditions with the important distinction between membership and non-membership-based legal personalities (Switzerland, Germany). Other definitions bring in additional aspects, such as type of founder (private or public), purpose (charitable or other), activities (grant-making or operating), revenue structure (single or multiple funding sources), asset type (own endowment or regular allocations), and the degree of independence from either the state or business interest[8].

Researchers mark out three interlinked, but still different, legal traditions of non-profit organizations: European, which arise from Roman law; Anglo-American and Soviet.

The first and most affluent is the tradition of the law of continental Europe (the civil law). Legal systems that proceed from this tradition require that non-profit organizations be placed in two different organizational forms: associations and foundations. Whereas, in the system of civil law, the legal form of this subject is particularly emphasized, the registration process is important. The assumed form of law defines many of the rights and obligations of the subject and thus registration becomes a mechanism that determines whether the subject fulfills the criteria and corresponds to the status by which it can receive certain benefits (for example, tax reduction).

Another legal tradition is the tradition of England, its former British colonies, and the United States. In general, the so-called "common law" differs from civil law in that the decision of judges plays an important role when creating legal norms. Usually, the systems of Anglo-American law are directed not at the organizational form, but at the goal of the existence of a legal subject. The status of the subject and the possibility of using certain benefits (especially in the field of taxation) don't follow from what form the organization will assume, but from the fact that the purpose of their existence is a charitable activity. Basically in "common law" systems, non-profit organizations can choose from a wide range of legal forms, including associations, foundations, trusts or non-profit corporations. The reg-

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[7] Morris, S. *Defining the non-profit sector: Some lessons from history* // Civil Society Working Paper 3. – Feb. 2000 / URL: https://core.ac.uk/download/pdf/96223.pdf

[8] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p.

istration process (usually designated as incorporation) is an easier and less essential thing. It is much more difficult, by contrast, to get a decision that the reason for the existence of a non-profit organization is "charity", and that the organization has the right to take advantage of tax cuts and other privileges.

The third tradition, which is still an influence on the development of non-profit law in the countries of the former USSR (including the EAEU countries researched by us), along with Central and Eastern European countries, is the tradition of Soviet law. Although the Soviet Union does not exist at the moment, it would be a mistake to ignore the continued influence of its legal traditions in the region. In the former socialist countries, there were different laws governing the activities of a narrowly defined type of organization; for example, special laws for youth organizations and organizations of artists. While there was a general law combining legislation for different types of legal entities, in practice this law hardly defined specific legal forms[9].

According to scientists, these three traditions of nonprofit law led to a significant differentiation of the terminology used.

Certainly, the diversity of terms has a right to exist and does not cause significant difficulties until it is considered under national law. However, the variety of terms that define the non-profit sector seems to preclude any systematic attempt to compare foundations cross-nationally. At the same time, such attempts of benchmarking studies have been, are, and will be undertaken[10] [11] (some of them will be described below), including for the purposes of tax law.

The task of this part of the dissertation is not to offer a single, universal term for a diverse non-profit sector around the world. Our goal is to clarify the terms used for non-profit organizations in different countries and legal traditions (also for tax purposes), and to determine how the terms used in different legal traditions relate to each other. This will provide an opportunity to present the sector in more abstract terms and will theoretically facilitate a comparative legal analysis of the legal approaches to taxation of non-profit organizations in different countries (particularly, in the EU and EAEU countries).

The broadest and most comprehensive term encountered in the literature is the term *"a third sector organization".* It should be noted that the definition of this term is not given in the countries' national laws; in light of this, the term has no legal standing.

This term refers to the concept of dividing the modern state's public activities into three sectors: the first – the sector of bodies that are fundamentally part of the state or the "public sector", the second – the sector of entities established primarily for private profit, and the third sector – non-profit organizations, which are not part of either the public sector or the business sector[12] [13].

The third sector is intermediate and exists because neither the state nor commercial organizations can fully satisfy the demands of society, since their functioning is determined by other goals and results (Figure 1).

The features of the composition of the third sector in Europe were studied in detail by L. Salamon and W. Sokolowski (2014) as part of the project "The third sector in Europe: Towards a consensus conceptualization"[14]. The project has succeeded in fashioning a con-

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[9] Ondrushek, D., et al. *Reader for non-profit organizations* (in Russian) / *Center for Conflict Prevention and Resolution* / Partners for democratic change, Slovakia. Open society foundation Bratislava. – Bratislava. – 2003

[10] For example, papers of the Johns Hopkins Comparative Nonprofit Sector Project.

[11] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p.

[12] This simplistic division of organisations into three sectors raises many problems and is often criticised by scholars in this field, but it is still helpful as a starting point

[13] Morgan, G. *The End of Charity?* / Valedictory Lecture. – Sheffield Hallam University. – 9 December 2015 / URL: http://www.kubernesis.co.uk/wp-content/uploads/The-End-of-Charity-print.pdf

[14] Salamon, L., Sokolowski, S. *The third sector in Europe: Towards a consensus conceptualization* / TSI Working Paper Series. – 2014. – N 2. Seventh Framework Programme (grant agreement 613034) / European Union. Brussels: Third Sector Impact

sensus conceptualization of the third sector in Europe that is rooted in a fairly thorough review of different conceptions of third sector realities in the various European regions. The conceptualization describes a broad common core of European institutions and forms of individual behavior that can reliably be considered to be within the scope of the third sector and consistent with the thinking of numerous stakeholders and of key members of the European third-sector research community.

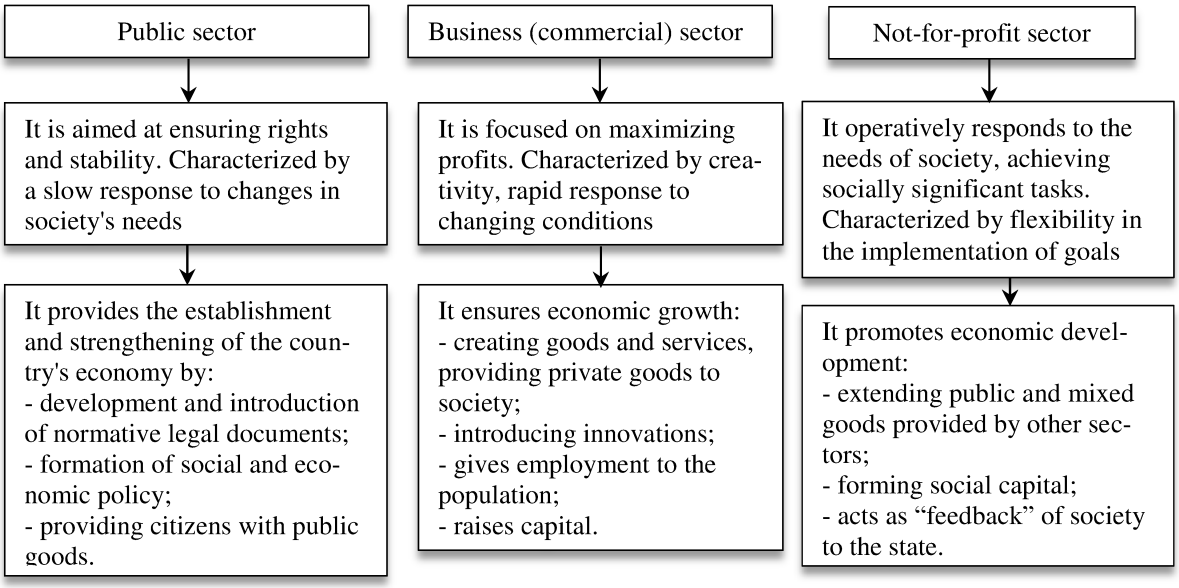

Figure 1[15] – Goals and performance of sectors

Two major conclusions flowed from this project. First, the review of conceptualizations of the third sector evident in different European regions certainly confirmed the initial impressions of enormous diversity in the way this term is used in different European countries and regions, and about the range of human activity it could be conceived to embrace. Given these different conceptions, reasonable doubts can exist about whether there is a common core conceptualization of the third sector in Europe.

But second, the process also revealed a significant area of agreement around certain key components that could potentially be captured in a "common core" definition of the European third sector.

Therefore, the project considers four more-or-less distinct clusters of entities or activities as candidates for inclusion within a consensus conceptualization of the European third sector in whole or in part: (i) nonprofit organizations; (ii) mutuals and cooperatives; (iii) social enterprises; and (iv) human actions, such as volunteering and participation in demonstrations and social movements that are undertaken without pay. It does not consider them as synonyms, but considers them as separate components of the third sector.

In considering the institutional characteristics of organizations entering the third sector, the consensus definition of the components of the third sector focuses on five defining features. An institutional unit of any organizational form must meet all five of these features to be considered "in-scope" of the third sector. In particular, to be considered part of the European third sector, entities must be:

- Organizations, whether formal or informal
- Private
- Self-governed
- Non-compulsory, and

[15] Compiled by the author

• Totally or significantly limited from distributing any surplus it earns to investors, members, or others[16].

Generally, it can be concluded that the term "third sector organizations" does not carry legal significance; it is used as a collective concept, focusing on the opposition of NPOs to the commercial and public sectors.

"Non-governmental organizations (NGO)" is another widespread term. The term emphasizes that such organizations do not pursue political goals in their activities and are not financed by their governments. This is the most popular and, at the same time, the vaguest term, since all private institutions, for example, commercial companies, belong to the sphere of non-governmental organizations[17].

The term "non-governmental organization", or NGO, came into currency in 1945 because of the need for the UN to differentiate in its Charter between participation rights for intergovernmental specialized agencies and those for international private organizations.

New terminology was introduced to cover ECOSOC's relationship with two types of international organizations. Under Article 70, "specialized agencies, established by intergovernmental agreement" could "participate without a vote in its deliberations", while under Article 71, "non-governmental organizations" could have "suitable arrangements for consultation". Thus, "specialized agencies" and "NGOs" became technical UN jargon. Unlike much UN jargon, the term "NGO" passed into popular usage, particularly from the early 1970s onwards[18]. It should be noted that the UNO Charter does not define non-governmental organizations. At the UN, virtually all types of private bodies can be recognized as NGOs. There is no generally accepted definition of an NGO and the term carries different connotations in different circumstances. Nevertheless, they have to be independent from government control, not seeking to challenge governments either as a political party or by a narrow focus on human rights, non-profit-making and non-criminal[19].

Thereafter, the term was fixed in a number of international instruments (UN, UNESCO, ILO, Council of Europe and other international organizations) and accepted by the domestic legislation of many States[20].

In the world legal and political lexicon "NGO" is, first of all, the traditional form of generalization when referring to a very vague circle of organizations. The rules of using the concept of NGO in international practice are not unified; it is often used in different meanings in the terminology of a single international institution. Such a logical conclusion is made by Pavel Smiltnex[21], who examined in detail the concept of NGO in legal theory and international law.

Following the example of the UN, many international (intergovernmental) organizations have established a consultative status for NGOs, and have introduced systems for their accreditation[22], but the construction of what organizations are considered NGOs differs from one international organization to another.

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[16] Salamon, L., Sokolowski, S. *The third sector in Europe: Towards a consensus conceptualization* / TSI Working Paper Series. – 2014. – N 2. Seventh Framework Programme (grant agreement 613034) / European Union. Brussels: Third Sector Impact

[17] Ondrushek, D., et al. *Reader for non-profit organizations* (in Russian) / *Center for Conflict Prevention and Resolution* / Partners for democratic change, Slovakia. Open society foundation Bratislava. – Bratislava. – 2003

[18] Willetts, P. *What is a Non-Governmental Organization? Output from the Research Project on Civil Society Networks in Global Governance, City University, London* / URL: http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM

[19] Ibid.

[20] Lysenko, V. *Legal status and the role of public associations in the system of intra-state and international relations: the experience of Russia, Moldova and Transnistria* (in Russian). / Monograph. Publishing house "Prospect". – 2015. – 268 p.

[21] Smiltneks, P. *The concept of NGOs in international law, legal theory and legislation of foreign countries* (in Russian) / URL: http://www.lawtrend.org/

[22] Among them are the International Labor Organization (ILO), the United Nations Industrial Development Organization (UNIDO), the United Nations Conference on Trade and Development (UNCTAD), the World Health Organization (WHO) and many others.

The Council of Europe worked out the "European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations"[23] on April 24, 1986, whereby states essentially agree to mutually apply the national regime to NGOs originating from other states, with minimal administrative formalities.

The Convention does not define "NGO" as such. It only establishes the conditions for the application of the norms of the CE Convention to certain organizations.

The World Bank defines "the NGO" in its operating directive from 1989 as follows[24]: "private organizations that carry out activities aimed at alleviating suffering, supporting the interests of the poor, protecting the environment, providing basic social services or developing the local community". However, in its own documents and publications, the Bank allows the use of the concept of "NGO" in a broad sense - in relation to any non-entrepreneurial organization, independent of the government, including, in particular, religious organizations and trade unions. During the initial period the use of the term was accompanied by an indication of whether it was used in a narrow or broad sense. Later, in the terminology of the Bank, the concept of "NGO" in a broad sense has often been replaced by another term – "civil society organizations" (CSO). In 1998, the World Bank devised "Guidelines for laws affecting civic organizations"[25]. These Guidelines underlined that NGO is not a legal term, and its choice is due to its wide use by the World Bank, the UN, and other interstate organizations [26].

Nevertheless, Commission Discussion Paper "The Commission and non-governmental organizations: building a stronger partnership"[27] gives a brief description of organizations that meet the definition of NGOs: "the term 'NGO' can be used as shorthand to refer to a range of organizations that normally share the following characteristics"[28]:

- NGOs are not created to generate personal profit;
- NGOs are voluntary;
- NGOs are distinguished from informal or ad hoc groups by having some degree of formal or institutional existence;
- NGOs are independent, in particular of government and other public authorities and of political parties or commercial organizations;
- NGOs are not self-serving in aims and related values. Their aim is to act in the public arena at large, on concerns and issues related to the wellbeing of people, specific groups of people or society as a whole. They are not pursuing the commercial or professional interests of their members[29].

Some international organizations define the essence of NGO in this way. As for national legislation, the definition of NGO is usually not given, and therefore this concept is not legal in most countries. In extremely rare cases when the term "NGO" is used in na-

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[23] *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations Strasbourg*, 24.IV.1986 / URL: http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm

[24] Operational Directive of the World Bank no.14.70 dated August 28, 1989 *Involving Nongovernmental Organizations in World Bank-Supported Activities* / URL: https://www.gdrc.org/ngo/wb-ngo-directive.html [in 1997 the Directive was replaced by World Bank Operational manual GP 14.70 "Involving nongovernmental organizations in bank-supported activities" dated January, 2000, that is in force up to now]

[25] *Guidelines for laws affecting civic organizations* / the Open Society Institute in cooperation and the International Center for Not-for-Profit Law by Leon E. Irish, Robert Kushen, Karla W. Simon. – 2nd ed., rev. and enl. – 126 p.

[26] Smiltneks, P. *The concept of NGOs in international law, legal theory and legislation of foreign countries* (in Russian) / URL: http://www.lawtrend.org/

[27] *The Commission and non-governmental organisations: building a stronger partnership*. Commission Discussion Paper presented by President PRODI and Vice-President KINNOCK, 18 January 2000 / URL: http://ec.europa.eu/transparency/civil_society/ngo/docs/communication_en.pdf

[28] This list is inspired by the list of common features of voluntary organisations proposed by the Commission in its *Communication on promoting the role of voluntary organisations and foundations in Europe* (COM/97/0241 final) of 06/06/1997 / URL: http://eur-lex.europa.eu/legal-content/SK/ALL/?uri=CELEX:51997DC0241

[29] *The Commission and non-governmental organisations: building a stronger partnership*. Commission Discussion Paper presented by President PRODI and Vice-President KINNOCK, 18 January 2000 / URL: http://ec.europa.eu/transparency/civil_society/ngo/docs/communication_en.pdf

tional legislations, it refers to organizations created under the laws of the country itself, replacing the more traditional concepts of "nonprofit" ("non-entrepreneurial", "noncommercial", "not-for-profit" etc.) organizations.

One of the most successful terms adopted in world practice to designate such organizations is the term *"nonprofit organization / nonprofit institution" (NPO/NPI).* Among a wide variety of definitions, one can identify the following: a "nonprofit organization" can be defined as an economic unit that is relatively independent of the economic sectors, operates to meet socially useful goals for which voluntary work and services are actively generated, as well as tangible and intangible resources; in the case of the formation of profit, it is directed exclusively at achieving the statutory goals[30].

Some important progress has been made in official statistical systems in clearly differentiating one set of likely non-profit institutions. The United Nations Statistics Division (UNSD 2003) in 2003 issued a Handbook on Nonprofit Institutions in the System of National Accounts that incorporated an operational definition of NPIs into the guidance system for international economic statistics[31]. The SNA defines NPIs mainly by the non-distribution constraint: "Non-profit institutions are legal or social entities created for the purpose of producing goods and services whose status does not permit them to be a source of income, profit or other financial gain for the units that establish, control or finance them". In practice, their productive activities are bound to generate either surpluses or deficits but any surpluses they happen to make cannot be appropriated by other institutional units[32].

According to this UN NPI Handbook, such non-profit institutions (NPIs) could be identified and differentiated from other societal actors on the basis of five defining features. In particular, they were:

a) Organisations
b) Not-for-profit and non-profit distributing
c) Institutionally separate from government
d) Self-governing
e) Non-compulsory

The term "non-profit institutions" (NPIs) was also used by Salamon and Anheier in their comparative study. The reference to it is of interest and importance, because, even by critics[33], this project is regarded as a major contribution towards the development of a common definition of the sector. It is one of the few attempts to combine in one definition all the characteristics pertinent to the non-profit sector.

In the fair opinion of Lester M. Salamon, Helmut K. Anheier, "the lack of attention that has historically been given to the nonprofit sector around the world has been due to factors that are as much conceptual as empirical. The nonprofit sector is poorly understood, in other words, not so much because the data on it are so limited as because the concepts used to depict its boundaries are so murky and imprecise"[34].

To correct this problem and to cut across this terminological tangle, L. Salamon and H. Anheier, in their comparative study of nonprofit organizations in 22 countries, proposed some unifying characteristics of such organizations, based on the numerous definitions adopted in the countries studied. They reviewed several alternative ways of defining this

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[30] Kutyeva, D., Makarova, V. *Theoretical basis for the definition of non-profit organizations* (in Russian) / URL: http://pskgu.ru/projects/pgu/storage

[31] Salamon, L., Sokolowski, S. *The third sector in Europe: Towards a consensus conceptualization* / TSI Working Paper Series. – 2014. – N 2. Seventh Framework Programme (grant agreement 613034) / European Union. Brussels: Third Sector Impact

[32] STD/NA(2002)38 OECD Statistics directorate. National Accounts. *Handbook on nonprofit institutions in the system of national accounts* / URL: https://unstats.un.org/unsd/publication/seriesf/seriesf_91e.pdf

[33] Morris, S. *Defining the non-profit sector: Some lessons from history* // Civil Society Working Paper 3. – Feb. 2000 / URL: https://core.ac.uk/download/pdf/96223.pdf

[34] Salamon, L., Anheier, H. *In Search of the Nonprofit Sector II: The Problem of Classification.* / Working papers of the Johns Hopkins / Comparative nonprofit sector project. – 1992 – 34 p.

sector and ultimately settled on what, in 1992[35] (and later, in 1997[36]) they termed the "structural/operational definition". The heart of this definition is a set of five core structural or operational features that distinguish the organizations that comprise the nonprofit sector from other types of social institutions. So defined, the nonprofit sector is a set of organizations that are:

1) formally constituted; i.e., institutionalized to some degree, in terms of their organizational form or system of operation.
2) nongovernmental in basic structure; i.e., institutionally separate from government;
3) self-governing; i.e., equipped with their own internal apparatus for governance;
4) non-profit-distributing; i.e., not returning any profits generated to their owners or directors but ploughing them back into the basic mission of the agency; and
5) voluntary to some meaningful extent; i.e., involving some meaningful degree of voluntary participation, either in the operation or management of the organization's affairs.

The sector is thus defined as the collection of entities which make a "reasonable showing" on each of the above five criteria[37].

Therefore, according to the criteria of "The Comparative Nonprofit Sector Project", nonprofit organizations are sociotechnical structures that are more or less open, formally structured and independent of direct influence from the state, generating and combining voluntary works, services and various material and non-material resources to achieve an independently established socially useful goal, and not to obtain a basic entrepreneurial income, so as to produce tangible and intangible works and services[38] in the public interest.

Even critics casting doubt on the universality of the generalized characteristics of NPO developed by Salamon and Anheier (for example, Susannah Morris), recognize that the structural-operational definition encompasses organizations which may fulfil a variety of functions; it does not focus attention exclusively on institutions providing public goods, or efficiently and effectively supplying private goods, or on organizations which offer positive externalities for society. It should, therefore be able to accommodate the majority of our interests in the sector[39].

Of course, as with any comparative definition, some problems remain at the "edges" and in what could be called "gray zones"[40]. Generally, however, the proposed definition of foundations as asset-based, private, self-governing, non-profit-distributing and public-serving organizations captures a common set of institutions across different countries and regions[41].

Analyzing the application of the term "non-profit organization", it should be noted that, in the opinion of some authors[42], such a notation is not exactly correct. The definition "nonprofit organization" is an antonym of the definition "for-profit organization", but it doesn't take into account the public sector of the economy. If we consider the three-sector

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[35] Ibid.

[36] Salamon, L. *Defining the nonprofit sector: a cross-national analysis* / Johns Hopkins Comparative nonprofit sector project. – 1997 / URL: http://ccss.jhu.edu/wp-content/uploads/downloads/2011/11/BOOK_Defining-Cross-national_1997.pdf

[37] Morris, S. *Defining the non-profit sector: Some lessons from history* // Civil Society Working Paper 3. – Feb. 2000 / URL: https://core.ac.uk/download/pdf/96223.pdf

[38] Salamon, L., Anheier, H. *In Search of the Nonprofit Sector: the Question of Definitions* // Voluntas. – 1992. – N 3(2), pp. 125-151

[39] Ibid.

[40] Specifically, there are three major areas where the definition proposed here encounters difficulties:
- Where foundations come close to markets and change into economic actors primarily;
- Where foundations become instrumentality of the state; and
- Where they are dynastic means of asset protection and control.

[41] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p.

[42] Kutyeva, D., Makarova, V. *Features of financial resources management in a non-profit organization* (in Russian) / Monograph / – SPb.: Izd-vo Politekhn. Un-ta. – 2014. –185 p.

model of the economy, non-profit organizations can include all organizations of the first and third sectors of the economy, and non-public organizations include organizations of the second and third sectors of the economy; i.e., there is no clear allocation of the third sector's organizations. In this light, these organizations need to be called a "non-public, non-profit organization", which sounds a bit awkward[43], and this name is probably not widely used.

Another term used in the world scientific literature is *"charitable organization / charity"*. In most countries[44], the term "charitable organization" in an established meaning of the word, is narrower than the term "nonprofit organization" and, as a rule, cannot replace it. So, as Zakhem Law's LLC stated, many people confuse the terms "charity" and "foundation" for "nonprofit". While charities and foundations are specific types of nonprofit organizations, an entire world of other nonprofit organizations exists outside of these limited structures[45].

Other authors share this point of view. Below, in Figure 2, Gareth G. Morgan introduces the place of charitable organizations, and also, in our opinion, makes a successful presentation of the correlation of various existing terms, including the concepts of "a third sector organization" and "nonprofit organization".

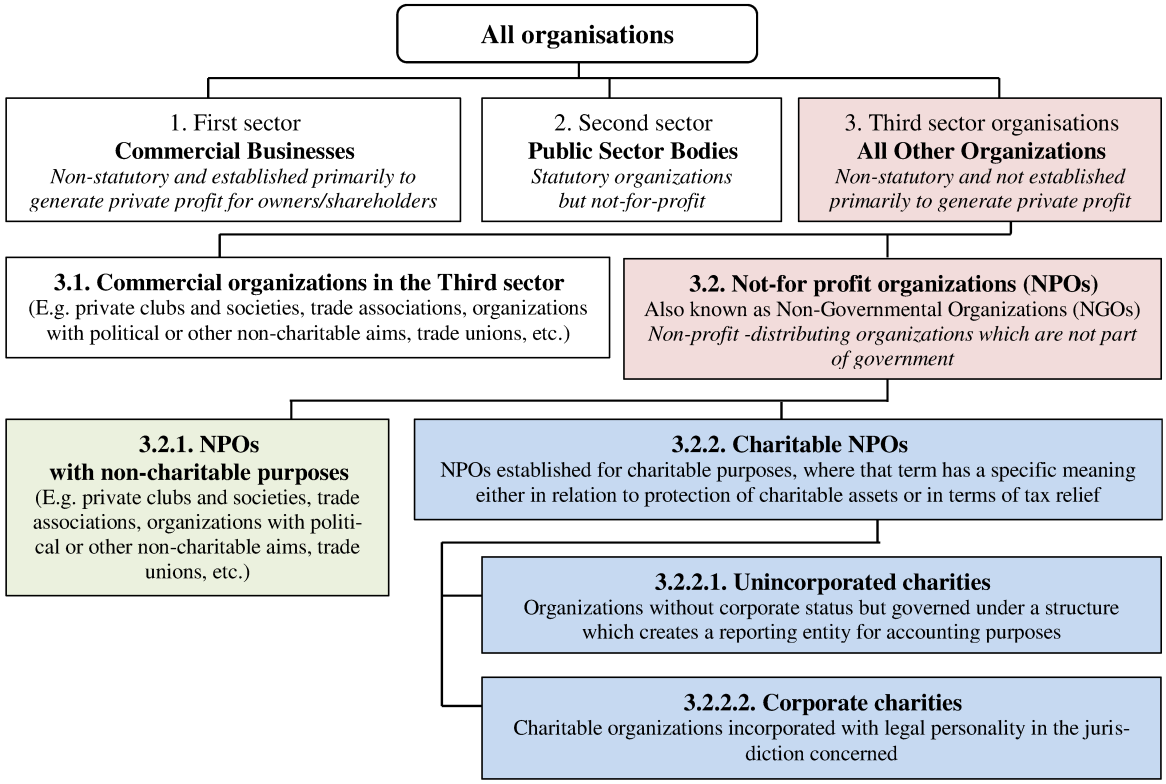

Figure 2[46] – Correlation of terms defining "the third sector"

The author rightly argues that we cannot just equate the third sector with non-profit organizations), because many noncharitable social enterprises and co-operatives would be seen as part of the third sector in the sense that they are trading for a social purpose, but they often allow at least a proportion of their profits to be distributed to employees or in-

[43] Ibid.
[44] The exception is Great Britain, where this term covers the whole range of public-spirited non-governmental non-profit organizations.
[45] *Non-Profit Organization Types and Common Issues* / by Zakhem Law LLC / URL: https://www.hg.org/article.asp?id=25795
[46] Morgan, G. The End of Charity? / Valedictory Lecture. – Sheffield Hallam University. – 9 December 2015 / URL: http://www.kubernesis.co.uk/wp-content/uploads/The-End-of-Charity-print.pdf

vestors. But even amongst organizations which are clearly established on a non-profit-distributing basis, and which are self-governing (rather than part of the public sector), many have non-charitable aims – for example, trade unions and private clubs.

Thus, the term "charity", in the sense of a particular type of organization, refers to a sub-category of NPOs within the wider third sector. A charity is a body that is established for exclusively charitable purposes. The definition is based, not on a certain structure, but on the organization's purpose – the reason for its existence – as expressed in the aims or objects in its constitution or other kind of governing document[47]. As practice shows, these organizations, due to their charitable purpose, have the use of the greatest number of tax benefits. However, as rightly noted by some researchers, only some of these concessions depend upon the use of the term "charitable" and, even in that case, other conditions typically need to be satisfied[48].

Turning to the legal nature of the terms "non-profit organization", "non-governmental organization", "third sector organization", it can be noted that, in the legislation of many countries, there is no specific legislative definition of these terms. This is especially true for countries of common law (USA, Great Britain). At the same time, many countries of civil law also do not have a common legislative definition of a non-profit organization (for example, Sweden). Instead of this, more specific concepts, such as "non-profit association", "foundation", "voluntary organization", "charity", etc., are used. They are determined either by specific laws or by established practice and internal documents (charters) of such organizations.

In the legislative practice of the ex-USSR countries, conversely, the most popular was the catchall term "non-profit/non-commercial organization" and/or "charitable organization"[49]. In addition, for tax purposes, legislation specifies the characteristics that an NPO must match in order to be considered as such and receive tax benefits. In particular, it is required to implement public benefit activities. More details about this specific activity of NPOs, we will discuss in paragraph 2.1.

All the above-mentioned terms characterizing these special organizations, are widely used in the scientific legal literature and legislation of different countries. However, the researchers' attempt to cover the entire diversity of the sector has led to the emergence of many more definitions. Each of these definitions identifies one of the important features of such organizations. Below we have tried to systematize them in the general list:

Non-governmental organization (NGO) – (as mentioned above, the term is most often used as a roundup by various countries in the documents of international organizations) - a concept that emphasizes the independence of the organizations from the state, at least in the sphere of ideology.

Nonprofit organization (NPO) – this term emphasizes the difference of organizations from the second (business) sector, and accentuates the non-profit nature of their activities. This concept does not exclude, though, economic business management that brings a certain income. From business, a non-profit organization is distinguished by the requirement to use all profits for statutory public benefit activities. Therefore, the term "not-for-profit organization" (NFPO) is often used, too. So far, it has not been possible to introduce a more accurate description of organizations on the basis of their attitude to profit.

Charitable organizations – this expression points to the traditional sphere of non-governmental organizations' activity - assistance to the poor, sick and needy people.

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[47] Morgan, G. *The End of Charity?* / Valedictory Lecture. – Sheffield Hallam University. – 9 December 2015 / URL: http://www.kubernesis.co.uk/wp-content/uploads/The-End-of-Charity-print.pdf

[48] Harding, M., O'Connell, A., Stewart M., Chia, J. *Defining Charity: A Literature Review* / Melbourne Law School. – 23/02/2011. – 91 p.

[49] Ivanova, I., Liborakina, M., Tolmasova, A. *Problems of the tax regime for charity and non-governmental non-profit organizations and prospects for its change* (in Russian) / Analytical report. Fund "City Economy" & Association of Independent Centers for Economic Analysis. – 2004

Voluntary organizations; community-based organizations – these terms emphasize the voluntary nature of citizens' associations as the main feature of such organizations. They are associated with the notion of "volunteerism" - the voluntary nature and disinterestedness of organizations.

Civil society organizations (CSOs) – this term accentuates the fact that organizations are created by citizens, and the method of self-organization of citizens. The title also emphasizes the civil position, the consciousness of citizens who co-operate to solve their problems.

Public benefit organizations (PBOs) (compared to MBOs - mutual benefit organizations) – i.e., organizations aimed at mutual benefit) – this term accentuates the organizations' activities for the public good - often in the field of health, education, widely understood social assistance, charity. Often, such organizations have a legally established status and conduct public activities in areas clearly listed by law.

Independent organizations – this term emphasizes independence, as the essential principle of the organizations' work.

Tax-exempt organizations – this expression is connected with the fact that organizations (often their donors, too) can enjoy tax benefits[50].

In the literature, there are also many slang notations that characterize organizations belonging to the third sector. Often such terms express the predominant source of funding or the possible dependence of the organization on its founders. A case in point is the term QUANGO - quasi-public private NGOs). Sometimes more specific designations are used:

GONGO – governmentally organized NGOs. These NGOs are created and depend on the government. Dependence implies explicit or implicit political control, complete dependence on the state budget, or a state-supported monopolistic position of an organization.

BONGO - business organized NGOs. Sometimes so-called non-profit organizations, founded and controlled by large corporations.

DONGO - donors organized NGOs – independent organizations that have arisen on the initiative of only the donor (donors) and give preference to the interests of the donor in their activities.

Sometimes in the literature you can meet abbreviations such as PVO, VSO, CSO:

PVO - private voluntary organization. This abbreviation is not used widely, although in literature, especially American, it can be met quite often.

VSO - voluntary support organizations. The term refers to organizations that rely on volunteers with the support of other organizations.

CSO – civil society organization. This term is the most common designation of organizations in the third sector. The term emphasizes the civil position of people[51].

An analysis of the existing terms allows us to conclude that the diversity of concepts is a linguistic reflection of realities existing in facts. Within the meaning of the above concepts, various components that are directly related to life realities are hidden. Examples (components) may include:

- public component ("public/community-based organizations") – indicating that, through these organizations, citizens participate in public life;
- civilian component ("civic organizations" or "civil society organizations") – indicating that organizations function in civil society;
- economic component ("nonprofit organizations", "noncommercial organizations", "not-for-profit organizations") – indicates that organizations that own property and have the right to carry out entrepreneurial activities (in addition to basic noncommercial activities) use the profits to achieve the goals of their creation;

[50] Vygnanski, Ya. *Terminology of the non-profit sector* (in Russian) / URL: //http://www.ngo.pl/x/302384

[51] Ondrushek, D., et al. *Reader for non-profit organizations* (in Russian) */ Center for Conflict Prevention and Resolution* / Partners for democratic change, Slovakia. Open society foundation Bratislava. – Bratislava. – 2003

- politic component ("non-governmental organizations", "third sector organizations", "independent organizations") – stress the independence of organizations from the state, as well as from the commercial sector;
- modal component ("voluntary bodies" and "public organizations") – indicates the freedom of expression of will in creating an organization.
- social component ("public benefit organizations", "public purpose organizations", "social sector organizations", etc.) – indicates the public benefit nature of the activities of such organizations.

The use of this or that concept, first of all, depends on which component is most significant in a given situation. For example, if it is necessary to emphasize the modal factor, then the term "voluntary organizations" is used, and if the economic factor, then the term "non-profit organizations"[52].

In conclusion, even if one has an idea of the arsenal of terms used by the world community regarding the organizations of the "third" or, in other words, non-profit sector, and understanding the essential characteristics of this type of organization, it is easy to come to a deadlock in making a comparative legal analysis. Different legal traditions not only define, but also treat such organizations in different ways: registration procedures, legal practices and supervision regimes for such organizations differ, sometimes even within the same country.

It is especially important to understand the essential characteristics of organizations of the not-for-profit sector for tax law purposes. Terms denoting such organizations are much contested because of the tax consequences that follow from charitable status, principally the eligibility for taxation concessions[53] (in many countries NPOs and/or their donors enjoy tax benefits).

It is understood that the existence of a set of definitions used in the legislation of different countries in relation to such organizations can complicate the work of the researcher.

In our opinion, in this situation, one cannot dispense with a certain terminological generalization. The role of such a generalization, based on the practice of its application, may be filled by the term *"non-governmental organization"*; it is applicable when, in relation to a foreign organization, its legal form is unknown or incomprehensible (its designation does not speak for itself unless one delves into the nuances of foreign legislation) or is not determinative (where one form can be used both in commercial and non-commercial purposes, depending on the content of the charter). This term can also be used in national legislation to refer to foreign organizations that are not controlled by a particular government and have non-commercial purposes[54].

In a case when the comparative analysis covers a group of countries of one tradition of non-commercial law, an alternative can be any other term: for example, we assume that for the countries of the Eurasian Economic Union and other post-Soviet countries, the terms *"non-commercial organization"* or "*nonprofit organization"* will be most appropriate.

When it comes to tax law, the most successful, in our opinion, are the terms *"nonprofit organizations"* (or "not-for-profit organizations") and *"public benefit organizations"*. The first of these definitions contains an indication that these organizations do not have the goal of maximizing profits, as in commercial organizations. However, it doesn't mean that

[52] *Non-profit law* (in Russian) / N. Idrisov (ed.) – B.:T. Kirland. – 2012. –243 p.
[53] Harding, M., O'Connell, A., Stewart M., Chia, J. *Defining Charity: A Literature Review* / Melbourne Law School. – 23/02/2011. – 91 p.
[54] In some CIS countries, legislation on non-for-profit organizations operates with words "foreign non-commercial/non-profit organization", "international non-commercial/non-profit organization". It is overlooked that the very concept of "non-profit organization" in the civil codes of these particular states is applicable only to legal entities established by their legislation. It is not legally correct applying it to a foreign organization. Has such an organization been established abroad as a non-profit organization or is a different definition used? What kind of requirements for this qualification? The term "non-governmental organization" could well be used to foreign legal entities which is similar to the non-profit organizations in their nature in the host country.

they cannot make a profit. That is why, the most correct definition is "public benefit organizations", because it stresses that the organization works for public benefit purposes, for which they are encouraged by tax incentives. Without denying the possibility of making a profit, this definition emphasizes that the profit, if it is received, is used to fulfill the organization's mission, i.e., for the sake of the common good, and not for subsequent investments or enrichment of the members of the organization. Such participation in the production of public goods justifies the existence of certain tax incentives for such organizations.

Another concluding insight into existing definitions is that the choice of term in one or another case mostly depends on research objectives. With all the external differences in the definitions used, the complex characteristics of NPOs do not contradict each other. Each of the definitions only emphasizes some of the features of such organizations. We think that, from the point of view of tax law, it is important that NPOs, unlike traditional business entities, are created, not for profit, but to fulfil some social goals (in paragraph 1.2, we will try in more detail to discuss all arguments for granting tax incentives to NPOs). Therefore, all other terms which do not emphasize this characteristic feature of NPOs, from the point of view of tax law and within the framework of this dissertation can be considered as synonyms.

Thus, due to the insignificant difference (from the point of view of tax law) between the existing definitions discussed above, and taking into account our own recommendations, in this paper the term "nonprofit organizations" (and its abbreviation NPOs) will be used as a main term. The other terms regarded by the author as part of the study will be considered as synonymous with this term. Of course, in some cases, necessary exceptions will be made (for example, in paragraph 2.1 we also use term "PBOs" in order to distinguish NPOs having special public benefit status from other NPOs).

1.2 Justifying tax incentives for NPOs: arguments for favorable legislation

A specificity of activities of the non-profit sector determines the constant dependence on external sources of funding, and, consequently, dependence on state support in various forms. As S. Golovan states in his research, "state support of NPOs is objectively necessary because of the specific mechanism for accumulating financial resources in non-profit organizations"[55].

The main sources of financial resources of non-profit organizations can be attributed:

- Revenues from permitted commercial activities;
- Funds received under the government order (public tendering);
- Proceeds from non-governmental organizations and individuals;
- Subsidies and grants from treasuries at all levels.

All listed sources of financial resources of non-profit organizations are irregular and do not include permanent budget financing. NPOs carry out their activities; distribute their goods and services on a no-charge basis[56]. Accordingly, NPOs are constantly experiencing a deficit of financial resources to continue their activities and are forced to constantly search the sources of financing.

Tax incentives are one of the important ways to regularly support NPOs. Currently the great majority of countries currently have various tax incentives for NPOs. Many NPOs might enjoy exemption from income tax, but their donors do not receive any special tax benefits for making a donation. Other NPOs use a wider list of benefits: in addition to benefits for NPO itself, their donors receive benefits too: money donated to such NPOs is gen-

[55] Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.

[56] Kiseleva, T. *Features of formation of monetary incomes and receipts of the noncommercial organizations* (in Russian) // The Scientific review. – 2014. – N 10, pp. 211-213; Kiseleva T., Dzusova, S., Frumin, S. *Features of the financial mechanism of non-commercial organizations* (in Russian) // Economics and Law. – 2015. – N 3, pp. 63-70

erally deductible from the donor's taxable income. Thus, much of the revenue flowing into such organizations escapes taxation at two levels: once for the donor and once for the recipient[57].

For the correct choice of ways to finance nonprofit organizations, it is important to know what are their features, in which cases the activities of nonprofit organizations are more beneficial to the society than the activities of business entities or state organizations, and also how it is possible to describe the choice of the level and quality of production services of non-profit organizations in different, including tax conditions. First of all, in order to assess the consequences of any approach to the financing the NPOs for the society, it is important to understand what function they perform[58].

Researchers list a number of advantages of NPOs before other forms of organization of economic activity:

- the organizations of the non-profit sector achieve their goals with lower costs as they involve motivated people - members of the organization and volunteers interested in the organization's mission;

- all resources attracted by NPOs (including profit, if the NPO carries out entrepreneurial activities) are used only for the implementation of statutory goals and are not distributed among the members;

- NPOs in comparison with state organizations are more responsive to the newly emerging needs of society, since they are not bound by administrative regulations;

- in the non-profit sector there are more favorable conditions for innovation and experimentation in the field of social security, since NPOs are characterized as flexibile and free in decision-making;

- NPOs, in addition to their own and budgetary funds, are able to attract donor funds on an irretrievable basis to realize their goals;

- organizations of the non-profit sector provide an opportunity for citizens for joint actions in the collective interests.

- the benefits created by NPOs, or cannot be provided by the state at all because of their exclusive nature, or their creation in the NPO sector is more effective than creation in the public sector[59].

In the literature, NPOs are often characterised as independent, free and flexible institutions.[60] Anheier and Leat[61] describe them as "innovative, risk-taking funders of causes that others either neglect or are unable to address".

Many spheres that seem to be necessary for the development and prosperity of the economy, science, technology and the state as a whole are not always beneficial for private investments. Such areas include the provision of a wide range of public goods, including legal regulation, free health and education, the development of science, national defense, social security and insurance, prevention and response to emergencies, communication and communication systems, delivery of information, etc[62]. In such cases, it is customary to talk about "market failures" or the inability of market mechanisms to solve adequately socioeconomic problems that are essential in society, imperfect market institutions and instruments, ineffective distribution of resources. In accordance with the theory of "market failures" the state should intervene in those areas where the market is not able to inde-

[57] Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N 4.
[58] Sinelnikov-Murylev, S., Trunin, I., Goldin, M., Ilyasova, G., et al. *Problems of taxation of non-commercial organizations in Russia* (in Russian) / – Moscow: Transition economy institute. – 2007. – N 108. – 371 p.
[59] Semenova, N. *The relationship between the state and non-profit organizations in a modern market economy* (in Russian) / The abstract of dissertation of PhD degree in economics. – Yaroslavl'. – 2011. – 29 p.
[60] *Understanding European Research Foundations: Findings from the FOREMAP project* / European Foundation Center and individual contributors. – 2009. – 199 p.
[61] Anheier, H., Leat, D. *Creative Philanthropy: Towards a New Philanthropy for the Twenty-First Century* / London: Routledge, 2006
[62] Yurlina, D. *Taxes and public goods* (in Russian) // Upravlenie finansami. – 2016. – N.5. – pp. 230-236.

pendently allocate resources efficiently and equitably[63].

But, like the market, the state also has its "failures", and it cannot always ensure the provision of public goods in the most effective manner. This inefficiency of the public sector leads to the search for a "middle way" between the state and the market for the provision of public goods. According to L.Salamon, the non-profit sector has clear advantages over the public sector in providing goods and services that are required by a society[64]. The non-profit sector is also more innovative and focused on service improvement than the traditional public sector, which can provide more efficient delivery of some public goods and services to the end consumer[65]. Finally, the existence of the non-profit sector reduces the financial burden of the state, freeing it from the need to provide the society with some goods and services.

Relevant considerations regarding the role of NPOs in the economy are systematized in a number of works by Rose Ackerman[66]. Three interrelated hypotheses concerning the functions of non-profit organizations that remain not fully implemented in the provision of similar services by other organizations, commercial and governmental, are as follows:

First, donors may prefer to make donations only to non-profit institutions, because they fear that their donations to commercial firms will be transformed into profit owners.

Secondly, the existence of NPOs can be a reaction to information asymmetry, which some service users face. Consumers, like donors, may have the conviction that there are fewer incentives for distorting information from NPOs, since their co-workers have less opportunity to obtain personal benefits from such deception. Asymmetry can also be observed in the case of donations. If the donor cannot fully control the target spending of funds[67], it can choose a non-profit organization for transfer funds to final recipients.

The third feature of NPOs is the possibility of greater diversification of services than it can be implemented in the public sector[68].

At the same time, the prerequisites for increasing the role of non-profit organizations are not only an economic nature. As noted in "Guidelines for Laws Affecting Civic Organizations"[69], there are at least six reasons why in any society it is necessary to adopt laws that support a strong and independent NPO sector. Half of them are non-economic:

(a) exercising free speech and unification;

(b) encouragement pluralism and tolerance;

(c) ensuring social stability and compliance with laws;

(d) economic effectiveness;

(e) market incapacity of the public sector;

(f) supporting the market economy[70].

In conclusion, summarizing the numerous positive aspects of NPO activities, and systematize them in the scheme (Annex B). It sets out a horizontal and vertical assessment of NPO functions. A horizontal review suggests the enumeration of areas of activity in which non-profit organizations can effectively manifest themselves (often more efficiently than the state and commercial sectors). The vertical assessment is based on a generalized

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[63] Gouwenberg, B., Karamat, Ali D., Hoolwerf, B., Bekkers, R., Schuyt, T., Smit, J. *EUFORI Study European Foundations for Research and Innovation.* Synthesis Report / Center for Philanthropic Studies of VU University Amsterdam. – European Union. – 2015. – 129 p.

[64] Salamon, L. *Partners in public service: Government-nonprofit relations in the modern welfare state* / L. M. Salamon. – JHU Press. – 1995. – 328 p., p. 237

[65] Domingue, R. *The Charity "industry" and Its Tax Treatment* / R. Domingue. – Ottawa: Library of Parliament, Research Branch. – 1995. – 441 p., p. 3

[66] Ackerman, R. *Altruism, Nonprofits, and Economic Theory* // Journal of Economic Literature. – 1996. – Vol. 34. – N 2, p. 715

[67] For example, in the case of humanitarian assistance to a population outlying from the donor State.

[68] Sinelnikov-Murylev, S., Trunin, I., Goldin, M., Ilyasova, G., et al. *Problems of taxation of non-commercial organizations in Russia* (in Russian) / – Moscow: Transition economy institute. – 2007. – N 108. – 371 p.

[69] *Guidelines for laws affecting civic organizations* / the Open Society Institute in cooperation and the International Center for Not-for-Profit Law by Leon E. Irish, Robert Kushen, Karla W. Simon. – 2nd ed., rev. and enl. – 126 p.

[70] Ibid.

framework for measuring the contribution of the sector, which was proposed in 2010 by Australian Government's Productivity Commission in its Research Report[71].

Thus, as well as other numerous functions of NPOs, explains the desire of many states to support the non-profit sector. Although these NPOs' functions explain support they received from governments, they do not explain the choice of tax form of this support.

In general, the measures of state support for non-profit organizations can be divided into direct and indirect measures (Figure 3).

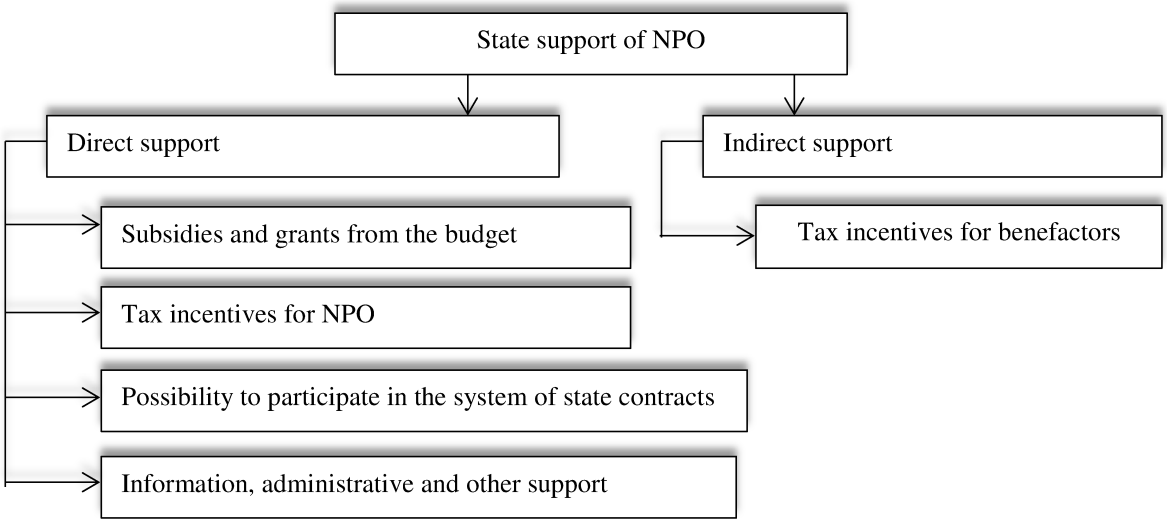

Figure 3[72] – Types of state support for NPOs

Direct measures include efforts aimed at directly at these organizations. In addition to providing financial support in the form of subsidies and grants from budgets of all levels, the provision of benefits (including payment for utilities and rent of premises), such support is also provided in the form of contracting (state contracts), grants, loans and loan guarantees, credits, reimbursement of individual costs. Direct measures are also administrative support (legal regulation, organization of dialogue with the authorities) and information support (staff training, consultations)[73].

The second way is indirect support, that is, a set of incentive measures for entities that provide financial support to the non-profit sector. Such measures include tax benefits for donors - individuals and legal entities. With this form of state support, a tax privilege is received not by the NPO, but by an individual or legal entity that carries out charitable expenditures. The effect of the benefits in any case is directed to the non-profit sector and allows not only to increase the amount of financial resources involved, but also to regulate the direction of philanthropic activity in the society by selecting NPOs that give the right to their donors to take advantage of the tax benefit[74].

However, neither the specific financing mechanism nor the specific functions of the NPOs explain the priority in choosing among the numerous forms of support for precisely the fiscal measures.

As I.Ivanova, M.Liborakina, A.Tolmasova noted, in theory, it is possible to finance the production of social services in two ways:

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[71] *Contribution of the Not-for-Profit Sector*. Research Report of Australian Government's Productivity Commission / January 29, 2010 / URL: https://ssrn.com/abstract=1586630

[72] Compiled by the author

[73] Askerov, M. *Features of state financial support for non-profit organizations* // Actual issues of modern economy. N 2, – 2015. – pp. 94-101

[74] Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.

1. The state collects taxes, then forms a contract for granting the subsidized part of public goods and places it among state or non-state suppliers. At the same time, non-state suppliers independently search funds to finance the unsubsidized part of these benefits. The unsubsidized part is financed by paying for services by consumers or through donations.

2. The state partially exempts from taxes (or provides other tax incentives) to both non-state non-profit providers and individual and corporate donors, thereby creating a system of selective incentives [75].

Defining its strategy of financing public goods, the state adheres to the principle of "democratic pragmatism" - i.e., the desire to use the most effective ways of resources allocation at the command of state[76]. But why indirect incentives, provided in the form of tax incentives, can be more rational, and therefore preferable to direct financial assistance in the form of subsidies or grants?

In economic terms, a tax exemption is equivalent to a government subsidy. While a nonprofit organization enjoys the benefits of receiving unlimited amounts of tax-free income, the government is still subsidizing the operations of that nonprofit in the amount that the organization would have paid in taxes, had it been a for-profit company.[77] But why do states that do no lack experience in direct subcidizing of industries and individual enterprises choose tax methods from a variety of other means available to stimulate NPOs?

There is no shortage of scholarly attempts to justify the tax incentives for nonprofits. As noted one of the American researchers of the nonprofit sector, Michael Fricke, beginning in the 1970s and running through today, a line of scholarly articles have proffered many theories as to why nonprofit organizations should be exempt from income taxation[78]. Here are brief characteristics of the theories that Michael Fricke considers most notable:

1) The Public Good Theory. The most popular theory of exemption is called the Public Good Theory. The gist of the Public Good Theory is that the government is unable, or ill equipped, to fulfill all of the services that society might desire. When a nonprofit steps in and provides these services – be they, for example, education, research, or poverty relief – the government subsidizes such operations by providing a tax exemption. In the absence of the nonprofit, the government itself would be forced to provide the service or society would have to go without. As an incentive for the private sector to fill in the gap, the government in essence agrees to split the cost with the nonprofit.

At first glance, the Public Good Theory is fairly attractive, especially when considering nonprofits that fulfill traditional roles, such as poverty relief. As a general rule, society provides safety nets to prevent those in poverty from living on the streets or going hungry. Welfare programs cost the governments – depending on how you define "welfare" – up to a trillions dollars annually[79]; so whenever a private organization offers to alleviate some of the government's burden in this area, it behooves the government to subsidize that organization. Additionally, the Public Good Theory provides cover for governments for exempting certain classes of nonprofits and not others. Only those nonprofits that actually provide a public good should be exempted, with all others being taxed.[80]

In our opinion, such a theory would be an ideal justification for tax incentives if they were presented only to public benefit organizations, and not to all NPOs without exception.

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[75] Ivanova, I., Liborakina, M., Tolmasova, A. *Problems of the tax regime for charity and non-governmental non-profit organizations and prospects for its change* (in Russian) / Analytical report. Fund "City Economy" & Association of Independent Centers for Economic Analysis. – 2004

[76] Kotelnikov, A. *State support for the reproduction of guarded goods* (in Russian) // Bulletin of the Saratov State Social and Economic University. – 2009. – N 5, pp. 221-223

[77] Hansmann, H. *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Taxation* // Yale Law Journal. – 1981. – N 91, pp. 66-67

[78] Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N 4.

[79] Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N 4.

[80] Ibid.

In other words, the theory explains the granting of tax benefits only to certain organizations. Fricke comes to this conclusion too: "while it might apply to some nonprofits, the Public Good Theory cannot simply be used as a universal theory supporting tax exemption".[81]

2) The Income Measurement Theory. In 1976, Boris Bittker and George Rahdert took a swipe at justifying nonprofit tax exemption by examining the technical meaning of the words used by the tax code in reference to income and taxation.[82] They began with the dominant exemption theory of the day, Public Good Theory, and decided it was unnecessary to even worry about defending the exemption on policy grounds because "neither the 'net income' concept nor the 'ability to pay' rationale for income taxation can be satisfactorily applied to charitable organizations".[83]

In essence, Bittker and Rahdert were arguing that, while nonprofits may very well take in more money than they spend, the difference is not "net income" in the way that term is used in the tax code.[84] From the very early days of the Revenue Act of 1894, Congress imposed a tax on the net income "of all... corporations, companies, or associations doing business for profit…"[85] According to Bittker and Rahdert, since nonprofits are by definition not doing business for profit, the concept of net income, as used in federal tax statutes, cannot be applied to them.[86] These authors further argue that even if we were to attempt to tax a nonprofit's net income, calculating such a figure would simply be too difficult.[87] Are charitable donations to be included in net income?[88] Should the nonprofit be treated merely as a conduit whereby donors transfer funds to the ultimate recipients of the charity, thereby causing the nonprofit to look more like a bank than an operating entity?[89] How do you determine "ordinary and necessary business expenses" for a firm that is not motivated by profit?[90] Bittker and Rahdert raise all of these questions, and many more, in their effort to show that calculating the net income of a nonprofit organization is difficult, at best.

Their solution, then, is to exempt nonprofits, not because of the type of service they provide to society, as was the case under the Public Good Theory, but because the very nature of a nonprofit firm defies the application of the principles of the tax code.[91]

In addition to other shortcomings of the theory[92], it can be noted that the theory is based on a technical, literal and verbal analysis of the US tax code. In this regard, its significant disadvantage is that it can only be applicable in part to other jurisdictions or not applicable at all.

3) The Capital Formation Theory. Having examined both the Public Good Theory[93] and Bittker and Rahdert's arguments pertaining to the problems surrounding the definition of a nonprofit's income,[94] Professor Hansmann proceeds to develop his own justification for exempting nonprofits grounded in economics.[95] According to Hansmann, nonprofits are at a disadvantage when it comes to raising funds because they are unable to issue stock and

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[81] Ibid.
[82] Bittker, B., Rahdert, G. *The Tax Exemption of Nonprofits Organizations from Federal Income Taxation //* Yale Law Journal. – 1976. – N85(3), pp. 299-358, p. 301
[83] Ibid., at 333.
[84] Ibid., at 302.
[85] Ibid. (alteration in original) (quoting Revenue Act of Aug. 27, 1894, ch. 349, 28 Stat. 556) (internal quotation marks omitted).
[86] Ibid., at 302–03.
[87] Ibid., at 307–14.
[88] Ibid., at 308.
[89] Ibid., at 309.
[90] Ibid. (internal quotation marks omitted).
[91] Ibid., at 302
[92] For more on the criticism of all the listed theories see Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N 4.
[93] Hansmann, H. *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Taxation* // Yale Law Journal. – 1981. – N 91, pp. 66-67
[94] Ibid., at 58-62.
[95] Ibid., at 72.

raise capital.[96] As a result, the only means by which a nonprofit may raise capital are "debt, donations, and retained earnings".[97] Donations are an "uncertain" source of funds, and many nonprofits do not even rely on a model whereby they are supported by donations at all.[98] The availability of debt, too, is likely inadequate, according to Hansmann, as lenders are seldom willing to provide enough capital for all of a firm's needs.[99]

Thus, the sole remaining, semireliable source of capital for a nonprofit is retained earnings.[100] By allowing nonprofits to accumulate retained earnings tax-free, the tax code essentially gives these firms a lifeline for their need to raise capital. Not only can tax-exempt organizations use the money they are not paying in taxes on capital expenditures, but also their increased cash flow as a result of not having to pay taxes will encourage lenders to extend them more debt financing, creating a double benefit.[101] In Hansmann's words, "the exemption can be understood as a subsidy to capital formation".[102]

As the Fricke notes, "Hansmann's Capital Formation Theory goes a long way toward justifying the income tax exemption for some nonprofits. However, it is hardly a comprehensive justification that can be applied to all nonprofits that receive the exemption"[103].

4) The Donative Theory. Beginning in 1991, Professors Mark Hall and John Colombo published a series of articles, examining the commonly discussed justifications for income tax exemption at the time,[104] finding them all lacking and offering their own rationale for exempting nonprofits from income taxation.[105] Hall and Colombo name their concept the Donative Theory, largely because its key aspect is the evaluation of nonprofits to determine whether they are worthy of being supported by the public through donations.[106]

In order to evaluate different justifications for income tax exemption, Hall and Colombo create a framework of four criteria against which to judge possible theories.[107] Their view of a successful theory is as follows:

Under the Donative Theory of Exemption, "the primary rationale for the charitable exemption is to subsidize those organizations capable of attracting a substantial level of donative support from the public".[108] When a public good is not provided to the optimally desired level by the government and such good is also not available in the private market largely due to free-rider problems, a confluence of both government failure and market failure emerges.[109] For these types of public goods, the only mechanism by which those who desire the good can realize its production is to make a donation toward the creation of that good.[110]

Again, like the Capital Formation Theory, the Donative Theory seems to work quite nicely for a certain subset of nonprofit organizations, namely those that are supported

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[96] Ibid.
[97] Ibid.
[98] Ibid., at 72-73.
[99] Ibid., at 73.
[100] Ibid.
[101] Ibid., at 73–74.
[102] Ibid., at 74
[103] Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N4.
[104] These commonly discussed justifications include, namely, the Public Good Theory, Bittker and Rahdert's Income Measurement Argument, and Hansmann's Capital Formation Theory.
[105] Hall, M., Colombo, J. *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption* // Washington Law Review. – 1991. – N 66, pp. 307-411, p. 307; Hall, M., Colombo, J. *The Donative Theory of the Charitable Tax Exemption* // Ohio State Law Journal. – 1991. – Vol. 52. – N 5, pp. 1379, 1382–84 [hereinafter Hall & Colombo, The Donative Theory].
[106] Hall, M., Colombo, J. *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption* // Washington Law Review. – 1991. – N 66, pp. 307-411, p. 316
[107] Ibid., at 328.
[108] Indeed, Hall and Colombo proceed to make a case for eliminating the exemption for nonprofit hospitals, a class of charitable organization that has certainly traditionally been exempt from income tax. See Hall, M., Colombo, J. *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption* // Washington Law Review. – 1991. – N 66, pp. 307-411, p. 390
[109] Ibid., at 394.
[110] Ibid.

through donations. But for nonprofits that receive revenue from sources other than just donations, the theory leads to inconsistent results.[111]

5) Other Theories. The theories discussed above are perhaps the most notable examples from the legal discussion, but several others deserve mention.

In his 1990 article, Rob Atkinson finds Hansmann's theory useful yet unsatisfying, so he adds another layer to it and suggests that those nonprofits worthy of tax exemption are the organizations that operate out of altruism, or "the conferring of uncompensated benefits".[112] The lovely thing about Professor Atkinson's model is that virtually all organizations we traditionally think of when we think of nonprofits fit nicely into his framework justifying tax exemption. The aspect of the altruism theory that is perhaps troubling to some is that it would likely confer the tax exemption on any number of firms engaged in businesses we do not typically associate with tax exemption, a fact that Professor Atkinson acknowledges.[113]

Nina Crimm provides an analysis of Atkinson's altruism theory, as well as all of the other theories described thus far in her 1998 article. She then proceeds to offer her own theory, which is that tax subsidies for nonprofits compensate them for engaging in the provision of public goods, an inherently risky endeavor.[114] The tax benefits serve to offset some measure of the risk and thereby create a market for public goods where one would not have otherwise existed.[115] In a sense, Professor Crimm's rationale resembles the Public Good Theory, but couched in the terminology of economics.

To solve the inefficiency problems associated with the Public Good Theory, Crimm separates the theory justifying the exemption from the analysis of the deservedness of any particular organization to receive the exemption.[116] By doing so only nonprofits which operate for worthy charitable purposes can claim the subsidy.[117] Professor Crimm's proposal is certainly thoughtful and insightful, but it is not immediately clear that the provision of public goods and services is as inherently risky as she claims, nor is it clear that the risk of providing public goods would deter entrepreneurs in the absence of the tax exemption.

It should be noted that by conducting a detailed analysis of theories that justify the tax benefits of NPOs, the Michael Fricke's goal is to criticize such preferential treatment. Recognizing that "…each has its own merits…, he assumes that ….perhaps the very fact that so many legal scholars have felt the need to justify exempting nonprofits is itself an indication that such exemption is unwarranted in its current form"[118]. Author urges to revisit the fundamentals of how the tax code treats nonprofits.

One can agree that the above mentioned theories do not sufficiently clearly show the benefits of the society from preferential taxation of NPOs, they also can not be considered universal theories. However, arguments against the very idea of tax incentives for NPOs, in our opinion, are not sufficiently significant. Yet, as the nonprofit segment of the marketplace continues to grow, a nonprofit's failure to use donations for charitable purposes occur more and more frequently. The tax benefits of NPOs are certainly not the last factor that has driven strong growth in the nonprofit sector in recent years. But in our opinion, one can not deny the utility of benefits only on the grounds that none of the analyzed theories gives an objectively or subjectively satisfactory opposition.

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[111] Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N 4.
[112] Atkinson, R. *Altruism in Nonprofit Organizations* // Boston College Law Review. – 1990. – 31(3), pp. 501, 565
[113] Ibid., at 510.
[114] Crimm, N. *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation* // Florida Law Review. – 1998. – Vol. 50. – N 3; St. John's Legal Studies Research Paper No. 08-0110. – 462 p. / URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103619
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.

In the end Michael Fricke comes to this conclusion too: "Absent a comprehensive theory that fits all exempt entities equally well, the average person, when attempting to justify the exemption, is likely to fall back on the well-worn rationale that most nonprofits are engaged in the kinds of activities that we want to support as a society, so we give them an income tax exemption for it. It is not scientific, and it is definitely not easy to test, but that seems to be the best justification we have at this point that fits equally well for all exempt nonprofits"[119].

It should be said that this is by far not a solitary one research questioning the expediency of granting tax benefits to non-profit organizations.

For example, R. Devlin states that "even assuming that government subsidies for non-profit organizations are economically justifiable, it does not necessarily follow that these subsidies should be in the form of tax incentives for individuals making contributions to non-profit organizations, and not in the form of direct state support for the non-profit organizations themselves"[120].

Thus, critics of tax incentives for charity expenditures raise two objections against tax benefits for non-profit organizations and their donors. First, in their opinion, tax incentives are not the most effective way to subsidize non-profit organizations. So, they believe that the tax revenues that have been received are less than the amount of charitable contributions made by donors. Secondly, they believe that the tax expenses associated with financing the non-profit sector are less rational and transparent than direct financing, and are less susceptible to control and supervision[121].

Another challenge to tax incentives as a way to support NPOs is that tax expenditures do not fall under the usual criteria used for public expenses, including: the criterion for rational allocation of resources among competing priorities, the criterion of control over the summary of charges, the criterion of responsibility for these costs, the criterion for the transparency of goals[122]. For example, in relation to the distribution of charitable spending, N. Brooks suggests that inversely to government spending, very few people will plan their charitable expenses in advance; more than likely the donor will focus on the situation that has developed at the moment. Regarding to accountability and transparency, he notes that non-profit organizations are rarely subject to social audit[123].

These objections create serious problems for the arguments in favor of tax benefits for NPOs.

In this connection, T.Malinina's research is of interest. The researcher cites the following winning comparative characteristics of direct budget expenditures in comparison with tax benefits[124]:

– information on tax incentives and on direct costs is reflected in different ways in the budget documentation, and also the availability of such information to the public is distinct;

– provision of subsidies and transfers through the tax system is administered by the tax authorities;

– expenditures for administration direct costs are more transparent than the costs of administration tax incentives, since they are usually reflected in the budgets of the agencies implementing a particular program; on the contrary, there are no special rules for account-

[119] Fricke, M. *The Case Against Income Tax Exemption for Nonprofits //* St. John's Law Review. – 2016. – Vol. 89. – N 4.
[120] Devlin, R. *Nonprofit Sector Research Initiative* / R. A. Devlin. – Canadian Policy Research Networks. – 1997. – 450 p.
[121] Brooks, N. *The tax credit for charitable contributions: giving credit where none is due* / in N. Brooks, S. Phillips, R. Chapman, V. Stevens (eds.) Between State and Market. – 2001. – 535 p., p. 46-47
[122] Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.
[123] Brooks, N. *The tax credit for charitable contributions: giving credit where none is due* / in N. Brooks, S. Phillips, R. Chapman, V. Stevens (eds.) Between State and Market. – 2001. – 535 p., p. 471-472
[124] Malinina, T. *Evaluation of tax benefits and exemptions: foreign experience and Russian practice* (in Russian) / – M.: Institute of E.Gaidar. – 2010. – 212 p., p. 16

ing costs for the administration of tax benefits, such costs are not reflected in the budget of the tax service;

– annual accounting period imposes certain limitations on the form of granting tax benefits (tax legislation, as a rule, provides for an annual period for determining tax obligations).

Thus, she notes that, state regulation has a more direct and quicker effect than expenditure programs and tax incentives, because it directly and proximately has an effect on the relevant object. Regulatory measures (for example, setting ecological standards) can also be implemented faster than the provision of tax exemptions, because in everyday practice they can be implemented by the executive without approval by the legislative power and therefore it is the most strategic method of response[125].

In addition, in her opinion, "regulatory measures, as a rule, do not have a direct impact on budget revenues and expenditures".

As for the *adherents* of supporting the tax benefits of NPOs, their main argument is that indirect financing in the form of a tax benefit is more effective than direct financing in the form of budget expenditures. This point of view, for example, was expressed by the K. Scharf and M.Taussig. The economic effectiveness of tax incentives for donors, as opposed to direct government subsidies, depends on the extent to which the total amount of charitable spending increases in response to a decrease in their net worth for the donor after taxation as a result of the stimulating policy. This indicator is called "price elasticity of charitable spending" by economists[126].

While high price elasticity shows that the increase the total amount of charitable expenses caused by the tax incentive exceeds the tax value in terms of lost income, low price elasticity shows that missed tax revenues caused by the introduction of benefits, as a result, exceed the increase in the number of charitable expenses. Economists have tried to get reliable estimates of the price elasticity of charitable activity over the past thirty years. Although early studies reported relatively low elasticity, noting that tax incentives are an inefficient way to subsidize non-profit organizations, subsequent studies have shown high elasticity of charitable spending, noting that tax incentives can be an economically effective way of supporting NPOs[127]. So, taking into account the fact that the transfer of charitable donations is a normal benefit, it can be argued that the demand for it will increase as the price decreases [128].

Empirical evidence of the effectiveness of tax incentives is research showing that, in gaining direct tax revenues, the society may lose in the total amount of funds spent on the production of public goods. In particular, the work of American scientists[129] showed that there is a moderate dependence between the amount of donation and the price of a charitable resource (the difference between the amount of a really allocated charitable resource and the amount of tax exemption). Most researchers recognized the most objective coefficient of elasticity 1.3 - with an increase in the price of donations by 10%, the volume of donations was reduced by 13%. In other words, the production of public goods can additionally "take" through taxes 10 dollars, but hereby donors will donate less instead of 10, but by 13 dollars. Thus, society as a whole will lose 3 dollars for public benefit purposes.

So, we can conclude that:

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[125] Ibid.

[126] Scharf, K. *Tax incentives for charities in Canada* / K. Scharf, B. Cherniavsky, R. Hogg / Ottawa Canadian Policy Research Networks. – 1997. – 50 p.

[127] Ibid.

[128] Taussig, M. *Economic aspects of the personal income tax treatment of charitable contributions* // National Tax Journal. – 1967. – T. 20. – N 1, pp. 1-19

[129] Clotfelter, Ch. *Federal Tax Policy and Charitable Giving* / University of Chicago Press. – 1985. – 321 p.

1) tax incentives to donors will help increase the charitable expenditure, therefore, provide indirect subsidies to the non-profit sector [130].

2) profitable taxation of the non-profit sector works to reduce the level of tax burden on the economy as a whole [131].

On tax benefits as a way of indirect financing of non-profit organizations can be looked at also from the perspective of the concept of tax expenses [132]. Figure 4 shows the mechanism of the state's exchange of tax expenditures on social utility with the participation of NPOs.

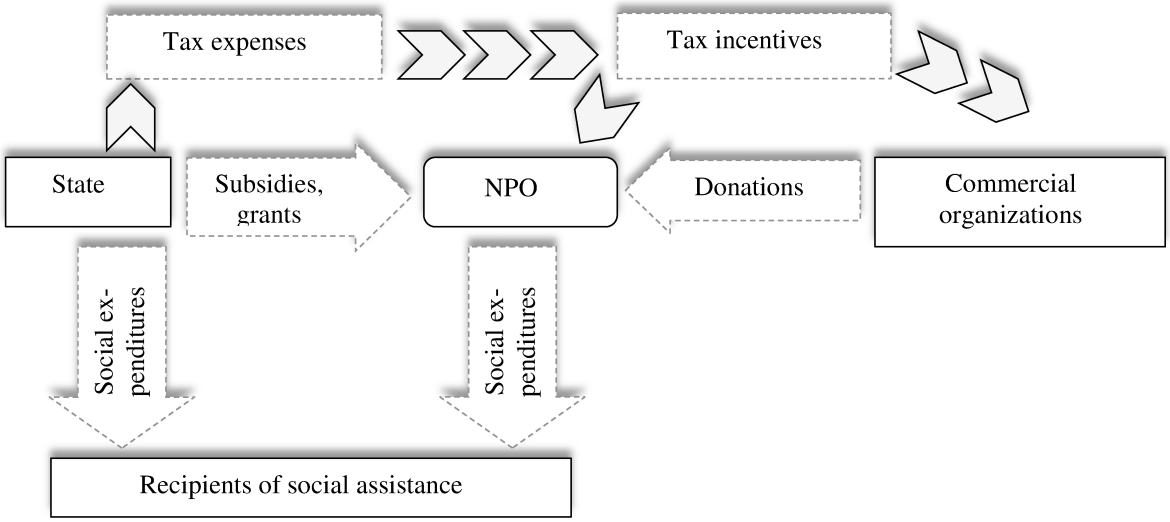

Figure 4[133] – The mechanism of the state exchange of tax expenditures on social benefits with the participation of NPOs

A distinctive feature of NPOs activity is the opportunity for donors to choose the direction of expenditure through which they can subsidize public events. This allows sending charitable funds in favor of NPOs that meet the current needs of society. In addition, as B. Bittker notes, indirect subsidies allow support to be provided without the consent of the political majority, therefore, as a rule, they are preferable to promoting innovation, as compared to traditional state funding[134]. At the same time, tax regulation of donations makes it possible to redistribute charitable spending in the best way for the state, that is, to identify specific socially important areas or specific beneficiaries of philanthropic assistance, and also influence the forms in which support will be provided.

Another authoritative opinion, it can be noted the research of S.Efremov, in which he examines the advantages and disadvantages of various ways of state support for non-profit organizations. Recognizing the advantages of other forms of state support, S.Efremov considers that the tax instruments are the most universal support tools. He also uses the concept of so-called “state support pathologies”, i.e. the distorting effects of state support, pre-

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[130] Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.

[131] Ivanova, I., Liborakina, M., Tolmasova, A. *Problems of the tax regime for charity and non-governmental non-profit organizations and prospects for its change* (in Russian) / Analytical report. Fund “City Economy” & Association of Independent Centers for Economic Analysis. – 2004

[132] Golovan, S. *Research of the mechanism of preferential taxation of charitable activity as a measure of indirect subsidization of socially-oriented non-profit organizations* (in Russian) // Journal of Scientific and Applied Researches. – 2016. – N 4, pp. 11-15

[133] Compiled by author on the basis of Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.

[134] Bittker, B. *The propriety and vitality of a federal income tax deduction for private philanthropy* // Tax impacts on philanthropy. – 1972. – pp. 145-170

venting NPOs to pursue their original goals. “Pathologies” can be commercialization and bureaucratization, increasing dependence on the state, misrepresentation of the mission and reorientation of management of NPOs, which is associated with the revision of the objectives of the activity in favor of fulfilling the state task. “Tax incentives are the most “soft” instrument of state support for NPOs and are less prone to distortions”.[135]

Finally, the use of tax incentives to stimulate charitable activities can be explained from the perspective of having a benefit for all participants in tripartite relations. The discussed benefits are shown in Figure 5.

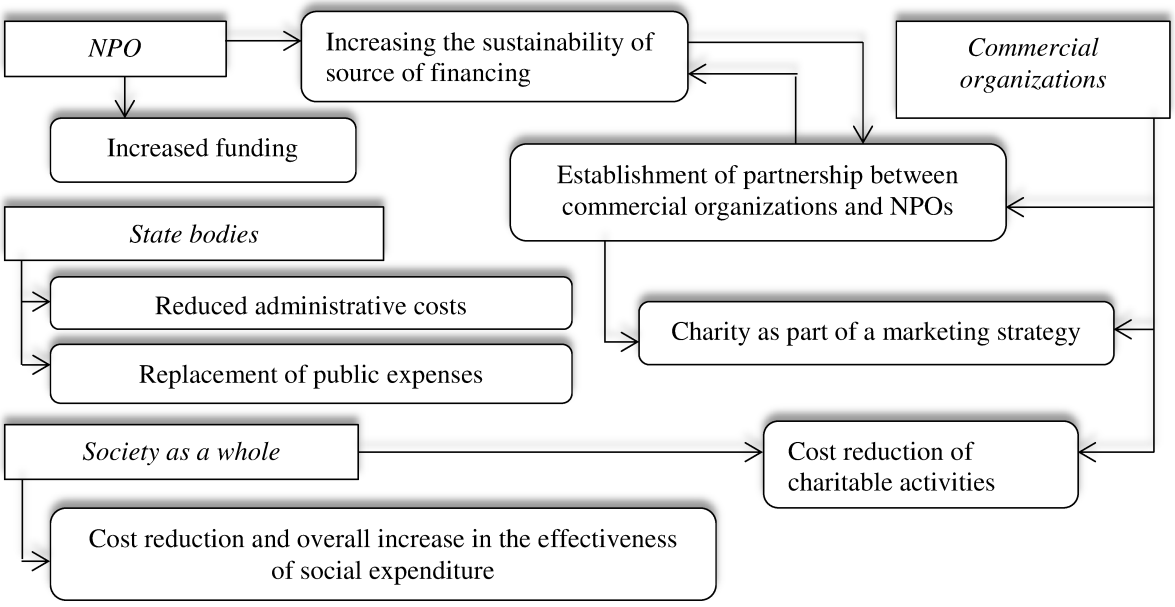

Figure 5[136] – The advantages of introducing preferential taxation for NPOs in terms of economic sectors and society as a whole

Thus, the provision of preferential taxation to NPOs and their donors gives obvious benefits. First, non-profit organizations that meet certain conditions will be able to rely on increased funding. This becomes possible as a result of the financial resources accumulation. Secondly, one can assume an increase in the sustainability of attracted sources of financing. The introduction of a tax benefit involves establishing closer partner relations between commercial organizations - donors and recipients of funds, which give advantages to both participants. Partnerships with NPOs allow commercial organizations to be mentioned on the websites of NPOs and acquire the reputation of a permanent benefactor, as well as to participate in the events held on the rights of joint participation. This, in its turn, allows viewing charity as part of the marketing strategy of a commercial organization, therefore, can lead to an indirect increase in the value of the business. Charity as part of a marketing strategy increases the interest of the business sector in maintaining relations with specific NPOs, which ultimately leads to an increase in the sustainability of this source of financial resources for NPOs. Advantages for the state are also evident. Charitable expenses of commercial organizations will be able to replace part of direct budgetary financing, which will lead to a more efficient allocation of available budget resources, as well as to reduce

[135] Efremov, S. *State economic support for socially-oriented non-profit organizations in the Russian Federation.* (in Russian) / Dissertation of candidate of economic sciences. – Moscow. – 2014. – 182 p., p. 34-36

[136] Compiled by author on the basis of Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.

the costs associated with levying taxes and the subsequent distribution of tax revenues in the social sphere[137].

These and other arguments speak in favor of preferential taxation for NPOs and their donors. This way of financing the non-profit sector has certain advantages over direct budget financing. At the same time the status of NPOs does not always guarantee unconditional provision of tax benefits. In the next section we will consider how a particular public benefit status of an NPO affects the provision of tax benefits.

[137] Golovan, S. *Improvement of the tax mechanism for stimulating philanthropic activities* (in Russian) / Thesis for the Candidate of economic sciences degree / Baikal State University. Irkutsk. – 2017. – 227 p.

CHAPTER 2. TAX REGIMES FOR NONPROFIT ORGANIZATIONS IN THE EUROPEAN UNION: COMPLIANCE WITH EU LAW NON-DISCRIMINATION PRINCIPLE[138]

2.1 Legal concept of privileged "public benefit" tax status of NPOs and its components in EU Member States

In countries where the authorities understand the role of NPOs in society, favorable conditions for their establishment and the implementation of their activities are created. The legal framework for not-profit organizations typically permits organizations to be created in different forms and to pursue a broad range of legitimate goals, including both mutual benefit and public benefit interests.

Most countries, however, as D. Moore noted, "identify a subset of NPOs as deserving a range of state benefits, based on their purposes and activities. By providing benefits, the state seeks to encourage certain activities, usually related to the common good or public benefit. NPOs pursuing such purposes and activities may be given various labels, including "tax-exempt organizations" or "charities" or "public benefit organizations"[139].

In this paragraph, the task is to study the European approaches to the issue of conferring on NPOs the public benefit status, giving the right to receive state support and especially for obtaining special tax privileges. The term "PBOs" in this paragraph is used for organizations that have official public benefit status. For organizations that do not have official public benefit status, terms used in this section are "nonprofit organizations" or "organizations".

New data compiled by the Donors and Foundations Networks in Europe (DAFNE) and the European Foundation Centre (EFC) and analyzed by Foundation Center (New York) indicate that there are more than 147 000 registered "public benefit foundations"[140] in Europe, with combined annual expenditures of nearly 60 billion euro. These figures are based on the latest available data from 24 European countries[141]. These 24 countries include 18 European Union Members – Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden, and United Kingdom. Together, these 18 countries represent 90 percent of the total population of the EU[142]. The 6 non-EU countries are Croatia, Liechten-

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[138] This chapter is based on the data of Council on Foundation's Country Reports, prepared by the International Center for Not-for-Profit Law ("ICNL"), on the European Foundation Centre's Country Profiles, on the countries reports of The Rules to Give By project. The methods of the research are comparative legal analysis and summary of country experts' evaluations and reports.

[139] Moore, D. *The Public Benefit Commission: A Comparative Overview* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 8. – Issue 2 / URL: http://www.icnl.org/research/journal/vol8iss2/special_1.htm

[140] For purposes of this report, a foundation is considered to be a "public benefit foundation" if it meets the following five criteria:

1. They are independent, separately-constituted non-profit bodies
2. They have no members or shareholders
3. They have their own established and reliable source of income, usually but not exclusively from an endowment
4. They have their own governing board
5. They distribute their financial resources for educational, cultural, religious, social or other public benefit purposes, either by… 1) Supporting associations, charities, and educational institutions or individuals; or, 2) Operating their own programmes

[141] It is important to note that these estimates do not include all organisations that operate as foundations in Europe, only those with a public benefit focus. In about half of the countries represented by DAFNE members, the term "foundation" can also refer to organisations that serve private purposes. According to the EFC, such purposes could include "the advancement of one family, relatives of the founder, trust funds for the education of the founder's children, etc." Including private benefit foundations, the total number of foundations in Europe would exceed 200,000. It should also be borne in mind that in some European countries, foundations may be established and largely operated by the state. Because such foundations are not privately governed and do not operate independently from the state, they do not conform to the definition of "public benefit foundation", as it is generally understood, and were excluded from the totals.

[142] The number of PBOs in EU countries (the total amount except Russia, Ukraine, Turkey, Croatia, Switzerland and Liechtenstein) are 122 468.

stein, Russia, Switzerland, Turkey, and Ukraine[143].

The number of public benefit foundations in each country varies from 40 (Ireland) to 20 200 (Germany)[144]. In addition to Germany, six other European countries have at least 10 000 registered public benefit foundations – Poland, Hungary, Spain, Sweden, Switzerland, and the United Kingdom (Figure 6). As Lawrence T. McGill stated, "despite the challenges inherent in collecting comparable data across diverse countries, it is apparent that public benefit foundations are playing an increasingly critical role throughout Europe…"[145].

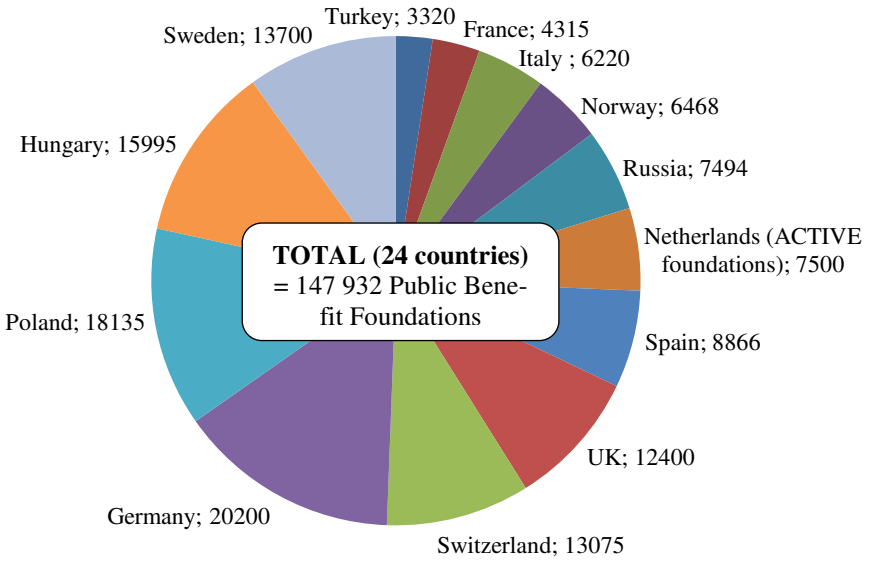

Figure 6[146] – Public Benefit Foundations in Europe, 2016

Note: Other countries: Finland (2,830); Czech Republic (2,075); Bulgaria (1,755); Austria (701); Belgium (491); Portugal (401); Slovak Republic (376); Croatia (226); Ireland (35)

As stated by D.Miloslavskaya, O.Shumburova and N.Ivanova, saying about public benefit status, "we must take into account the presence of the following of its most essential features: concept of public benefit activities, criteria for receiving public benefit status, normative legal approaches to the public benefit status, regulating public benefit activities, benefits and obligations of PBOs"[147].

Comprehensive studies of public benefit status of NPOs are represented in in the writings of David Moore[148]. Those studies indicated that the underlying rationale for introduc-

[143] *McGill, L. Number of registered public benefit foundations in Europe exceeds 147,000* / in European Foundation Sector 2016 Report / Foundation Center. – 01.10.2016

[144] These figures represent the number of ACTIVE public benefit foundations in each country. It is important to keep in mind, however, that in most countries the available data includes both active AND inactive foundations

[145] *McGill, L. Number of registered public benefit foundations in Europe exceeds 141,000* / in European Foundation Sector 2015 Report / Foundation Center. – 2015

[146] McGill, L. Number of registered public benefit foundations in Europe exceeds 147,000 / in European Foundation Sector 2016 Report / Foundation Center. – 01.10.2016

[147] Miloslavskaya, D., Shumburova, O., Ivanova, N. *Public benefit status in international legislation* (in Russian) // Public Administration Issues. – 2015. – N 1, pp. 33-52

[148] See 1) Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm; Moore, D. *The Public Benefit Commission: A Comparative Overview* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 8. – Issue 2 / URL: http://www.icnl.org/research/journal/vol8iss2/special_1.htm; 3) Moore, D. *Public Benefit Status: A Comparative Overview* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 7. – Issue 3 / URL: http://www.icnl.org/research/journal/vol7iss3/special_2.htm; 4) Rutzen, D., Moore, D., Durham, M. *The Legal Framework for Not-for-Profit Organizations in Central and Eastern Europe* // The International Journal of Not-for-Profit Law. – 2009. – Vol. 11. – Issue 2 / URL: http://www.icnl.org/research/journal/vol11iss2/art_1.htm

ing public benefit status is usually to promote public benefit activities. Governments recognize that PBOs serve more effectively the needs of local communities and society as a whole[149].

In addition, states across Europe have adopted this status to:

1. Encourage flow of private resources to NPOs through creating incentives for private giving to PBOs;

2. Facilitate a state-NPO relationship in provision of social services (for example, PBOs can be eligible to bid on tenders for social services).

3. Strengthen relationship between NPOs and public. Often governments expect that regulation of NPOs through the empowerment of public benefit status (for example, transparency and accountability requirements) would help improve the generally poor image of the sector and increase trust in PBOs[150].

In practice the status is considered as an issue of fiscal regulation. It means that through introducing public benefit status, governments generally want to ensure that tax benefits granted to NPOs are related to purposes and activities which are of benefit for the public and the society. For example, in Croatia, tax benefits are only available for donations to organizations pursuing the types of activities listed in the tax laws, while in Hungary tax benefits for donors are linked to organizations which have obtained a PBO status. Further, the tax laws will either grant exclusive benefits to such activities and organizations or give them the right to greater benefits than those of organizations that have not received the status. In Poland PBOs are exempt from corporate income tax (as well as other taxes) on all income devoted to the public benefit objectives listed in the law, while in Hungary PBOs have a right to a higher-threshold exemption on income from economic activities.

At the same time, as D. Moore noted, in Europe there is a tendency to establish link of other types of state support, which can come in the form of grants, subsidies, payments for providing certain services, and percentage designations, to public benefit activities or public benefit status.

Moreover, even if the state does not require organizations to have public benefit status, they might draft the criteria in a law or tender in a way that the criteria closely correspond to the public benefit criteria. For example, the Hungarian Law on 1% mechanism does not require organizations to have obtained public benefit status; however, the criteria for such status are closely linked to those in the PBO law.

At the same time public benefit status is generally[151] considered to be voluntary. Having public benefit status might be required to obtain certain benefits, but its existence in the legal framework generally does not inhibit the right of individuals to establish an organization for private purposes and does not prevent an organization to operate without having such status, even if it is established for public benefit purposes. If the public benefit organization ceases to fulfill the conditions for having this status, it would lose the status and the benefits associated with it, but it could still continue to operate[152].

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[149] Hadzi-Miceva, K., Bullain, N. *Supportive Financing Framework for Social Economy Organizations* / in Social Economy – Building Exclusive Economies (OECD Local Economic and Employment Development (LEED) Programme), 2007

[150] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

[151] The approach to public benefit is different in the United Kingdom, in that all organizations with exclusively public benefit purposes are considered "charities". In England and Wales, those charities with income above 5,000 British pounds are required to register with the Charity Commission for England and Wales (with some small exceptions). Those with income below 5,000 British pounds may voluntarily choose to register. In Scotland they are registered with the Office of the Scottish Charity Regulator. Charities based in Northern Ireland do not, and indeed cannot, register; they need to apply to the Inland Revenue to obtain a charitable status for tax purposes.

[152] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

Criteria for receiving public benefit status. First of all, requirements to identify non-profit tax status to receive tax benefits can be formal or material. Formal requirements (authorizations, registrations and other formalities) make it possible to define the prevailing purpose of a body as stated in its articles of incorporation. The activity that is actually undertaken is therefore of lesser importance. For the non-profit tax status to be recognized it is sufficient for the tax authorities to verify the purpose of the organization as formally laid down in its articles of association. Material requirements go beyond formal conditions, taking into account the effective activities of charities. An example of the material conditions for obtaining tax benefits is a restriction on the implementation of business activity. Most Member States adopt mixed systems, both formal and material, to confer the status of a non-profit entity[153].

Formal and material requirements sometimes coincide. In some national tax systems, a percentage of income is fixed to be invested in objectives of social benefit that must be achieved by the non-profit entities[154]; thus the final destination of revenue for social benefit is both a formal and a material requirement. Formal requirements can sometimes be used to guarantee the existence of material conditions. Examples of this are the prohibition of the payment of dividends or any other kind of profit distribution (for example in the Netherlands)[155].

As a rule, public benefit status is established for the development of activities aimed at the public good. Notions of what constitutes public benefit are tied closely to national cultural and legal traditions; historical and political circumstances; and this is reflected in national laws by listing a number of specific objectives of the NPOs activities.

Generally the following criteria are considered when granting public benefit status: 1) qualifying activities for public benefit status, 2) eligible organizations, the extent to which PBOs must be organized and operated for public benefit, 3) target beneficiaries, and 4) financial and governance requirements.

The first criterion is qualifying activities/purposes considered as publicly beneficial.

Generally laws regulating public benefit activities enumerate certain specific purposes deemed to serve the public good. The list below contains virtually all of the public benefit activities recognized in one or more countries in Europe:

a) Arts, culture or historical preservation
b) Environmental protection
c) Civil or human rights
d) Elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination
e) Social welfare, including prevention or relief of poverty
f) Humanitarian or disaster relief
g) Development aid and development cooperation
h) Assistance to refugees or immigrants
i) Protection of, and support for, children, youth or elderly
j) Assistance to, or protection of, people with disabilities
k) Protection of animals
l) Science, research and innovation
m) Education and training
n) European and international understanding
o) Health, well-being and medical care
p) Consumer protection

[153] In some Member States, such as Austria and France, there are no formal conditions to achieve non-profit tax status.
[154] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60
[155] Ibid.

q) Assistance to, or protection of vulnerable and disadvantaged persons
r) Amateur sports
s) Infrastructure support for public benefit purpose organizations
t) Other[156].

It is important that countries choose public benefit purposes that reflect their needs, values, and traditions. In the Table 1, which is made on the base of country reports we compiled an overview of activities that are recognized as public benefit in different EU countries.

Table 1 – Public benefit purposes set out for obtaining tax benefits in EU countries

Public benefit purpose	BE	BG	CZ	HR	DK	DE	EE	IE	EL	ES	FR	IT	LV	LT
Arts, culture or historical preservation														
Environmental protection														
Civil or human rights														
Elimination of all forms of discrimination[157]														
Social welfare, including prevention or relief of poverty														
Humanitarian or disaster relief														
Development aid and cooperation														
Assistance to refugees or immigrants														
Protection of children, youth or elderly														
Assistance to, or protection of, people with disabilities														
Protection of animals														
Science, research and innovation														
Education and training														
European and international understanding														
Health, well-being and medical care														
Consumer protection														
Assistance to, or protection of vulnerable and disadvantaged persons														
Amateur sports														
Infrastructure support for public benefit purpose organisations														
Other														

Table 1 (cont. horizontally)

Public benefit purpose	LU	HU	NL	AT	PL	PT	CY	MT	RO	SI	SK	FI	SE	UK
Arts, culture or historical preservation														
Environmental protection														
Civil or human rights														
Elimination of all forms of discrimination														
Social welfare, including prevention or relief of poverty														
Humanitarian or disaster relief														
Development aid and cooperation														
Assistance to refugees or immigrants														

[156] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

[157] Discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination

Table 1 (cont. vertically)

	LU	HU	NL	AT	PL	PT	CY	MT	RO	SI	SK	FI	SE	UK
Protection of, children, youth or elderly	■	■	■	■	■	■	■		■	■	■	■	■	■
Assistance to, or protection of, people with disabilities	■	■	■	■	■	■	■	■	■	■	■	■		■
Protection of animals	■	■	■	■	■	■	■	■	■	■	■	■		■
Science, research and innovation	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Education and training	■	■	■	■	■	■	■	■	■	■	■	■	■	■
European and international understanding	■	■	■		■	■			■	■	■	■		■
Health, well-being and medical care	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Consumer protection	■	■	■		■	■			■	■	■	■	■	■
Assistance to, or protection of vulnerable and disadvantaged persons	■	■	■	■	■	■		■	■	■	■	■	■	■
Amateur sports	■	■		■	■	■		■	■	■	■	■	■	■
Infrastructure support for public benefit purpose organisations	■	■	■		■	■	■		■	■	■	■		■
Other			■											
Source: Compiled by the author on the basis of: Legal and fiscal countries reports within EFC project The operating environment for foundations / EFC – European Foundation Centre. – 2014														

■ - the purpose is clearly spelled out in the country's legislation or its existence follows from the essence of the legal provisions of national legislation.

The most popular public benefit purposes are “culture or historical preservation”; “environmental protection”; “science, research, education and innovation”; “social welfare, prevention or relief of poverty”; “humanitarian or disaster relief”, “protection of, and support for, children, youth or elderly”; “assistance to, or protection of, people with disabilities”, “vulnerable and disadvantaged persons”; “health, well-being and medical care” – these purposes are recognized by the governments of the vast majority of EU countries.

Ambiguously EU countries treat to “development aid / development cooperation” and “development of amateur sports” purposes. The first purpose is not supported in Belgium, Czech Republic, Cyprus, Latvia, Austria, France and Malta. The second one is not recognized as a public benefit purpose in Belgium, Ireland, the Netherlands and Cyprus.

The least common are “European and international understanding” and “consumer protection” - they are not recognized in one third of the Member States including Belgium, Bulgaria, France, Italy, Latvia, Austria, Cyprus and Malta.

In some countries, the list of public benefit purposes is broader than the above list. For example, in Latvia the list additionally includes “civil society’s development”; in Netherlands in addition to the purposes listed in the table, public benefit activities are also “religious and political activities”.

Almost all countries include in their lists of purposes some sort of “catch-all” category, which simply embraces “other activities” which are deemed to serve the common good. This formulation, although it has less legal certainty than a fully closed list, allows, however, avoiding too narrow definition and including newly emerging activities in the list.

The second criterion in determining public benefit status is the type of legal entities that can obtain it. In most continental European countries, recognizing a certain organization to be of “public benefit” indicates that the organization has obtained a “status” and not that it has been registered as a separate legal form. Public benefit status is granted after the organization has been registered as a legal entity (most commonly in the form of an associ-

ation, foundation or other form depending on the country)[158]. Sometimes both registration and assignment of status are carried out simultaneously.

The third criterion often used to decide whether one organization should obtain a public benefit status are the extent to which the organization must be engaged in public benefit activities.

Many countries require that the organization be organized and operated principally to engage in public benefit activities. An organization is "organized" principally for public benefit when the purposes and activities contained in its governing documents limit it to engaging principally in public benefit activities. An organization is "operated" principally for public benefit when its actual activities are principally public benefit. "Principally" may mean more than 50% or virtually all, depending on the country. There are different ways of measuring whether the "principally" test has been satisfied – for example, by measuring the portion of expenditures[159].

In the legislation of most countries, the PBO status and related benefits directly depend on whether the organization is engaged in commercial activities or not, and on the ratio of commercial and public benefit activities. In the Netherlands, the organization may obtain the PBO status if the public benefit activities make up at least 50% of its overall activities. Germany and Poland require an organization receiving tax benefits to engage exclusively in public benefit activities[160].

As the fourth criterion, which is present in the legislation of most countries, is the circle of potential beneficiaries. In order to differentiate public benefit organizations, the law establishes requirements on the number of sponsorship recipients and the extent of activity beneficial to the public[161]. So, in the British law on charity, the concept of a sufficient part of society, whose needs must be met by the charitable organization, is treated as part of the population that can be called a social class[162]. In the Netherlands: if the activities of organization are aimed at serving too restricted a group of persons – persons belonging to a family, for example – then the organization is not eligible for public benefit status. Similarly, in France, in order to qualify as a PBO, an organization must engage primarily in at least one public benefit activity and provide services to a large, undefined group of individuals in France.

In general, a purpose is not charitable if it is mainly for the benefit of a named person or specific individuals (or a family). It will also not be charitable if the people who will benefit from it are defined by a personal or contractual relationship with each other.

In addition to the key criteria mentioned above, some laws prescribe additional criteria which must be met if the organization wishes to receive public benefit status or to be included in the list of organizations eligible for tax and other benefits. Those additional criteria include: restrictions on conducting economic activities, governance requirements, restriction on engagement in political activities, financial management, asset management and distribution, remuneration of board and employees, etc.

Legal procedure for granting a public benefit status. How and by whom is the public benefit status granted? As the study of D. Moore, K. Hadzi-Miceva, and N. Bullain shows, public benefit status can be conferred on PBOs explicitly by including provisions in framework legislation (e.g., basic law that governs different forms of NPOs), in special

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[158] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

[159] Ibid.

[160] Ibid.

[161] Andziulytė, R. *Legal analysis of the public benefit* / in Sauliūnas, D., Jokūbauskas, R., Andziulytė, R., et al. Issues of the NGO Legal Framework in Lithuania / NGO Law Institute. – Vilnius, 2008

[162] *The Charity Commission. (2008). Public Benefit. Analysis of the Law Relating to Public Benefit* / URL: http://forms.charitycommission.gov.uk/media/94849/lawpb1208.pdf (accessed: 10 March, 2017)

laws concerning public benefit status, or in tax laws. In some countries, various activities and criteria concerning public benefit can be found in different laws.

1) Public benefit status in framework laws. The framework laws define the public benefit status within the framework of the law on non-profit organizations. As stated by D. Moore, "this approach makes most sense when there is one law that governs both the associations and the foundations and the public benefit status extends to these legal forms. In these situations, it is important that the reform of tax laws which introduce benefits for PBOs is adopted parallel to introducing this status. Otherwise, if such status does not entail any financial benefits the organizations may have no incentive to obtain it"[163].

2) Special law on public benefit status. An alternative approach is to adopt specific, separate "public benefit" legislation, in an effort to regulate the status comprehensively and consistently. This approach is usually adopted in countries where associations, foundations and other entities, which may obtain this status, are governed by separate laws (Hungary, Poland and Latvia). Thus having one distinct law on PBO status (vs. regulating it in the separate laws) helps to ensure that it is harmonized and applied consistently in the system. The advantage of this approach is that separate PBO laws prescribe more explicitly the benefits that the organizations that acquire this status will gain.

3) Public benefit status in tax legislation. The activities that are of public benefit and therefore deserve specific benefits can be regulated in tax law (like, for example, in Estonia, Germany and Netherlands).

In these and other countries tax legislation lists public benefit activities and defines fiscal privileges for PBOs pursuing those activities. The advantage of this approach is administrative simplicity; since public benefit status is an issue of fiscal regulation, it is natural to regulate public benefit issues through the tax code. The disadvantage is that, in some legal traditions, it is inappropriate to impose operational requirements (such as requirements about internal governance and reporting) through the tax law.

4) Regulating public benefit activities in different laws. In some countries, the activities that are of public benefit and therefore deserve specific benefits are regulated through provisions in various laws (e.g., tax laws, government grants laws, humanitarian assistance laws, donations law). However, such practice can bring to an inconsistent application of the concept, as it happened in Croatia where the benefits provided in the tax laws do not embrace all activities which are recognized as of public benefit in the other non-tax laws. In addition, different laws introduce a publicly beneficial status for certain types of organizations[164].

Regulating public benefit activities, which are entitled to state benefits, through various laws can bring to an inconsistent application of the concept. For example, in Croatia different laws refer to activities that are of public benefit (e.g., Law on Humanitarian Assistance, Profit Tax Law, and Personal Income Tax Law). The lists refer only to limited categories of public benefit activities (e.g., education, humanitarian) and fail to include other, equally important activities (e.g., human rights, children rights). Even more, (e.g. humanitarian organizations, fire brigades) which lists specific criteria, and benefits that they are entitled to. As a result, the Croatians have concluded that they need to reform the system in order to introduce a coherent policy concerning public benefit status.

Regulation of PBOs activities. Legislation, as a rule, provides for the existence of an authority that decides on granting the public benefit status and regulates the activities of organizations that have received this status.

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[163] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

[164] Ivanovic, M. *Legal Framework for the Activity of Public Benefit Organizations in the Republic of Croatia* – State of Affairs on 31 May 2005 / European Centre for Not-for-Profit Law and National Foundation for Civil Society Development. – 2005

In this respect countries adopt a variety of different approaches. As a rule, there are several options. So, the public benefit status can be granted:

1) by tax authorities;

2) by governmental entities, such as the Ministry of Justice;

3) by national courts;

4) by independent commissions;

5) by state body after obtaining a recommendation from the independent commissions.

Each approach has distinct advantages and disadvantages. Let us consider them more closely.

1) The tax authorities. Countries adopting this approach for at least some categories of public benefit activity include Denmark, Finland, Germany, Greece, Ireland, the Netherlands, Portugal and Sweden. Vesting the tax authorities with authority over the public benefit determination has the advantage of administrative convenience, in that one entity makes all such decisions. In addition, the tax authorities in some countries demand this authority, because the determination affects the tax base. A potential disadvantage, however, arises out of the potential conflict of interest between the duty to maximize the tax base and the responsibility for granting a status that reduces the tax base.

2) The single Ministry. The primary advantage of placing authority within a single ministry is the greater likelihood of consistent decision-making. Perhaps the greatest danger in assigning authority to a single ministry is the danger of arbitrary, politically motivated decision-making. Bulgaria is an example of such approach.

3) The courts. Courts are authorized to make decisions on the public benefit status in Greece, Hungary, Poland and France. Where courts have such powers throughout the country, registration in court also gives the advantage of accessibility. Furthermore, courts can actually speed up the process of public benefit recognition, in countries where PBOs can apply simultaneously for both registration as a legal entity and recognition as a public benefit organisation. On the other hand, because courts are usually overburdened, the registration process can be slow-moving. Also, courts must deal with a wide range of issues, making it difficult for them to develop specialized expertise in public benefit issues.

4) The independent commissions. This is the most innovative approach. A classic example is the Charity Commission for England and Wales. While it is part of the government, yet it is independent of the political process. Its powers are conferred by an Act of Parliament and exercised under the oversight of Commissioners, each of whom is independent of the political process and voluntary sector. The main function of the Commission is to assign to organizations the status of benefactors, as well as rendering services for building "sound" charitable activities.

The key benefits to the commission approach are its independence from political interference and the quality and consistency of decision-making made possible through the concentration of expertise in the Commission. The key disadvantages are the cost of creating and maintaining such a commission and the fact that it is a centralized organ. Undoubtedly, successful activity of the Charity Commission is largely caused by historically established relationship between the state and the third sector in United Kingdom, where non-profit organizations have a long history and enjoy broad public support[165].

5) State bodies in cooperation with independent commissions. Estonia, Poland and Latvia are examples of countries where the decision on the public benefit status is granted by the Government, court or a Ministry. However, in addition to these ministries the laws set up the public benefit commissions with consultative, advisory status.

*Benefits and obligations of public benefit organizations***.** Public benefit recognition would have no real meaning if there were no state benefits provided to facilitate the work

[165] Miloslavskaya, D., Shumburova, O., Ivanova, N. *Public benefit status in international legislation* (in Russian) // Public Administration Issues. – 2015. – N 1, pp. 33-52

and sustainability of PBOs. Although direct government support is also practiced in Europe, there is a growing tendency to refuse direct support in favor of indirect incentives - tax incentives, rental of premises on preferential terms, priority participation in competitions, etc.[166]. European PBOs receive tax benefits, primarily, in the form of tax exemption. The following categories of income may be exempt from taxation:

- Income from grants, donations, and membership dues;
- Income from economic activities;
- Investment income;
- Real property; and
- Gifts and inheritance.

Tax benefits are usually available only if the income is used to support the public benefit purpose. In addition, many countries extend exemptions or preferential rates on value added tax (VAT) to PBOs or to organizations engaged in transactions of certain goods and services related to the public benefit.

In addition to tax benefits intended directly for PBOs, states provide tax incentives to donors – to individuals and corporations donating to PBOs. This type of tax incentives is crucial to encouraging private philanthropy and to support public benefit activity. Almost invariably, donor incentives are linked to either the public benefit status of the recipient or to enumerated public benefit activities in which the recipient is engaged. For example, France and Germany allow only public benefit organizations to receive tax-deductible donations.

The state may also provide other forms of support to public benefit organizations, including the following:

- Many sources of grants are available more easily, or exclusively, to charities (UK);

- A PBO may purchase the right of perpetual usufruct of estates that are owned by the State (Poland);

- A taxpayer may allocate 1% of his/her tax payment for the sake of public benefit organizations chosen by him or her (Poland);

- Users of PBO services are entitled to a personal tax exemption for the value of the service received (Hungary)[167].

It can be said, that the variety and magnitude of tax benefits, as well as the coverage of other types of support shows relationship between a state and the NPO sector. States with deeply rooted democratic and legal traditions apply benefits to NPOs more widely and diversely than countries where such traditions were less developed historically[168].

The right of PBOs to greater state benefits brings with it more stringent obligations and reporting requirements. Since PBOs are recipients of direct and/or indirect subsidies from the government they are naturally subject to greater government scrutiny. The purposes of this scrutiny are to protect the public from possible fraud and abuse by NPOs and to ensure that public support is linked to public benefit. In positive terms, the goals of supervision are to promote the effective operations of PBOs, by supporting good management, appropriate to the size of the organization, and to ensure that public benefit organizations are accountable to their members, beneficiaries, users and the public. The degree of supervision should be proportionate to the benefits provided, and not so intrusive as to compromise the organization's independence.

There are several basic types of requirements for NPOs.

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[166] Ibid.

[167] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

[168] Andziulytė, R. *Legal analysis of the public benefit* / in Sauliūnas, D., Jokūbauskas, R., Andziulytė, R., et al. Issues of the NGO Legal Framework in Lithuania / NGO Law Institute. – Vilnius, 2008

1) Governing structure requirements. Some countries (Bulgaria, for example) prescribe a special mandatory requirement for a two-tiered governing structure aimed to ensure that the organizations will have additional internal supervision over their activities and that they are indeed undertaking activities and spending the public funds according to their status and other conditions stipulated in the public benefit legislation.

2) Rules regarding use of property, transformation and liquidation.When PBOs are exempt of relevant taxes, they often face greater restrictions on the use of their property than organizations that have not obtained this status, in order to ensure that public money is not used for the private purposes of members closely linked to the organization. An important constraint that can be found in many laws is the prohibition of transformation of the public benefit organization into an organization pursuing private benefits (e.g., Bulgaria, Latvia). Liquidation rules are also specifically prescribed in most of the laws regulating the public benefit status.

3) Supervisory Authorities. The governmental body authorized to regulate PBO activity varies widely from country to country. In nearly every country, the tax authorities play a prominent supervisory role, through their control over the tax treatment of PBOs. Indeed, in countries like Germany and the Netherlands, where public benefit regulation is primarily an issue of tax regulation, it is the tax authorities that play the central supervisory role. In other countries, a ministry (in Bulgaria and in Poland), the public prosecutors (in Hungary) and other specialized governmental bodies (for example the Charity Commission of England and Wales) may be vested with primary authority over PBO supervision.

4) Reporting. To ensure that PBOs are transparent and accountable, the state has legitimate interests in receiving information. Relevant information includes (1) financial information (e.g., annual financial statements, an accounting of the use of assets obtained from public sources and claimed to be used for public benefit) and (2) programmatic information (e.g., a report on activities made in the public interest).

Most commonly, a PBO files reports with the tax authorities, including annual tax returns (even if the organization is exempt) and/or tax benefit application forms (submitted voluntarily), as well as annual activity reports to the supervisory ministry or agency.

Appropriate disclosure of information enables the public to exercise oversight responsibilities. Recognizing this valuable role, many countries expressly require public disclosure. In Hungary, for example it does not require the submission and filing of a public benefit report with a ministry or regulatory authority, but only that the report be made available for review (if the organization does not have a website, making "publicly accessible" will suffice)[169].

5) Audits and Inspections. In addition to reporting obligations, authorities often employ other monitoring tools, such as government audits and inspections. In Germany, for example, tax authorities may conduct regular tax inspections, following notice and an adequate time for the PBOs to prepare; VAT inspections may, however, be conducted without prior notice.

State Enforcement, Sanctions and Withdrawal/Termination. State sanctions against PBOs often include the imposition of fines, for violations such as the failure to file reports. Additional sanctions may be available against public benefit organizations; these typically include the loss of tax benefits and in exceptional cases the termination of PBO status.

Thus, it can be noted that approaches to granting and regulating the public benefit status differ in countries throughout Europe. Although everywhere the goal of introducing this status is to stimulate the public benefit activities and public benefit organizations, however, numerous local factors (existing legal and regulatory framework, local culture

[169] Moore, D., Hadzi-Miceva, K., Bullain, N. *A Comparative Overview of Public Benefit Status in Europe* // The International Journal of Not-for-Profit Law. – 2008. – Vol. 11. – Issue 1 / URL: http://www.icnl.org/research/journal/vol11iss1/special_1.htm

and traditions, tax benefits, level of development of the third sector, relations with the government) influence the regulation significantly.

2.2 Tax treatment of NPOs and donors in EU Member States: domestic cases

2.2.1 Income tax treatment of NPOs: domestic cases

Non-profit activity is the lifeblood of modern society. Although NPOs activity, by definition, does not depend on governments, they, as we concluded in the previous chapter, still play an important role in ensuring the right legislative and regulatory conditions for the development of non-profit activities, including through tax regulation. Tax benefits can be provided to both sides of the donation process, for the donor and for the recipient, i.e. for NPOs. This section is devoted to the studying of tax treatment of NPOs.

2.2.1.1 Tax regime for grants, donations and gifts to NPOs

Such revenues of NPO include all grants, including donations and gifts from individual and corporate donors, grants and subsidies from the state, sponsorship, membership fees paid by members. It should be noted that donations and gifts in this case include income from donors made during their lifetime. Testamentary gifts are considered in the context of taxation of inheritance and donation and are considered in another paragraph.

In European countries, there was a general consensus that grants, donations and gifts to NPO should not be taxed. This is eloquently evidenced by the data presented in Table 2.

Table 2 – Tax treatment income of NPOs from grants and donations

Country	Do public benefit foundations pay income tax on grants and donations?
Austria	No
Belgium	No
Bulgaria	No
Croatia	No
Cyprus	No
Czech Republic	No
Denmark	Yes, unless given in order to build up the foundation’s endowment
Estonia	No
Finland	No
France	No
Germany	No
Greece	No
Hungary	No
Ireland	No
Italy	No
Latvia	No
Lithuania	No
Luxembourg	No
Malta	No, for grants/donations of cash
Netherlands	No
Poland	No
Portugal	No
Romania	No
Slovakia	No
Slovenia	No
Spain	No
Sweden	No

Table 2 (cont.)

United Kingdom	No
Source: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p.	

We can see here some conditions only for Denmark and Malta. In Denmark, income from gratuitous donations and grants is taxed in all cases, except the case in which they are aimed at creating an endowment. In Malta only donations of cash are tax exempted.

2.2.1.2 Tax regime for NPOs' economic activities

Unlike the taxation of income from grants and donations, the approach to taxation of income received as a result of the economic or entrepreneurial activity of a non-profit organization is much more complicated.

Economic activities are considered as a key income source for the NPOs[170] in countries around the globe. Engagement in economic activities enables NPOs to expand the pool of unrestricted resources, but also to develop their services and increase their quality, and to target more effectively the needs of the beneficiaries. In addition, this is an important resource especially for advocacy NPOs, who need to be able to create an independent resource base for implementation of their activities and thus retain a certain degree of independence from the Government[171].

In the last decade researchers have noted the growth of entrepreneurial activity of NPOs around the world and explain this by two reasons:

- Non-profit sector is looking for ways of financial sustainability, diversification of financial resources, obtaining additional funds in the conditions of reduction of state support;

- Increasing dependence on market ideology forces the non-profit sector, at its own will, or in response to the expectations of the government or funds that finance its activities, to consider entrepreneurial activity as a means by which to increase the institutional level of development of a non-profit organization[172].

According to study conducted by L. Salamon and S. Sokolowski, more than 53% of NPOs' income in different countries is generated through fees for services, economic activities, investments and other income generating activities[173].

In the academic literature, one of the foundation typologies is based on the activities of the foundations. A foundation can be, among others, grantmaking, operating, or it could focus on both (mixed foundations). Operating foundations deliver social services within their own programs. Examples of these foundations are schools, hospitals and universities. Grantmaking foundations are a much more modern "invention", with their introduction in the 19th and 20th centuries. These foundations are often endowed foundations engaged in making grants for specific projects/purposes[174]. In some countries there are clear legal

[170] The term not-for-profit organizations is used in a broad sense to encompass non-governmental legal entities that are variously referred to as association, foundations, non-profit companies, public benefit organizations, charities, civic organizations etc.

[171] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[172] Ivanova, I., Liborakina, M., Tolmasova, A. *Problems of the tax regime for charity and non-governmental non-profit organizations and prospects for its change* (in Russian) / Analytical report. Fund "City Economy" & Association of Independent Centers for Economic Analysis. – 2004

[173] Salamon, L., Sokolowski, S., et al. *Global Civil Society: Dimensions of the Nonprofit Sector* / Vol. 2. – Kumarian Press Inc. – 2004. The study included 16 advanced industrialized countries, 14 developing countries from Africa, Asia and Latin America, and 5 countries from Central and Eastern Europe, including the Czech Republic, Hungary, Poland, Romania and Slovakia.

[174] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p.

boundaries between the two types, whereas in other countries the situation is more complex[175].

From some studies of the non-profit sector, it can be concluded that the European countries are historically close to NPOs engaged in operating activities, including economic activities. So, as noted by the authors of "Understanding European Research Foundations: Findings from the FOREMAP project", "historically, European foundations were predominantly of the operating kind, with their own programs and projects and with a clear service delivery function"[176]. A high proportion of operating NPOs has been consistently maintained to this day, despite the fact that the number of grantmaking foundations in Europe is increasing. A study conducted in 2015 "EUFORI Study: European Foundations for Research and Innovation"[177], showed that more than 41% of the 1490 respondents European NPOs claimed to be operating only, whereas 47% of the foundations claimed to carry out just grantmaking activities. The remaining 12% of the foundations are mixed foundations involved in both grantmaking and operating activities. The EUFORI results confirm that operating foundations are indeed an important feature of the European foundation landscape[178].

According to one of the classifications (proposed by F.Amatucci and G.Zizzo), an activity of operating NPOs can be divided into three categories:

- Activities that directly achieve the social purpose or the "institutional" activities;
- Activities related to the institutional activities, such as "auxiliary" or "complementary" activities; and
- Activities unrelated to the social purpose or the institutional activities, usually conducted with the intent to raise money to support the institutional activities.

All these activities, particularly those falling in the latter two categories (in other studies often they are called "related" and "unrelated" activity), may be run as business activities[179]. In this case, it can be in two distinct situations:

1) The NPO runs the institutional activity itself as a business activity;
2) The NPO runs additional activities (related or unrelated to the institutional ones) as business activities[180].

It is necessary to make a digression for characterizing as such an economic activity. Researchers of the non-profit sector make a distinction between economic activity and commercial activity. So, in "Survey of the treatment of economic activities of nonprofit organizations in Europe", prepared by ICNL, it is noted that "generally speaking "economic activities" mean the active sale of goods or services, referred to as "trade or business" activities; it entails sale of goods and services that are pursued with the frequency or continuity"[181]. As a rule, normal asset administration by foundations (including investment in bonds, shares, real estate) is not considered as economic activity.

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[175] Toepler, S. *Operating in a grantmaking world: Reassessing the Role of Operating Foundations* / in Anheier, H., Toepler, S. (eds.) Private Funds, Public Purpose: Philanthropic Foundations in International Perspective. – 1999. – 264 p., pp. 163-184, p.174

[176] *Understanding European Research Foundations: Findings from the FOREMAP project* / European Foundation Center and individual contributors. – 2009. – 199 p.

[177] EUFORI study is a study project quantifying and assessing foundations' financial support and policies for research and innovation in the EU, making a comparative analysis between 29 European countries, and identifying trends and the potential for future developments in this sector.

[178] Gouwenberg, B., Karamat, Ali D., Hoolwerf, B., Bekkers, R., Schuyt, T., Smit, J. *EUFORI Study European Foundations for Research and Innovation.* Synthesis Report / Center for Philanthropic Studies of VU University Amsterdam. – European Union. – 2015. – 129 p.

[179] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

[180] Ibid.

[181] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

As suggested in another ICNL study (1996), in order to determine the difference between the economic and commercial activities of an NPO, it is necessary to compare "the ways in which non-profit organizations conduct their activities and how to conduct similar activities by traditional commercial organizations". From this point of view, "commercial" activity can be defined as a subdivision of "economic" activity, consisting of those types of work in which there is a "commercial partner"[182]. Other factors have also been suggested to indicate inappropriate commerciality, such as profitable operation and the accumulation of profits, competition with for-profit companies, extensive and successful expansion, and the use of paid workers[183].

This conceptual distinction between an economic and commercial activity is slippery and difficult to define and implement. The main reason is the lack of agreement on what defines a "commercial partner" or "significant competition". In addition, identifying such a distinction requires that government officials (or judges) engage in a complex microeconomic analysis of the activities of NPOs and their partners[184].

The difference between terms "economic" and "commercial/business" activity is unclear and in national legislations, although some jurisdictions attempt to create a distinction between "economic" activities and "commercial" activities, treating "economic" activities more permissively. For example, the laws in Hungary distinguish between economic activities related to the statutory purposes and commercial/entrepreneurial activities which "aim at or result in obtaining income and property" and are unrelated to the statutory activities[185]. In France, if the NPO undertakes an activity in a field with market competition, in order to apply a preferential tax regime it is necessary to assess if the activity is operated in ways differing from those of an ordinary business, taking into consideration the kind of product offered, the price asked, the target clientele and the marketing methods. If there is a significant difference, the activity is regarded as a non-profit activity and qualifies for tax relief[186].

Naturally, the issue of providing tax incentives for a certain activity takes place only where this activity is permitted. That is why at this stage of the analysis, the question is not whether such activities are or should be tax exempt, but whether there is or should be a limit to economic activities undertaken by an NPO.

Science gathered a considerable number of arguments "for" and "against" the permission of NPOs to engage in economic activities. The volume of thesis does not allow us to examine them in detail[187]. Let's note, however, that in almost all countries of Europe (except Czech Republic and Malta) NPOs are generally permitted to engage directly in economic activities. This is completely consistent with EU framework documents on the status of NPOs in Europe. However, pursuit of economic activities is a special case, since the NPOs' non-profit-making nature that distinguishes them from commercial enterprises. Therefore, although "Fundamental Principles on the Status of Non-governmental Organisations in Europe"[188] lays down the principle that "an NGO is free to carry on any economic, business or commercial activity", there is a condition, that "any profits are used to finance

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[182] *Economic Activities of Not-For-Profit Organizations* // Materials of the Conference on the regulation of civil society. – ICNL. – Budapest. – 1996 / URL: http://www.lawtrend.org/wp-content/uploads/1999/03/Econ1.-activityrus.pdf

[183] Hopkins, B. *The law Of Tax-Exempt Organisations* / 11th Edition. John Wiley & Sons. – 2015. – 1152 p., p.343

[184] *Economic Activities of Not-For-Profit Organizations* // Materials of the Conference on the regulation of civil society. – ICNL. – Budapest. – 1996 / URL: http://www.lawtrend.org/wp-content/uploads/1999/03/Econ1.-activityrus.pdf

[185] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[186] National report of France / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.255

[187] They are considered in detail, for example, in Hadzi-Miceva, K., Bullain, N. *Supportive Financing Framework for Social Economy Organizations* / in Social Economy – Building Exclusive Economies (OECD Local Economic and Employment Development (LEED) Programme), 2007

[188] *Fundamental principles on the status of non-governmental organisations in Europe* (and explanatory memorandum)// Council of Europe, Strasbourg, 13 November 2002, FP Final / URL: http://www.legislationline.org/documents/action/popup/id/8082

the pursuit of the common- or public-interest objectives for which the NGO was set up"[189]. Later document of the Council of Europe – Recommendation CM/Rec(2007)14 "Legal status of non-governmental organisations in Europe"[190] also states that "NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required"[191].

Practically, most Member States have set requirements that determine the ability of NPOs to engage in economic activities.

1) Statutory purpose. The most common requirement on NPO economic activity employs the notion of statutory purpose.

a) Economic activity related to statutory purpose. The first and most common condition of these requires that the economic activity be related to the organization's statutory purpose. The countries with this requirement include Estonia, Croatia, Bulgaria, Lithuania, Romania, and Slovenia.

b) Income from economic activity used to support statutory goals. A second condition related to statutory purpose requires that income from economic activities be used solely to support statutory goals. That is, instead of focusing on "whether" the economic activity is related to the organization's statutory purpose, this requirement focuses on "how" the income from such activity is used. Bulgaria uses this requirement.

2) Incidental/auxiliary/not primary purpose. Another most common type of condition for economic activity requires that such activity not be the primary purpose or main activity of the NPO but rather an incidental or auxiliary activity. Countries with this restriction include Latvia, Czech Republic, and Romania[192].

Generally, for the NPO to enjoy a favourable tax regime, these business activities must remain in a subordinate position, even though the funds are entirely spent in the institutional activity. In other words, the institutional activity must always be predominant for the entity to be accepted as an NPO for tax purposes[193]. Some countries provide a specific threshold. For example, the Netherlands requires the entity to pursue public benefit purposes for at least 90%[194]. Spain requires that the income from non-institutional economic activities does not exceed 40% of the total earnings of the entity[195]. Sweden allows non-institutional activities only if they are insignificant, e.g. not more than 5%-10% of all activities[196]. Belgium does so only if the business activities are in size and importance subordinate to the non-profit activities or when the business activity is carried on in a clearly non-business-like manner.

If not otherwise specified, in order to weigh institutional and non-institutional activities, usually a case by case analysis is necessary, taking into account elements both of a quantitative (revenues, expenditures, time spent) nature and a qualitative nature (relation with the public benefit purpose)[197].

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[189] Ibid. [Explanatory memorandum], para. 27

[190] *Legal status of non-governmental organisations in Europe*. Recommendation CM/Rec(2007)14 adopted by the Committee of Ministers of the Coincil of Europe on 10/10/2007 and explanatory memorandum

[191] Ibid., para.14

[192] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[193] National reports France, Germany, Italy, Norway, Portugal and Switzerland / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p.

[194] National report of Netherlands / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.376

[195] National report of Spain / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 515.

[196] National report of Sweden / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.541

[197] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

3) Identified in founding documents. Some countries allow an NPO to engage only in economic activities identified in its founding documents. It is used in Slovenia and Croatia. For example, Croatia allows NPOs engagement in economic activities to the extent it is necessary and only in those activities, which are enumerated in the statute so that the registration authority could review their legitimacy in advance. However, the lack of clear criteria regarding what is considered to be an economic activity often is one of the problems in implementing this provision.[198]

4) Registration. In Poland, an NPO can only engage in economic activities if the organization has been registered in the entrepreneurs' court register.

Table 3 summarizes data on the involvement of NPOs of EU countries in economic activities and the restrictions imposed on these activities by national legislations.

Table 3 – Involving NPOs of EU countries to economic activities[199]

Country	Are economic activities (related/ unrelated to the public benefit purpose) permitted?	Is there a ceiling or other type of limitation? If yes, what are these?
Austria	Public benefit foundations: related only. Private foundations: related and unrelated	Yes, economic activities must be ancillary
Belgium	Yes, related and unrelated	No
Bulgaria	Yes, related	Yes, economic activities must be ancillary
Croatia	Yes, related and unrelated	No
Cyprus	Yes, related and unrelated, depending on the type of organisation	No
Czech Republic	Yes, related and unrelated with some limits	Cannot be purpose itself. Profits have to be used for foundation purpose only.
Denmark	Yes, related and unrelated	Yes, for non-profit foundations economic activities must be ancillary.
Estonia	Yes, related and unrelated	No
Finland	Yes, related and unrelated	No
France	Yes, related	Yes, economic activities must be ancillary
Germany	Yes, related and unrelated	If the annual income from unrelated economic activity does not exceed €35,000, it is not taxed. The tax-exempt ceiling for income from sporting events is €45,000.
Greece	Yes, related	No
Hungary	Yes, related	Yes, 60% of the total income of the foundation
Ireland	Yes, related and unrelated	No
Italy	Yes, depending in the type of organisation	Yes, economic activities must be ancillary
Latvia	Yes, related and unrelated	No
Lithuania	Yes, related and unrelated	No
Luxembourg	Yes, related and unrelated	No
Malta	No, but some exceptions exist	Yes, economic activities must be ancillary
Netherlands	Yes, related and unrelated	No
Poland	Yes, related and unrelated	No

[198] Hadzi-Miceva, K., Bullain, N. *Supportive Financing Framework for Social Economy Organizations* / in Social Economy – Building Exclusive Economies (OECD Local Economic and Employment Development (LEED) Programme), 2007

[199] For the purposes of this table economic activity can be understood as "trade or business activity involving the sale of goods and services". "Related" economic activity is in itself related to and supports the pursuance of the public benefit purpose of the foundation.

Table 3 (cont.)

Portugal	Yes, related	No
Romania	Yes, related	Yes, economic activities must be ancillary. Annual limit of €15,000 profit
Slovakia	No, but some exceptions exist	n/a
Slovenia	Yes, related and unrelated	Yes, income generated must amount to less than 30% of the foundation's total income
Spain	Yes, related and unrelated	No limit for related economic activities. Income generated from unrelated activities must not exceed 40% of the foundation's total annual income.
Sweden	Yes, related	No
United Kingdom	Yes, related	Yes, economic activities must be ancillary
Source: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p., p.23		

It can be noted that in almost all countries of Europe NPOs are generally permitted to engage directly in economic activities.

The tax treatment of the income from economic activities differs widely among the countries of Europe. Some countries, such as the Netherlands and Slovenia, tax all income from economic activities. Others prescribe certain conditions, which must be fulfilled for the organization to benefit from profit tax exemption.

The first difference among the countries relates to the types of organizations that receive the exemption from profit tax. The following models are represented in the region. In European countries the following models can be found:

- A broad range of NPOs are eligible to claim exemptions (e.g., Czech Republic, Croatia, Hungary, Latvia, Lithuania, Romania and Slovakia).

- Only those NPOs that engage in certain types of activities intended for public benefit or organizations that have attained public benefit (PBOs)[200] status or charitable status (e.g., England, Estonia, Ireland,[201] Poland) are eligible to claim exemptions.

- Very limited categories of organizations are eligible for tax exemptions.

In addition to limitations on the type of qualified NPO, different countries use diverse methods to determine the extent to which the income from economic activities will be tax exempt. Generally, countries employ different methods in order to restrict the use of economic income, so as to ensure that the economic activity remains a supplemental, rather than the primary activity of an NPO.

There are six different approaches to taxation of NPOs income from business activity. Any net income received by an NPO from an entrepreneurial activity can:

a) be fully taxable;

b) be completely exempt from income tax;

c) be subject to income tax only if it was not received as a result of activities related to the statutory goals of the NPO, i.e. as a result of related activities - the so-called "the related nature approach";

d) be subject to income tax, unless it is directed to financing the basic public benefit goals of the NPO – "the destination of income approach";

[200] The public benefit status essentially distinguishes between organizations that are established for the mutual interest of the members, such as sailing clubs, from those whose activities benefit a larger community. Countries generally list the type of activities that are considered of public benefit and prescribe the criteria to further define the status.

[201] For example, in Ireland the Revenue Commissioners determine which is granted charitable tax exemption. This body will be issued a charity reference number e.g. CHY 1111 and this CHY number needs to be quoted in all future correspondence with Revenue.

e) be exempt from income tax in certain limits established by the national legislation and to be taxed at a rate exceeding this limit;

f) be subject to income tax according to an integrated approach combining some aspects of the above approaches.

Let's consider these approaches in relation to EU countries.

a) The whole profit is a subject of taxation.

One approach is to tax all NPO profits derived from direct economic activity. The following countries generally tax all profits, with some exceptions as indicated: Bulgaria, Slovenia.

The main argument for full taxation of NPO economic activities is that if they are not taxed there is potential for NPOs to gain a competitive advantage over for-profit organizations. Some argue that tax-exempt profits give NPOs higher post-tax rates of return on their business activities than for-profit organizations. Tax-free profits may also enable NPOs to maintain lower profit margins on their economic activities. This advantage could be used to reduce prices on goods and services below levels which are competitive, or even sustainable, on the part of for-profit organizations. Additionally, an NPO may use tax savings to reinvest in economic activities in a way non-exempt for-profit organizations could not. Also, tax exemptions may provide NPOs with a larger capital base, which can be used to finance expansion and outbid for-profit organizations for land and facilities. In summary, proponents of this approach argue that with the possible exception of certain traditional public benefit activities, it is necessary to tax all economic activities to place NPOs and for-profit organizations on an equal footing in the marketplace. This argument, for example, prompted the Croatian legislature to pass a law pertaining to this perceived competitive advantage. Income from economic activities by NPOs may be subject to tax if the Tax Administration finds that exempting that income would result in the NPO's gaining an "unjustified privileged position in the market", in which case the economic activities are taxed at a rate of 20%.

A second argument in favor of full taxation is that NPOs enjoy competitive advantages over for-profit organizations separate from tax exemptions, thus eliminating the need for further subsidization. As mentioned above, NPOs may already have a competitive advantage over the for-profit sector because they are not required to expend as much capital to achieve the same result. As NPOs operate to serve the public benefit, they have a built-in positive reputation with consumers and need not engage in public relations and advertising to the same extent as for-profit entities. In addition, NPOs often have access to free labor in the form of volunteers and consequently spend less on wages and benefits for their employees, giving them another advantage over their for-profit counterparts. Also, in addition to generating income from economic activities, NPOs may also be receiving government funds and private donations. Proponents would argue that these non-tax benefits eliminate the need to provide NPOs with tax benefits.

Third, the full taxation approach is easier to administer since NPOs are treated like any other organization for tax purposes. And fourth, full taxation eliminates the possibility and therefore minimizes the potential for abuse by organizations attempting to take advantage of NPO tax preferences.

b) Full exemption / No taxation.

Some countries fully exempt income from economic activities. As noted earlier, in Hungary all NPOs are exempted from profit tax on income from economic activities (however are taxed on the income from commercial activity). In Croatia associations and foundations are generally exempt from profit tax. However, if an organization performs for-profit activity and if exemption from the tax would give the organization an "unjustified privileged position in the market" then such income will be taxed at the regular tax rate. The law does not define what will constitute "an unjustified privileged market position" and it therefore leaves it up to the tax administration to determine on case by case basis.

The main reason to fully exempt NPO from taxation of income from economic activities, is that such NPOs often lessen the government's burden to provide similar services – the so-called the Public Good Theory, which was discussed in the first chapter of the dissertation and all the advantages that distinguish the non-profit sector from commercial or state sectors, and which we discussed in the first chapter.

Further, giving NPOs a competitive advantage (through exemption in taxation) in certain fields may serve the public as NPOs are often able to identify needs and solve problems more quickly and efficiently than government bureaucracies. Also, NPOs are often able to provide needed services at a lower cost and higher quality than for-profit organizations, which are bottom-line driven.

Finally, as to the argument that giving NPOs preferential tax treatment results in unfair competition with the for-profit sector, it has been argued that empirically such concerns are largely unfounded and the negative impact on the for-profit sector overestimated. First, small businesses are often able to avoid profit taxes by means unavailable to NPOs. Large salaries and expensive offices may allow small businesses to substantially reduce paying income tax. Second, small businesses are eligible to receive loans from lending institutions, whereas NPOs are generally ineligible for loans. Third, economic activities in which NPOs take part generally fall in the province and jurisdiction of the not-for-profit sector and therefore do not compete with for-profit entities. This is especially true when a country uses the "relatedness" approach to NPO tax exemption.[202]

c) The related nature approach.

This approach looks to the source of the income. Under this approach, NPO income is tax exempt if it derives from economic activities sufficiently related to the public benefit purposes of the organization. Generally the activities that are considered as unrelated to the statutory goals will be taxed same as other entities. This is the case of Latvia, Germany, UK, Sweden, the Netherlands, Spain. As noted by F.Amatucci and G.Zizzo, "in the fields of welfare, health care, education, culture or sports the institutional activities may be carried out as non-business activities (without charging a price or charging a price of a symbolic amount) or as business activities[203]. Moreover, often, the most effective way for an NPO to achieve its purposes is to pursue them through economic means". For example, NPOs which assist certain disadvantaged groups within society would find it natural to produce and/or distribute products that serve that group (like medical devices for people with disabilities). NPOs supporting cultural causes often publish informational materials or charge admission to cultural events. Such activities are a logical extension of the goals of the NPO. As long as the public benefic goals remain the principle purpose of the NPO and the income is not improperly distributed, exempting profits from such related activities is appropriate and justifiable[204].

Many countries acknowledge this possibility and allow NPO's to run institutional activities as business activities. Some grant institutional activities a privileged tax regime regardless of the business-like or non-business-like nature of the activities[205]. In Germany, "dedicated activities", i.e. those carried out in order to "directly achieve" the qualifying purpose, are not regarded as business activities[206]. The United Kingdom applies an exemption to profits stemming from charitable trade, i.e. "a trade carrying out a primary purpose

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[202] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[203] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

[204] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[205] Italy (under the ONLUS regime), Norway and Poland.

[206] National report of Germany / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.281

(i.e. a charitable purpose) of the charity or where the work in connection with the trade is mainly carried out by the beneficiaries or the charity"[207]. Spain provides a list of economic activities, such as promoting and managing social welfare activities, hospitalization and health care assistance, scientific research, technological development and others[208]. These are exempted as long as they are carried out in pursuit of the entity's qualifying purposes. In the Netherlands, certain activities, such as maintaining a designated country estate, pension funds, hospitals, care for elderly people and libraries, are exempt even when they are run as business activities[209]. Sweden exempts business income that is directly attributable to the entity's public benefit activities or is a direct feature of these activities[210].

The related nature approach attempts to address concerns of unfair competition and it makes theoretical sense.

A second argument in favor of this approach is that it does not provide NPOs with tax advantages over for-profit entities in "unrelated" fields as there is little incentive for NPOs to become involved in activities which are not related to their public benefit purposes. Tax preferences are only provided for publicly beneficial activities. For these activities, deemed particularly worthy of support by society, claims of unfair competition by for-profit organizations might deserve a less sympathetic ear. Also, "related" activities are often naturally within the jurisdiction of the NPO and may be of little commercial interest to the for-profit sector. In addition, it is possible to cap the amount of tax exempt "related" income to reduce concerns that this preference might be abused or exploited.

Third, by exempting only "related" activities, this approach encourages NPOs to engage only in economic activities which are related to their purposes and generally worthy of support. It reduces the temptation to get involved in economic activities merely because they are profitable.

Fourth, in granting such exemptions, governments not only provide additional revenues to NPOs, they also provide incentives and send signals for NPOs to engage in certain forms of behavior. NPOs often perform essential services that would otherwise have to be performed by the government and which might be under-supplied without a tax exemption. Additionally, the not-for-profit sector is often able to identify such need more quickly and meet them more efficiently than governmental bureaucracies. While this argument can be used to justify any governmental support of NPOs, it is much more persuasive when it concerns activities related to public benefit purposes.

Probably the major disadvantage of this approach is that it can be complex to administer since it is often difficult to decide which economic activities are closely enough "related" to satisfy the test. For example, if a museum opens a shop on its premises to sell books about or copies of works in its collection, this is clearly related to the purposes of the museum and should not give rise to taxable income. But what if the museum opens a retail store somewhere else which sells materials about art and culture in general? Geographic location can be important, since a coffee shop on the museum premises would be seen as a natural step to enable visitors to obtain refreshments, which such an establishment on the other side of town should clearly be considered an unrelated activity.

The complexity of defining related and unrelated activities gives rise to many reasons for theoretical reasoning and hampers the development of laws or regulations which adequately codify the concept of "relatedness". That's why guiding principles must often be

[207] National report of United Kingdom / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.603

[208] National report of Spain / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 515.

[209] National report of the Netherlands / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.376

[210] National report of Sweden / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.541

established on a case by case basis. After a body of decisions or norms concerning application of the rule exists, this is likely to be a less serious problem.

Compared to the approach, which will be considered next, this approach creates fewer tax exemptions for NPOs, a negative for NPOs, but more tax revenue, a positive for the government[211].

d) Destination of income approach.

This approach looks at the destination of the NPO's income – or what are the purposes for which the income is used. Under this approach, income used for charitable or public benefit purposes is tax exempt; all other income is taxed.

Countries that exempt all income which is used for charitable or public benefit purposes include Poland (No tax if income is devoted to public benefit goals specified in the tax law[212]). Sweden, Finland and, to some extent, the United Kingdom also apply a favourable tax regime to unrelated activities (e.g. bingo, lotteries, etc.) only when customarily used to finance public benefit activities[213].

This is a desirable approach in many ways. First, it is based on the premise that tax exemptions should only subsidize activities which benefit the public, so only income actually spent in furthering public benefit purposes should be tax exempt. Proponents argue that tax preferences are appropriate for activities which would or should otherwise have to be undertaken by the government to improve the situation of the citizenry. Second, although this approach does require a (sometimes difficult) determination of whether income has been spent for public benefit purposes, generally speaking it avoids the complex analysis required in some other approaches, such as the relatedness test, discussed below.

Third, when there is no limit to the exemption, this approach provides the greatest level of financial support to NPOs since, as long as income is devoted to public benefit purposes, NPOs do not incur any tax liability. Of course, this "advantage" is a matter of perspective. From the government's point of view this is a disadvantage as this approach would probably generate the least amount of tax revenue. This revenue loss can, however, be limited by imposing a ceiling on the amount of income exempt from taxes, a "threshold" approach discussed next.

The main criticism of this approach is that it creates unfair competition. For example, under this approach, even if an NPO spent 99% of his time on purely entrepreneurial activities and earned 99% of his income from purely entrepreneurial activities, for example, from the manufacture and sale of pasta, it could be considered as an NPO exempted from income tax, in case of using all profit for non-profit purposes.[214] So, in the same time the NPO would probably be competing with other for-profit manufacturers of pasta who would be paying taxes on whatever profits they earn and would therefore have to sell the pasta at a higher price. Thus, this approach risks potentially negative macroeconomic consequences for the business sector. Indeed, the United States abandoned the destination of income approach in favor of a relatedness approach due to unfair competition concerns.

Another criticism of this approach is that it allows NPOs to engage in income generating activities completely unrelated to their goals, with various possible negative consequences. First, it may divert an NPO's attention and energies away from the purposes and goals for which it was established. Second, this approach may lead the public to view NPOs as nothing more than for-profit businesses in disguise. Third, more than other ap-

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[211] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[212] Ibid.

[213] National reports of Finland, Sweden and the United Kingdom / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p.

[214] If an NPO does business directly, but through a subsidiary, the tax authorities may treat the subsidiary as a business entity, but at the same time release it from paying income tax on income transferred to the founding NPO. The result remains the same: commercial activity is allowed, and incomes are not taxed.

proaches, it may attract unscrupulous individuals seeking to use an NPO for tax evasion purposes[215].

In our opinion, the "destination of income criterion" has a wider scope than the related nature approach, since it is used for all income-generating activities, and not only for those activities that are carried out to achieve public benefit purposes. This feature, perhaps, can also be an additional argument in choosing a specific country's policy in the field of taxation of economic activity of NPO.

e) Threshold approach.

As already mentioned, this approach places a ceiling on NPO tax exemptions in monetary terms, percentage terms, or both. For the countries surveyed, this approach, when present, is always combined with another approach (i.e., a hybrid approach). For example, the Czech Republic combines this approach with the destination of income approach. And Hungary and Slovakia combine this with the relatedness approach.

Hungary combines the relatedness test with the threshold method by introducing a certain limit of exemption for income from unrelated commercial activities. As mentioned above, all economic activities that are included in the statute of the organization as supporting the mission are not subject to taxation. Income from commercial/entrepreneurial activities (those that are unrelated to the mission) is taxed only if such income exceeds the envisioned threshold. For example, all NPOs, regardless of whether they acquired public benefit status or not, may benefit from tax exemption on the income from commercial activities which does not exceed 10% of total income or 10 million HUF (€32 270). Further, the Hungarian law also creates two categories of public benefit organizations, which are entitled to higher percentage of the exemption. Thus, organizations that have acquired public benefit status are exempt for commercial income that does not exceed 10% of total income or 20 million HUF (€64 538), and those who have obtained status of prominent public benefit organizations are exempt up to 15% of total income.

In France, earnings from economic activities are exempt from tax, provided that they are not distributed and that other features are present to distinguish the organization from a commercial entity. Specifically, NPOs with annual revenue exceeding € 60 000 are eligible for tax-exempt status if: (1) management does not have a financial interest in the NPO; and (2) the NPOs do not compete with the commercial sector. NPOs with annual revenue below € 60 000 can receive tax-exempt status only if (1) not-for-profit activities are their predominant activities and (2) they do not distribute any income or assets to any private interests.

In Germany, public benefit organizations (PBO) may carry out business activities. Profits are free from corporate and commercial tax, as long as the business activities are necessary to pursue the PBO's statutory public benefit purposes (education, health care etc.). Unrelated commercial activities are ordinarily taxed if the income amounts to more than about € 35 000.

In Romania, non-profit legal persons are exempt from profit tax on income obtained through economic activities during a fiscal year, provided that the amount is less than the equivalent in Romanian currency of €15 000 for a fiscal year.

One rationale for this approach is that the government can use it to limit the losses of tax revenue posed by the destination of income and relatedness methods of taxation.

A second rationale is that it is usually relatively easy to administer (although, as this approach is usually combined with another approach, administrative difficulties may remain).

[215] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

Third, this approach discourages for-profit organizations from masquerading as NPOs to gain tax benefits and allays fears of unfair competition with the for-profit sector by restricting the amount of tax free profits an NPO may generate.

Fourth, limiting tax benefits on income from economic activities can help preserve the integrity of the NPO sector by ensuring that the economic activity remains a supplemental, rather than main, activity of the NPO.

Finally, this approach still allows and encourages NPOs to engage in economic activity, at least up to a point and provides guarantees against the possible misuse of the income[216].

f) Mixed approach.

Some countries use two or more approaches when establishing requirements for the tax exemption of income from the economic activities of an NPO. For example, in applying the related nature, some countries apply a ceiling on the tax exempt income, even if it is obtained from activities related to the basic public benefit activities. Examples of such an approach can be all the countries listed as an example of the previous approach.

Note that the choice of approach depends on the social, economic, political and legal traditions and conditions in each country[217].

Data on tax regime of income from NPOs economic activities and income from NPOs asset administration in EU countries are presented in the table 4.

Table 4 – Tax regime of income from NPOs asset administration and NPOs economic activities[218]

Country	Is income from asset administration taxed?	Is income from asset administration taxed?
Austria	No	No
Belgium	Yes, certain types of asset income listed by the law	No, if remain ancillary or if the foundation is active in the so-called "privileged sectors" listed by the law. If none of these grounds for exemption applies, total income subject to corporate tax.
Bulgaria	Yes, except for income from sale of shares on a regulated Bulgarian market	Yes
Croatia	No	No, unless a tax exemption would lead to unfair competition
Cyprus	No	Yes
Czech Republic	No, income from the registered endowment of a foundation is exempt from income tax	n/a – economic activities not permitted
Denmark	Yes, but dividends received from companies in which the foundation holds at least 10% of the shares are exempt from tax	Yes
Estonia	No	No
Finland	No, with some exceptions	Yes, if unrelated

[216] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[217] *Economic Activities of Not-For-Profit Organizations* // Materials of the Conference on the regulation of civil society. – ICNL. – Budapest. – 1996 / URL: http://www.lawtrend.org/wp-content/uploads/1999/03/Econ1.-activityrus.pdf

[218] For the purposes of this chart economic activity can be understood as "trade or business activity involving the sale of goods and services". According to the above, normal asset administration by foundations (including investment in bonds, shares, real estate) would not be considered as economic activity.

Table 4 (cont.)

France	No	Yes, if unrelated or if the annual profits derived from related economic activities exceed €60,000
Germany	No, for tax-exempt public benefit foundations	Yes, if unrelated and the income exceeds €35,000
Greece	Yes	No
Hungary	No	No, if income from economic activities represents less than 15% of the total income.
Ireland	No	No, if related
Italy	Yes	Yes, except for the tax exemption for ONLUS
Latvia	No	No
Lithuania	No, but with limitations	Yes, within a specified threshold
Luxembourg	No	No, if related
Malta	Yes, unless the public benefit foundation is tax exempt or a specific exemption applies with respect to that income	n/a economic activities generally not allowed
Netherlands	No, provided that the activities do not entail more than regular asset management as performed by individuals	No, provided that the annual profit does not exceed €15,000 or the profit from the reporting year and the 4 preceding years does not exceed €75,000
Poland	No	No, provided that the income is spent on the foundation's statutory public benefit activity.
Portugal	No, except for income from bearer securities	Yes, if unrelated
Romania	Yes, if profits exceed €15,000	Yes, if profits exceed €15,000
Slovakia	No, except for income from the sale of investments	No, but only allowed to a very limited extent – lease of real estate
Slovenia	No	Yes
Spain	No	No, provided the activities are purpose related and ancillary
Sweden	No, except for Income from leasing of a property that belongs to the foundation	Yes
United Kingdom	No	No, if directly purpose related. Profits from unrelated economic activities are only taxed if the annual sales exceed the lower of (a) 25% of the foundation's total sales or (b) the equivalent of approximately €60,000
Source: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p., p.47		

The table demonstrates that, although the details of tax legislation may vary from country to country, the general features of the restrictions on the economic activities of NPOs in the EU countries are briefly presented in this way:

1) Most countries broadly permit NPOs to engage in economic activities, but then use tax laws to insure that NPOs do not engage in economic activities to the extent that they become commercial companies[219].

2) In most countries income from economic activities is at least partially tax exempt[220];

[219] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

3) Institutional and related activities often enjoy a favourable tax regime even if they are conducted as business activities;

4) Unrelated business activities, when allowed, do not usually enjoy the same tax regime, even when the profits they generate are used to fund the institutional activities[221]. Some countries also exempt unrelated economic activity, but only if this is conducted on a small scale;

5) A handful of countries do however tax all business income in full whether from related or unrelated activity[222].

As an inference, it should also be added that the rules permitting or restricting economic activities are distinct from rules relating to the taxation of income from such activities – but they are closely related and work together to balance the benefits of allowing economic activities with the need for some limitations on those activities.

There are various methods that can be used to determine the appropriate approach to regulation and taxation of economic activities. In deciding which approach to implement in the country it is important to consider the aims of the legislative reform, the local economy situation, the level of development of the NPO sector and its capacity, the level of engagement in economic activities, types of activities NPOs pursue and other factors. Thorough consideration of all factors will help ensure that the most appropriate strategies are adopted to support the aims of the regulation and ensure its effective implementation[223].

2.2.2 Income tax treatment of donors: domestic cases

All over the world the tax incentives for donors of NPOs are the norm. Tax incentives of some description are offered to corporate and individual donors in the majority of countries across all income groups with the exception of low income countries[224]. So, 80% of high income countries offer tax incentives to corporate and individual donors. In this case, incentives for corporate donors are more common - some form of tax incentive is offered to corporate donors in 77% of nations whilst some form of incentive is offered by governments to encourage individual giving in 66% of countries. 28 countries (16%) offer tax incentives to corporate donors but offer no incentives for individuals.

Tax incentives are effective in all contexts of economic development. As results of the study "Rules to Give By. A Global Philanthropy Legal Environment Index" showed, the influence of tax incentives on giving does not depend on a country's level of economic development. For example, across the economic spectrum, countries which offer tax incentives to individuals see higher rates of people giving money to charity according to the World Giving Index (difference of 12 percentage points)[225].[226]

Most European countries provide variety of more or less favourable tax treatment of contributions donated for NPOs, when the provisions set by national tax legislation are

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[220] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p., p. 13

[221] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

[222] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p., p. 13

[223] *Survey of the treatment of economic activities of nonprofit organizations in Europe* / ICNL. – 2007. / URL: http://www.ecnl.org/dindocuments/185_Economic%20Activities%20Paper%202007.pdf

[224] It is used the division of the countries on income level developed by the World Bank

[225] It is important to recognize that a relationship between incentives and the propensity of people to donate is not one in which we can demonstrate causation. It may well be, for example, that nations with a strong culture of charitable giving are more likely to develop incentives. Nevertheless, taking into account the breadth of the sample, we can assume the existence of such a relationship.

[226] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p.

met[227]. So, in 88% of European countries the corporations have tax incentives for giving; in 85% of European countries individuals have tax incentives for giving (Figure 7).[228]

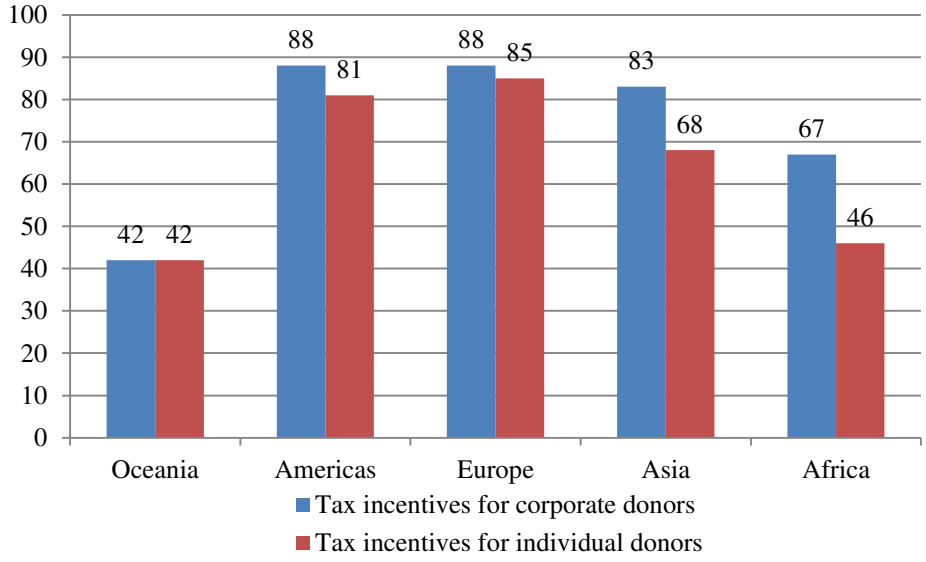

Figure 7[229] – Percentage of countries provided tax incentives for corporate and individual donors of NPOs (by continent)

Tax benefits for donors can take many forms:

1) tax deduction schemes (reducing taxable income);

2) tax credit schemes (reducing the amount of tax);

3) tax benefits reclaim schemes (refund of tax paid)

4) tax designation schemes, also referred to as "percentage schemes" (transfer of a portion of the tax paid by the donor to the NPO)

5) the treatment of some expenses in respect of gifts as deductible costs.

From a technical point of view, the most common incentive is a tax deduction: the donor can deduct the amount of donation from his personal taxable income. There are alternative approaches, but they are very rare. Some countries use a tax credit mechanism in their schemes of tax incentives for donors of NPOs. An example could be Portugal where an individual taxpayer is not granted a deduction in the tax base but instead a tax credit. The creditable amount is limited to 25% of the value donated up to a maximum of 15% of the tax assessed[230]. Another example is France, which allows personal income tax reduction at 66% of the value of the gift, up to 20% of the donor's taxable income; alternatively wealth tax reduction of 75% of the value of the gift, up to €50,000. Italy also provides for a tax credit option for individuals, allowing reducing the tax payment by 26% (up to the maximum amount of € 2,065.83)[231].

A rarer scheme is tax benefits reclaim scheme. One example of such a scheme – is a Gift Aid Scheme in the UK. Donating through Gift Aid means charities and community

[227] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 25.

[228] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p., p.29

[229] Rules to Give By. A Global Philanthropy Legal Environment Index / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p.

[230] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[231] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 23

amateur sports clubs can claim an extra 25p for every £1 donor gives. It won't cost donor any extra[232]. The same rule applies, but at the equivalent trust rate, to money gifted by non-charitable trusts to a charity. Accordingly, the taxpayer may lower the correlative donated sum. This means that the taxpayer does not receive tax relief or credit but rather an indirect benefit[233]. But higher rate taxpayers in UK can claim the difference between the rate they pay and basic rate on their donation. Example: the donor donates £100 to charity - he claims Gift Aid to make his donation £125. He pays 40% tax so he can personally claim back £25.00 (£125 x 20%)[234]. The same scheme is still effective only in Ireland: charities (but not the donors) can claim a tax refund up to 31% (for donations of € 250 - 1 million).

In general this type of preference does not provide a direct incentive for donors because it does not reduce their taxes. It is more valuable to individual taxpayers who plan their donations carefully, for they can ensure that the charities will receive the amount they want them to by making contributions net of the tax that would otherwise have been payable on the gross amount of the gift. The advantage of the so-called scheme "Give Us You Earn" is that it seems to be administrated in a fairly straightforward and easily understandable fashion[235].

Tax designation schemes, accepted, for example, in Hungary, Romania and Lithuania, allow taxpayers to designate a small percentage of their tax payment, which must be paid in the current year, in favor of one of the NPOs of their choice. This simple mechanism for transferring tax payments to NPOs is quite effective – for example, the so-called "1% Law" in Hungary, which has been operating since 1996, only in the first year of its operation accumulated $9 million to support public benefit activity of NPOs[236].[237] In Romania and Lithuania when paying income tax a taxpayer can designate 2% of his tax payment in favor of a NPO. As a rule, the state offers a list of certain NPOs, from which the donor can choose his recipient. The same system acts in Italy: donor can designate €8 from each €1,000 of his tax payment in favor of one of the NPOs (usually religious) from the proposed list, €5 from each €1,000 of tax payment – in favor of any other ONLUS by his choice, €2 from each €1,000 of tax payment in favor of one of the active political parties.

In some countries several forms of tax incentives for donors are used simultaneously. For example, in Poland, three forms of tax relief regarding donations are provided: the first offers the possibility to deduct the amount of tax due; the second allows the amount to be deducted from the tax base and the third enables the treatment of some expenses as deductible costs[238]. In Italy also three options for tax relief (at least for individuals) are provided: a tax deduction, a tax credit and the tax designation scheme described above.

But what distinguishes the various tax treatments of such donations from one jurisdiction to another are the variations in conditions and limitations set by the respective tax laws[239]. In addition to the type of tax benefits, the differences can relate to 1) the magnitude of tax benefits in general; 2) restrictions on some public benefit purposes, 3) restrictions on the type and form of NPOs; 4) limiting tax benefits to a certain value or pro-

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[232] *Charities, volunteering and honours* / URL: https://www.gov.uk/donating-to-charity/gift-aid

[233] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[234] *Charities, volunteering and honours* / URL: https://www.gov.uk/donating-to-charity/gift-aid

[235] Irish, L., Simon, K. *Tax Preferences for non-governmental organizations* / in P. Bater, F.Hondius, P.Liebe (eds.). The tax treatment of NGOs: legal, fiscal, and ethical standards for promoting NGOs and their activities / Kluwer Law International. – 2004. – 84 p., pp. 303-322, p.318

[236] Hirlap, M. *One-third of Citizens Donated Forints* / NIOK. Civil World, 23/09/1997

[237] *Tax benefits for non-governmental organizations. Overview* / ICNL. – 2005. – 24 p. / URL: http://www.lawtrend.org/freedom-of-association/sravnitelnye-issledovaniya/analiticheskie-stati-obzory-sravnitelnye-issledovaniya

[238] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[239] Ibid.

portion of income; 5) the form of tax privileges[240]. In addition, even within the one country, it is often possible to observe a difference in tax regimes for different types of donors (corporate or individual donors), and for different objects of donation (cash donation /in-kind donation)[241].

It is interesting that in laying down provisions regarding the tax treatment of donations for the benefit of entities that pursue non-profit purposes, the tax legislator tries to strike a balance between certain goals that at first glance seem contradictory. On the one hand, he pursues the support of non-profit activities using taxation as a tool for social policy and cutting state expenditure through the provision of tax deductions for donations in the context of such activities; on the other hand, he aims to protect state revenues by implementing restrictions on the deduction of such expenses from the gross income of donors, e.g. by setting a cap on the deductible amount as well as by limiting the risks of tax evasion and abuse of tax provisions favourable to non-profit activities.

From a constitutional point of view, there is no legal obligation to grant tax relief for gifts and contributions to non-profit entities because they are not affected by the principle of ability to pay. The question of how and to what extent gifts and contributions for non-profit entities or activities should be tax deductible must be answered with regard to the predominating political and sociocultural ideas in each state or society. It is evident that the prevailing ideas vary and therefore the treatment of gifts and contributions and other tax incentives in the PIT and CIT for non-profit entities or activities are also different.

Some countries (Slovakia, as well as Finland and Hungary with respect to individual donors) do not provide for tax benefits to donors, being satisfied with the provision of certain privileges for NPOs. At the same time, in the practice of European taxation we can find a polar opposite attitude: as noted by Heike Jochum and Aikatarini Savvaidou "…on rare occasions, deductions of donations without limitations are permissible for specific non-profit entities..."[242]. For example, in exceptions to the rule of limited deductions for donations capped at a certain amount, donations for scientific research and occupational training, as well as for research purposes, are fully deductible in Denmark[243]. The value of donations made is unconditionally and completely deductible from the taxable income of the donor also in Cyprus.

However, the middle approach still prevails. In all national tax systems in Europe the deductibility of gifts and contributions by the donor or contributor is allowed, but limited. But both a number of common instruments and some very special approaches are found in the national tax systems of EU countries[244].

The most common restrictions are the following:

1) Limits in the scope of activities. Most countries only allow for the tax deduction of donations and contributions for certain categories of non-profit entities.

The Austrian Income Tax Act, for example, contains a deduction for donations made to universities, research centres, the national library and museums[245]. In Denmark only foundations with public benefit purposes enjoy tax privileges in the form of deductions for donations. To be deductible the donations should be devoted only to humanitarian purposes, research and protection of the environment or to a religious society and, to some extent,

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[240] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p., p.34

[241] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.23

[242] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[243] Ibid.

[244] Ibid.

[245] *National report of Austria* /ch. 8, sec. 8.2.9 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.

associations working for social, educational, national and cultural purposes[246]. In Finland, a special rule exists for the purpose of promoting science or art at a university or a polytechnic, or a university fund receiving public funding in the EEA[247]. In Portugal a corporation is entitled to even deduct a disproportional amount, e.g. 120%-140% of the amount if the donation is attributed to social, cultural, environmental, sports or educational purposes[248].

2) Special preconditions regarding the status of the non-profit entity

Some countries establish certain requirements regarding the status of the non-profit entity receiving the gifts or contributions. These requirements may concern the overall size of the entity (Denmark), organizational aspects (Denmark, France) or the location of the entity (that contradicts EU law in almost all cases).

It should be noted that in most cases the limits in the scope of activities of NPOs (restriction №1) and special preconditions regarding their non-profit status (restriction №2) repeats the requirements set by national legislation for public benefit status of NPOs (observed in the previous paragraph). However, since donor incentives are an additional means of encouraging NPOs, nothing prevents States from establishing for obtaining the deductible donations additional and even stricter requirements than those required for obtaining the privileged tax regime of NPOs.

3) Limits in amount or value

A limit in the amount of deductible donations is the most common limitation usually set by tax legislation. It is important to note that the limitations set by the tax legislator on the amount of the deduction depends to a great extent on the effect that this particular tax expenditure may have on the fiscal targets set by the respective states.

The limit may refer to the amount of the gift or contribution or to its value. Such an amount may be fixed either as a fraction (expressed in percentages) of the donated amount or as an amount calculated on the gross income of the donor or as a flat maximum amount of the donation. Also, the cap on the tax deductible donation amounts may consist of a combination of the above methods[249].

- Limits based on the fraction (expressed in percentages) of the donated amount.

This limitation can be set by valuating the donated assets. This is important in cases of gifts and contributions in kind. Most countries recognize gifts and contributions in cash as well as in kind. They establish rules for measuring the value of donations in kind. The general rule in Spain, for those cases in which the donor is obliged to carry out commercial bookkeeping (companies and individual entrepreneurs), is that the tax base will be the book value of the donated good at the moment of the donation. This can be regarded as a general rule in many countries[250].

In the case of cash donations a limitation is possible by way of special deduction rates.

In Portugal the creditable amount is limited to 25% of the value donated, but the amount deducted by individuals should not exceed 15% of the value of the donor's total income tax. In France income tax reduction at 66% of the value of the gift, up to 20% of the donor's taxable income is provided for. In Greece 10-20% of the value of the gift may be deducted from the taxpayer's gross income (with a limit of this value set at 10% of the taxable income). In Spain, individual taxpayers may deduct 25% of the donated amount or value from the tax due. The deduction may not exceed 10% of the total tax base of the tax-

[246] National report of Denmark / ch. 10, sec. 10.1.2 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 211

[247] National report of Finland / ch. 11, sec. 11.2.7 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 245

[248] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[249] Ibid.

[250] Ibid.

payer. Corporations may deduct from the amount of tax payable an amount equivalent to 35% of donation, up to a limit of 10% of the taxable base for the corresponding period. In Sweden, individuals are also allowed to claim a tax reduction of 25% of the value of the donation with a limit of SEK 1,500.

- Limits based on the fraction (expressed in percentages) of the tax base of the donor

Most countries provide a (limited) deduction of the donated amount against the tax base. In regard to individual donors the lowest rate Slovenia offers – 0,3% of the donor's annual gross income. The highest limit is set by Bulgaria – donations are deducted at rates of 5, 15, or 50% of the donor's income depending on the recipient, but total deduction may not exceed 65% of the donor's annual gross income. The rates of other countries are in this amplitude: in Croatia, the amount of deduction is up to 2% of the donor's income, in Estonia – 5%, in Poland – 6%. In Austria, the Netherlands, Belgium, Italy and Greece the maximum deduction reaches 10% of the donor's income, in the Czech Republic –15%, in Germany, France and Latvia the amount of deduction reaches 20% of the total taxable income.

Concerning corporate donors the lowest limit is installed in Slovenia – 0,3% of the donor's annual gross income. But an additional deduction of up to 0,2% of taxable income for donations to organisations established for cultural purposes or for protection from natural and other disasters. Low limit for deductible corporative donations is set in Belgium - 5% of the taxable income; in Austria, Czech Republic, Greece, Italy, Poland and Spain this limit reaches 10% of the taxable income. In Germany and Luxembourg the amount of deduction may not exceed 20% of taxable income. The maximum limit can be found in Lithuania and Bulgaria – 40% and 65% of taxable income, respectively.

In relation to corporations, other calculation indices are sometimes used, rather than taxable income. So, the basis of calculation can be net profit, turnover, salary fund. These indicators are used as alternative (Germany) or single calculation bases (Romania and France). For example, in Romania the amount of deduction should not exceed 0,3% of the turnover. Germany sets the limit in 0,4% of the sum of the turnover and salaries). In France there is a general cap on the deduction of 0,5% of turnover for corporate taxpayers. In Portugal the limit reaches 0,8% of the annual turnover.

In Estonia total amount of donations deducted from taxable income may not exceed 10% of the calculated profit of the latest fiscal year; in the Netherlands, a donation can be deducted in an amount not exceeding 50% of the profit.

- Limits based on a fixed amount of the deduction

Such a limitation is to establish the maximum amount in national currency, which can be deducted under all the terms of the donation. For example, for individual donors such a maximum amount is in Denmark 14 500 Danish kroner (about € 1,950), in Estonia - € 1,920, in Malta - € 50,000-100,000, depending on the recipient, in Italy € 70,000 (with tax deduction) € 2 065 (with tax credit – only for individual donors), in Sweden 1,500 Swedish kroner (about € 158), in Belgium - € 380,550.

For corporate donors in general, the same maximum amounts apply. How different it's worth to add cases of Finland and the Netherlands, which do not set a fixed maximum for donations of individual donors. Corporate donors in Finland have been allowed to deduct at the most € 250,000 in monetary donations for the purpose of promoting science or art at a university or polytechnic, or a university fund receiving public funding in the EEA[251]. In the Netherlands donation with a maximum of €100,000 can be deducted. For donations to cultural institutions sets maximum of € 5000.

- The minimum amount of the donation requirement

As we noted above, on the whole, countries set a maximum limit on donations that can be deducted, regardless of whether the limit is fixed in a fixed amount, calculated with re-

[251] Ibid.

spect to the value of the donation, relative to the amount of taxable income, or a combination of these methods is used. Some national tax systems state a minimum amount of donation, which must be made to obtain any (at least partial) deduction.This is quite reasonable because of matters of efficiency and, with respect to the intention of the donor, offers a telling incentive.

That is true for the Netherlands where the donations of individuals have to exceed € 60 in order to obtain deduction. In Denmark a minimum of 500 Danish kroner (about € 70) is required to obtain tax deduction. No deduction is possible in Greece for donations below € 100. In Luxembourg, Spain and Ireland the value of the year's donation(s) must be at least € 120, € 150 and € 250 respectively. The minimum amount of donation is required in Belgium – €40 and Czech Republic - 1000 Czech koruna (about € 35). To get a tax credit in Sweden, an individual donor should donate at least 6,000 Swedish kronor (about € 630).

For corporate donors practically the same amounts are fixed: the minimum fixed amount is set in Belgium (€ 40). In the Czech Republic, Denmark, Lithuania the donations of individuals have to exceed € 70 in order to obtain deduction. In the legislation of Luxembourg fixed the amount in € 120, in Ireland – € 250. The highest amount of donation is required in Finland: corporate donors have been allowed to deduct at least € 850 from their net income in monetary donations for the purpose of promoting science or art at a university or polytechnic, or a university fund receiving public funding in the EEA[252].

- *Combined restrictions.*

Some countries, as we can see, use more than one type of restrictions in taxation of the donors of NPOs. Very often, as a condition for deducting donations from the tax base or obtaining tax credit, a maximum and / or minimum amount of donation is set, while simultaneously determining the ceiling of deduction (of tax credit). This combination is more a characteristic of tax systems of Sweden, Belgium, Czech Republic, Estonia, Greece, Italy, Ireland, Luxembourg, the Netherlands. In Spain and France combinations of limit based on the fraction (expressed in percentages) of the donated amount and limit based on the percentage of the tax base of the donor are used.

- *Disproportional amounts of deduction*

Some countries provide special rules granting disproportional deductibility to give an extraordinary incentive in situations that are deemed particularly worthy of support. Disproportional deductibility means the ability to deduct an amount, which is greater than the actual amount donated.

For example, a corporation in Portugal is entitled to deduct a disproportional amount, e.g. 140% of the amount if the donation is contributed to social purposes, 130% if contributed in the framework of multi-annual contracts and 120% if contributed to cultural, environmental, sports or educational purposes. In addition, an individual taxpayer may obtain a disproportional tax credit of 130% of the donated value when the donations are received by churches and religious entities[253].

An example of even more generous tax benefits can be found in the Netherlands. From 2012 to 2016, the Netherlands introduced a temporal multiplier to help cultural public benefit entities. The Dutch Personal Income Tax Act taking into account gifts to cultural entities at 125%. For example, if a person gives € 1,000 to a cultural entity, he can deduct € 1,250. If he is in the top tax bracket of 52% (which is already reached with an income of over € 56,000), the tax benefit is € 650. The person only pays 35% of the gift. The maximum additional deduction is € 1,250. This means that the maximum effect of the multiplier is reached if the total amount of gifts to cultural public benefit entities is € 5,000 per year,

[252] Ibid.

[253] National report of Portugal / ch. 20, sec. sec. 2.9.2.1 and 2.9.2.2 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.449

resulting in a deduction of € 6,250. The Dutch Corporate Income Tax Act contains a multiplier of 150%[254].

The tax incentive in the form of disproportional deduction has some specific features. Such an incentive may effectively lead to "subsidization", by the state, since the donor due to the tax deduction effectively bears only a part of the entire amount donated. So it must be noted that these types of tax incentives contain the risk of being considered as State (tax) aid and for that reason the way in which they are made available and are administered must be carefully examined.

4) Time limits for deduction of gifts and contributions

The limits in amount often refer to yearly payments; so they imply a time limit of sorts. However, of greater importance is the occurrence of limited exceptional national provisions. Extraordinary political or social projects may provide for atypical deductibility in order to encourage donations. For example, as already mentioned, in Finland corporate donors have been allowed to deduct at least € 850 and a maximum of € 250,000 in monetary donations from their net income for the purpose of promoting science or art at a university or polytechnic or a university fund receiving public funding in the EEA from 1 January 2009 to 31 December 2011[255].

5) Formal requirements

To avoid the abuse of favourable tax provisions, the tax legislation of certain countries provides for certain formal/procedural conditions that need to be met for the deductibility of donations. For example, in Denmark, the donor must notify the competent tax authority of the relevant donation in order to receive a tax deduction for the amount of his donation to nonprofit entities that pursue public interest purposes.

Deductibility also requires, in many countries, that payments are due and carried out, and that the receiving association with public benefit purposes checks and follows up on missing payments. In Portugal, for example, all entities receiving donations are accordingly obliged to issue a receipt for each donation. A special form is often required which allows the identification of the donor. The method with which Poland counters the possibility of abusive use of favourable tax provisions is also interesting. In Poland, a taxpayer will not pay the donation himself; it will be made by the tax authorities in reference to the tax return. In the tax return, a taxpayer may choose whether or not he wants to make a donation. He has to indicate in the tax return the amount of the donation transferred, the amount of the deduction made and data allowing for identification of the beneficiary. This practice of intermediation by the tax authorities regarding the payment of the donation aims at deterring the possibility of fictitious donations aiming to take advantage of the tax benefit. Other countries, such as Greece, opt for an intermediate solution by providing for an obligation to pay the donation to a third-party legal entity that is under state supervision, e.g. the Fund for Deposits and Loans, which intervenes in this procedure. In particular, the donation in Greece, if it exceeds EUR 300 per year, must be deposited in a special account belonging to the legal entity that must have been opened in the Public Deposits and Loans Fund or in a bank specifically for that purpose. The relevant receipt is required, which must contain certain information: the details of the donor or sponsor and of the recipient; the amount of donation or sponsorship in figures and in writing; the date of deposit; the signature of the donor or sponsor. For legal entities, the threshold is EUR 290[256]. In Sweden, a recognized recipient of donations has to submit a tax return to the Swedish Tax Agency if a donation amounts to more than SEK 200 at the same time a donation is made,

[254] National report of Netherlands (Ch. 17, sec. 17.2.2.1) in Frans Vanistendael (ed.) Taxation of Charities. / EATLP International Tax Series, vol. 11, IBFD, 2015. – 638 p.

[255] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[256] National report of Greece / Ch. 14, sec. 14.2.10.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 301

if the name of the donor is known. The tax return must provide details as to the total amount received in donations during the year[257].

6) Promotion of sustainability. To the number of non-restricting, but special complicating conditions in the provision of deductions can be attributed special provisions provided by some countries obviously aimed at the stabilization of the reliable source of income for NPOs. Two approaches can be distinguished:

- Promoting periodic gifts and long-term subsidies

In Denmark, a special tax relief is granted if the taxpayer obligates himself with a written statement to make continuous payments indefinitely or for a period of at least 10 years[258]. Nevertheless, the deductibility of continuous and of one-sided payments is also limited to DKK 15,000 annually and is furthermore capped at 15% of the donor's income. Dutch personal income tax distinguishes between periodic gifts and other gifts. Periodic gifts are gifts that the donor is obliged, by notarial gift deed, to pay annually for at least five years while he is alive. These gifts are fully deductible without a threshold and at up to 100% of the income of a certain year. If the periodic gift exceeds the income of a certain year, the excess can be carried forward for deduction in a following year. Other gifts are only deductible when they make up 10% or less of the gross income. In Portugal, a corporation is even entitled to deduct a disproportional amount of 130% of the donated value if attributed in the framework of multi-annual contracts[259]. In Spain, individual taxpayers may deduct 35% (instead of the standard 25%), if donations are made to the same entity periodically for at least 3 years. In Hungary an amount of corporate deduction increases from 20 to 40% of the value of the donation if it is made under a long-term donation contract.

- Promoting trust funds and locked-up basic capital

According to the German Personal Income Tax Act, donations to the asset stock of a foundation for the furtherance of tax-privileged activities are deductible, on request, by an amount of up to EUR 1 million within the assessment period in which the donation takes place and within the following 9-year period. This carry-over privilege is granted in addition to the deduction of the aforementioned amount. This provision seems to have had a significant impact on the development of the sector of not-for-profit foundations in Germany[260]. In Denmark, a foundation is exempt from taxation in cases in which gifts and donations are allotted to a trust fund or to the locked-up basic capital of the foundation[261].

Thus, the enactment (or not) of beneficial/favourable tax treatment of non-profit persons or entities, and particularly the recognition of the deductibility of the donations that are given for the benefit of such persons/entities in pursuing non-profit activities, constitutes an issue that pertains to the tax policy decided and implemented by a state, and in particular of the areas that this is envisaged to support through taxation.

The option of certain tax treatment of donations given to non-profit entities that pursue non-profit purposes, and particularly the deductibility of such donations from the donors' income, depends initially on the choice made by the tax legislator to exercise an interven-

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[257] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[258] National report of Denmark / Ch. 10, sec. 10.3.1.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 211

[259] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[260] National report of Germany / Ch. 13, sec. 13.3.2 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.281

[261] National report of Denmark / Ch. 10, sec. 10.2.8.3 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 211. The concept of "locked-up" capital covers that amouht of capital of effectively paid-in capital of the non-profit entity that under no circumstance can be distributed and that represents the amount that third parties may take for granted as assets beloniging to the entity.

tionist/social policy through taxation. If the legislator considers that taxation (and especially the provision for tax expenses) is the appropriate means of exercising social policy, then the type of donations that are recognized as tax deductible depends on the priorities set by the state/government, e.g. for education, culture/civilization, sports, religion etc. In addition, the thresholds of deductible amounts may be defined (or must be defined) after their fiscal and budgetary repercussions of beneficial tax treatment of such non-profit activities (as well as the audit capabilities of the tax authorities to police the abusive use of this favourable regime) are taken into consideration.

A comparison of the different national approaches of the tax treatment of gifts and contributions and of the person of the donor or contributor shows that all countries follow the idea of granting a tax benefit within certain limits. From a technical point of view, this benefit may be designed in the shape of a deduction, tax relief or a credit. Limitations are in line with constitutional law because gifts and contributions for non-profit entities are unaffected by the principle of ability to pay. Limiting tax benefits can therefore be used to create tax incentives in order to promote special issues that are – from a political or sociocultural point of view – deemed particularly worthy of support. In this regard, the most popular tax incentives among the countries considered are the waiver of limits in deductions for special charitable purposes during a limited period of time or the granting of a limited (at cost) deduction. A more fundamental approach is the attempt to promote periodic gifts and long-term subsidies by waiving deduction limits or by promoting trust funds and locked-up basic capital[262].

2.2.2.1 Tax regime for individual donors

Everything said in section 2.2.1.2 is fully valid for the tax treatment of individual and corporate donors. Given the abundance of conditions and restrictions imposed on tax deductions for donors in the national tax laws, it seems difficult to make any additional generalizations in the context of tax concessions granted to individual and corporate donors in various countries. A more detailed description of the features of tax treatments for individual donors in EU countries is given in Table 5.

Table 5 – Tax treatment of individual donors

Country	Are there tax incentives for individual donors giving to a NPO?
Austria	Donations are deductible up to 10% of taxable income
Belgium	Cash donations of €40 or more are deductible up to 10% of the taxable income, with an absolute maximum of €380,550 (year 2014)
Bulgaria	Donations are deductible at rates of 5, 15, or 50% of the income depending on the recipient. Total deduction cannot exceed 65% of the total income
Croatia	Donations are deductible up to 2% of taxable income.
Cyprus	The full value of donations is tax deductible
Czech Republic	Deductions up to 15% of taxable income, provided at least 2% of taxable base is donated or not less than approximately €35.
Denmark	Donations deductible exceeding 500 Danish kroner (approximately € 70) and up to 14 500 Danish kroner (approximately € 1,950) (2013)
Estonia	Donations deductible up to 5% of the donor's total income, up to a limit of €1,920 euro.
Finland	No tax incentives
France	Income tax reduction for 66% of the value of the gift (75% for specific donations), up to 20% of the donor's taxable income.

[262] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

Table 5 (cont.)

Germany	Tax deduction up to 20% of the yearly taxable income or donations to the endowment of a foundation (not applicable to spend-down foundations) can be deducted up to an amount of up to €1 million for an assessment period of up to 10 years
Greece	20% of the value of a donation beyond €100 up to 10% of the income
Hungary	No tax incentives
Ireland	Charities (not the donor) are able to claim the tax back from donations over €250, up to 31% (grossed up).
Italy	Donations to ONLUS are deductible: - from declared incomes, for sums up to 10% of the income itself, and up to € 70,000.00. - from Gross Tax IRPEF for the amount of 26% from 2014 of the tax payment itself, up to the maximum amount of € 2,065.83 Alternatively, according to the tax regime applied to voluntary donations to NGOs: - Deduct from income donations not superior to 2% of total declared income
Latvia	Income tax deduction up to 20% of the donor's total taxable income.
Lithuania	No tax incentives but individual donors can allocate 2% of their income tax to an approved NPO
Luxembourg	Tax deduction up to 20% of the taxable income or €1,000,000, provided the total donations amount to at least €120.
Malta	Cash donations made to certain organisations can be deducted against the income of the donor. Ceilings vary between €50,000 and €100,000 depending on the organisation to which the donation is made, and minimum donations may also apply for the deduction to be allowed.
Netherlands	Donations can be deducted up to 10% of the donor's gross income. No deduction is possible for donations below 1% of the gross income or €60.
Poland	Donations of cash, shares, securities, real estate and in-kind donations are deductible up to 6% of the taxable base.
Portugal	For cash donations, income tax deduction up to 25% of the amount donated where there is no limit for corporate donors. Where there is a limit on deduction for corporate donors, the amount deducted by individuals should not exceed 15% of the value of the donor's total income tax.
Romania	Donors can direct 2% of their income tax to NPOs. Contributions (sponsorship) are deductible up to 5% of total income.
Slovakia	No tax incentives
Slovenia	Donors can deduct up to 0.3% of their taxable income.
Spain	Individual taxpayers may deduct 25% of the donated amount or value from the tax due. The deduction may not exceed 10% of the total tax base of the taxpayer. On 1st January 2015, the government approved a tax reform granting a 75% deduction for the first €150 donated by individuals. For amounts above €150, 30% is deductible, or 35% if donations are made periodically for at least 3 years to the same entity. The ceiling for deduction is 10% of total taxable income.
Sweden	Individuals are also allowed to claim a tax reduction of 25% of the value of the donation as of the income year 2012. The tax reduction may amount to a maximum of SEK 1,500 (about € 160) if the donation(s) amount to SEK 6,000 (about € 640) or more. The gift must be given to a recipient in Sweden or in the EU which is approved by the Swedish tax authorities.
United Kingdom	Cash donations are deductible via Gift Aid or payroll giving schemes. The donor claims a deduction from taxable income or capital gains for the amount of the donation grossed up by the basic rate of tax (currently 20%). Gift Aid allows the charity to then reclaim the income tax deemed to be deducted from the donation from the tax authorities.

Table 5 (cont.)

Sources: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p.; Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement? / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.; Jochum, H., Savvaidou, A. Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

General observations make it possible to note that, both globally and on a European scale, tax incentives for individuals are less popular than tax incentives for corporate donors. At the same time they are particularly effective in stimulating of public benefit activities of NPOs. Indeed, countries which offer tax incentives to individuals see higher rates of participation in giving money to charity: the proportion of people donating money to charity according to the World Giving Index is 12 percentage points higher in nations which offer some form of tax incentive to individuals (33%) than those that offer no incentives (21%)[263].

In only a small number of the European countries do individual donors not receive tax incentives for their donation in the form of either a tax credit or tax deduction – for example, individual donors do not have tax incentives only in Slovakia, Finland and Hungary. The levels of the incentives offered vary and may depend on the type and/or level of the donation (e.g. only monetary donations above a certain amount) and the value of the tax credit/deduction can usually not exceed a specific threshold, most commonly expressed as a percentage of the donor's total annual taxable income[264].

2.2.2.2 Tax regime for corporate donors

In almost all of the EU countries there are tax incentives for corporate donors giving to NPOs, at least in certain cases. Details of the tax regime of corporate donors are given in Table 6.

Table 6 – Tax treatment of corporate donors

Country	Are there tax incentives for corporate donors giving to a public benefit foundation?
Austria	Deductions up to 10% of taxable income
Belgium	Only cash donations (of more than €40), the exception being works of art donated to museums: up to 5% of the taxable income, with a maximum of €500,000 in 2013.
Bulgaria	10%, 15% or 50% of the donation (dependent on the recipient) can be deducted from the positive financial result. The total amount of the deduction cannot exceed 65% of the total income.
Croatia	In-kind and monetary donations can be included in business expenses (which will decrease the amount of taxable income) up to 2% of the total revenue generated in the previous calendar year.
Cyprus	The whole amount of the donation can be deducted, subject to certain conditions
Czech Republic	The donation can be a movable asset or real estate. The donation is deductible up to 10% of taxable income. Minimum value of each gift is €70.

[263] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p., p.10

[264] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p., p.13

Table 6 (cont.)

Denmark	Gifts to qualifying charitable organisations exceeding approximately €70 up to approximately. €1,950 are deductible each year. The limit is adjusted annually and was approximately €70 for the fiscal year 2013.
Estonia	Total amount of donations deducted from taxable income may not exceed 3% of the sum of the payments subject to social insurance tax made during the year, nor exceed 10% of the calculated profit of the latest fiscal year.
Finland	Cash donations of at least €850 are eligible for a tax deduction. Maximum amounts depend on the recipient: for donations given to a publicly-financed university or to a fund within the university the maximum is €250,000. For donations given to a public benefit foundation it is €50,000.
France	A tax reduction equal to 60% of the donations to qualifying NPO up to 0.5% of annual turnover. The deduction can be carried forward over the next 5 years.
Germany	A tax deduction on the income up to 20% of taxable income (or 0.4% of the sum of the turnover and salaries).
Greece	Cash donations are deductible up to a maximum of 10% of taxable income. The total amount of donations that are deductible may not exceed the amount of net profits.
Hungary	Up to 20% of the value of the donation (or the book value of the goods or services provided). 50% of the value if provided to certain national funds. An additional 20% of the value of the donation if provided under a long-term donation contract, up to the amount of the pre-tax profit on the aggregate.
Ireland	Donations of cash and publically quoted shares of at least €250 are deductible in full.
Italy	Concerning donations to ONLUS Organizations: - The donation is deductible for amounts inferior to € 2,065.83 or 2% of the declared company's income - Donations are deductible from declared incomes, for sums up to 10% of the income itself, and up to € 70,000.00
Latvia	A tax deduction of 85% of donated sums, up to 20% of total payable tax.
Lithuania	Corporate donors can deduct cash, in-kind donations, and services offered. Exception is cash payments beyond approximately €70 for one single recipient. In some cases, double the amount of the donation may be deducted up to 40% of taxable income.
Luxembourg	Tax deduction for donations from €120 up to 20% of the taxable income of the donor or €1,000,000.
Malta	Cash donations made to certain organizations can be deducted against the income of the donor. Certain capping applies depending on the organization to whom the donation is made. Capping varies between €50,000 and €100,000, and minimum donations may also apply for the deduction to be allowed.
Netherlands	The amount of the donation can be deducted up to 50% of the profits with a maximum of €100,000. Donations to cultural institutions are calculated at 150%, with a maximum annual deduction in this case of €5,000.
Poland	Cash, shares, real estate and in-kind donations are deductible up to 10% of the tax base.
Portugal	No limits on tax deduction when donations benefit state supported foundations or represent endowment of private origin foundations pursuing social or cultural aims. Donations are calculated as a cost to the donor and rates range from 120-150% of the monetary value of the donation.
Romania	Donations can be deducted up to 20% of the income tax, but not more than 0.3% of the turnover.
Slovakia	No tax incentives

Table 6 (cont.)

Slovenia	A tax deduction on the amount of donations up to 0.3% of the taxable income, but not exceeding the amount of the total tax base. An additional deduction of up to 0.2% of taxable income for donations to organizations established for cultural purposes or for protection from natural and other disasters.
Spain	Corporations can deduct from the amount of tax payable 35% of the value of the donation up to a limit of 10% of the taxable base. In addition, from 1st January 2015, the deduction of 35% is increased to 40% for donations made to the same entity for the same or higher amount for at least 3 years.
Sweden	No
United Kingdom (England & Wales)	Money, land, and quoted shares are deductible. A 100% deduction from taxable profits can be claimed.
Sources: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p.; Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement? / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.; Jochum, H., Savvaidou, A. Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74	

As the two charts above show, Slovakia is the only Member State that has no tax incentives for donations to NPOs. All other Member States offer some form of tax incentive for individual and/or corporate donors at least in certain cases, establishing limitations discussed above[265].

2.2.3. Inheritance and gift tax treatment: domestic cases

Many countries impose an estate tax, inheritance tax or other tax on transfer the assets owned by an individuals upon their death (collectively referred to as "estate tax"). Estate tax rates can be significant. For example, the current maximum estate tax rate in the United States is 40%. Because estate tax rates are generally high, a deduction or credit from estate tax for transfers made to charitable organizations can be an important incentive for major legacy gifts to charity. When an individual may save significant taxes for transfers made to a charity (versus paying a large tax for a transfer to individuals), there is an incentive to give to charity versus to family members or other individuals. An individual who would otherwise leave all assets to family members may be convinced to leave some or all of his estate to charity in order to save tax, particularly in instances where an individual's heirs are financially secure[266].

"Rules Give By" World Charity Overview[267], studied the state of charity in 193 Member States of the United Nations demonstrated that "legacy gifts to NPOs are not universally incentivized"[268]. 72 countries impose an estate (or similar) tax (41%). 34 of those countries (47%) offer no tax incentives for legacy gifts to NPOs. And in Europe, almost half (48%) of all countries impose estate taxes and offer tax incentives or exemptions on legacy gifts to charities. For comparison, for Asian countries this figure is 20%, for the Americas - 19%, for Africa - 8% and for Oceania it is also 8% (Figure 8) [269].

[265] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 22
[266] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p., p. 41
[267] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p.
[268] *Rules to Give By. A Global Philanthropy Legal Environment Index* / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p., p.11
[269] Ibid., p.28

Before considering the NPOs' gift and inheritance tax regime, it should be noted that when using the terms "inheritance tax", "estate tax" and "gift tax", we mean taxes when inheriting upon the death of a testator. This kind of taxes can be explicitly set forth in tax laws and have their proper place in the tax system, but can also be hidden and levied through income tax, stamp or other duties. For the purposes of this paragraph, all taxes applied upon the death of a testator hereafter will be covered by the term "inheritance taxes". Most Member States that impose inheritance taxes, also tax the gifts between living people. In this case, we are talking about the gifts and other donations, which are regulated by income tax legislation. Taxes on such donations between individuals and legal entities are excluded from a scope of this part of paragraph.

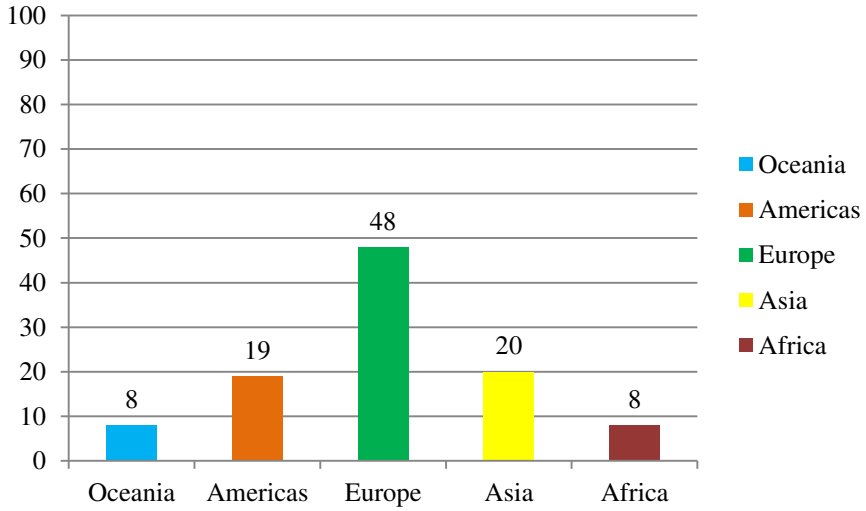

Figure 8[270] – Percentage of countries, where an estate (or similar) tax is imposed and where donations of estate are tax exempt (across continents)

Currently, there is no single EU-wide law regulating inheritance, estate and gift tax. That is why legislation in the area of inheritance, estate and gift tax varies considerably.

According to the data provided during the EATLP Congress (2012), 18 of the 27 EU Member States impose specific taxes upon death in their national legislations whereas seven of Member States do not do so. The latter Member States are Austria, Cyprus, Estonia, Latvia, Romania, Slovakia and Sweden. Two countries (Malta and Portugal) levy inheritance taxes under other headings such as income tax[271], transfer duty or stamp duty[272].

The tax rules concerning bequests and gifts made by individuals and corporate bodies to NPAs also differ considerably from country to country. Data on inheritance tax treatment of NPOs in EU countries are presented in Table 7.

[270] Rules to Give By. A Global Philanthropy Legal Environment Index / Nexus, McDermott Will & Emery, Charities Aid Foundation. – 2014. – 345 p.

[271] Commission Communication to the European Parliament, the Council and the European Economic and Social Committee. *Tackling cross-border inheritance tax obstacles within the EU*. COM(2011)864 final, para. 3.

[272] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

Table 7 – Gift and inheritance taxation and tax benefits for NPOs

Country	Does gift/inheritance tax exist?	Are domestic NPOs exempt from the gift / inheritance tax?
Austria	No	Not applicable
Belgium	Yes (Inheritance tax and transfer duty upon death)	Yes
Bulgaria	Yes (Inheritance tax)	Yes
Croatia	Yes	No, only humanitarian associations and the Red Cross are tax exempt
Cyprus	No	Not applicable
Czech Republic	Yes (Inheritance tax)	Yes
Denmark	Yes (Tax on Estates of deceased persons and Gift Tax)	Yes
Estonia	No	Not applicable
Finland	Yes (Inheritance tax)	Yes
France	Yes (Succession duty – Transfer duty)	Yes
Germany	Yes (Inheritance tax)	Yes
Greece	Yes (Tax on inheritance, gifts and parental provision)	No
Hungary	Yes (Inheritance tax)	Yes
Ireland	Yes (Inheritance and gift tax)	Yes
Italy	Yes (Succession and gift duty)	Yes
Latvia	No	Not applicable
Lithuania	Yes (Inheritance tax)	Yes
Luxembourg	Yes (Inheritance tax)	Yes
Malta	Yes, (Transfer duty)	No
Netherlands	Yes (Inheritance and Gift Tax)	Yes
Poland	Yes (Tax on inheritances and gifts)	Not applicable, since levied only on natural persons
Portugal	Yes, Stamp duty	Yes
Romania	No	Not applicable
Slovakia	No	Not applicable
Slovenia	Yes (Inheritance and Gift Tax)	Yes
Spain	Yes (Succession and gift duty)	Not applicable, since levied only on natural persons
Sweden	No	Not applicable
United Kingdom	Yes (Inheritance tax)	Yes
Sources: 1) Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement? / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p. 2) Commission Communication to the European Parliament, the Council and the European Economic and Social Committee. Tackling cross-border inheritance tax obstacles within the EU. COM(2011)864 final		

According to the country reports, all EU countries can be divided into three categories:

– countries that do not levy any gift or inheritance tax;

– countries that levy a gift or inheritance tax and apply a general exemption for charitable institutions;

– countries that levy gift or inheritance tax and do not apply a general exemption for charities[273].

[273] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

1) Countries without inheritance taxes. In these countries inheritance taxes are imposed neither on NPOs nor on other entities. Such a regime is set in Austria, where these taxes have been repealed by the Constitutional Court as of 31 July 2008, in Portugal[274] and in Sweden where inheritance tax was abolished in 2003 in 2005[275] relatively. In Italy in 2001the tax was also abolished but in 2006 it was reintroduced (against much lower rates)[276]. In Poland, the object of taxation is acquisition of equity by natural persons; consequently, non-profit organizations do not fall within the scope of the Inheritance and Gift Tax Act[277]. It can be seen that a number of Member States have abolished their gift and inheritance tax laws not so long ago.

As authors of "Taxation of cross-border philanthropy in Europe after Persche and Stauffer" noted, for those Member States the question of a tax exemption will not be relevant, since the tax from which the exemption or reduction would be sought does not exist[278]. Nevertheless, we consider them in a separate category of countries with a tax regime that is positive for NPOs, since these countries do not create barriers to cross-border cases of inheriting, which is very important in the light of the expanding cross-border activities of NPOs.

2) Countries with a general exemption for charitable institutions. Another group of countries covers countries that levy inheritance taxes on commercial companies, but exempt NPOs from this tax. These include, for example, Hungary, Finland, Great Britain, Italy, Germany and the Netherlands.

In *Hungary*, a non-profit organization can request a statement from the national tax authorities to receive a special inheritance, estate or gift tax status. It is understood that this exemption can only be applicable to organizations that have not incurred any corporate tax liability for revenues from entrepreneurial activities[279]. The following purposes are generally exempt from gift and inheritance tax: scientific, artistic, educational (public), cultural and public welfare in Hungary[280]. It is questionable whether this in accordance with EU rules.

In *Finland*, charitable institutions are able to receive gifts and inheritances without gift or inheritance tax consequences as a result of a general exemption[281].

The United Kingdom has two exemptions for charities: a main charity exemption as well as a number of listed exemptions. The main charity exemption provides that transfers of value are exempt to the extent the values transferred are attributable to property given to charities. However, if any part of the property given to charities is applicable for non-charitable purposes, the exemption will not be applied. There must be an acquisition of the property by the charity[282]. The charities of the UK, the EU as well as some EEA charities can qualify for the relief.

Additionally, exemption is provided for property transferred to museums, libraries, art galleries, local authorities, government departments, universities and health service bodies.

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[274] National report of Portugal / Ch. 20, sec. 20.4.1. in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.449

[275] National report of Sweden / Ch. 23, sec. 23.4. in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.541

[276] National report of Italy / Ch. 16, sec. 16.4.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.353

[277] National report of Poland / Ch. 19, sec. 19.4.1. in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 414

[278] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 26

[279] National report of Hungary / Ch. 15, sec. 15.4.1. and 15.4.2 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.339

[280] Ibid.

[281] National report of Finland / Ch. 11, sec. 11.4.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 245

[282] National report of United Kingdom / Ch. 26, sec. 26.4.3 1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.603

Some institutions are listed by name, such as the National Gallery and the British Museum[283].

Germany also provides an exemption for charities. Donations and inheritances received by a domestic corporation, association or estate that exclusively and directly serve public benefit, charitable or religious purposes are exempt from inheritance and gift tax. The same is true for donations to foreign corporations if their state of residence retroactively exempts donations to German charitable corporations from taxation (reciprocity).

A special and interesting rule states that in case assets received as a lifetime gift or by inheritances on account of death are transferred within 2 years to a foundation that, according to its statutes and effective management, exclusively and directly serves public benefit, charitable or religious purposes, the recipient is exempt from inheritance and gift tax with retroactive effect. These tax exemptions are of significant relevance for NPOs as donations would otherwise be taxed at a rate of up to 50%.[284]

Italy reintroduced gift and inheritance taxes in 2006,[285] but at relatively low rates: 4% (direct line), and 6% or 8% (non-related persons). Exemptions apply, however, in case of transfer to legally recognized foundations or associations with exclusive purposes of assistance, study, scientific research, education or any other purpose for public benefit and also to so-called ONLUS (organismo non lucrativo (di) utilità sociale). The status of ONLUS can be recognized only to associations, foundations, committees, social cooperatives and other private bodies. The exemption also applies to transfers to legally recognized public bodies, foundations and associations, if the transfers are made for purposes previously mentioned.[286] In addition, the exemption applies to foreign public bodies, associations and foundations established abroad if the requirement of reciprocity is met.

In *the Netherlands*, qualifying charitable organizations are exempt from gift and inheritance tax. This exemption applies to both incoming gifts and inheritances and to outgoing donations that are in conformity with the statutory purpose of the organization. In order to qualify, the charity needs to be registered by the Dutch tax authorities. The obligation to register applies to all entities whether or not resident in the Netherlands.[287] Without this listing a charitable organization in principle is liable to gift and inheritance tax, unless the organization is a so-called social benefit entity. The latter entities are also exempt from gift and inheritance tax, but are granted fewer other tax allowances.

Furthermore, it is possible to "pay" inheritance tax with moveable works of art.[288] This tax incentive is similar to the UK "acceptance in lieu of tax" and the French "dation". An important difference, however, is that instead of 100%, 120% of the value of the work of art is taken into account in the Netherlands. Only works of art that are on the list of protected objects, which are deemed indispensable or irreplaceable or which are of great national cultural-historical or art-historical value, can qualify. The Minister of Finance decides whether a work of art is accepted in lieu of inheritance tax. A small committee consisting of an art historian, a civil servant of the Ministry of Finance and a former Minister of Finance advises the Minister. If a work of art is accepted, the state becomes the owner of the work of art.

3) Countries that tax NPOs. Countries that levy inheritance tax on NPOs (regardless of whether the tax rate is preferential or not) include Belgium, Denmark, Greece, France, and Croatia.

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[283] Ibid., sec. 26.4.4.

[284] National report of Germany / Ch. 13, sec. 13.3.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.281

[285] National report of Italy / Ch. 16, sec. 16.4.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.353

[286] Ibid., sec. 16.4.2

[287] Additional requirements apply to foreign entities; see National report of Netherlands / Ch. 17, sec. 17.1.10 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.376

[288] Ibid., sec. 17.4.2

Belgium. In Belgium, substantial normative competences on gift and inheritance taxes have been transferred to the Regions[289]. In all three regions of Belgium, charities benefit from preferential rates of gift taxes (7% in the Flemish Region, 6.6% for public interest foundations or 7% to other charities in the Brussels-Capital Region and 7% in the Walloon Region). A specific fixed duty applies when the donator is a charity.

Charities also benefit from preferential rates of inheritance taxes:

– 8.8% rate in the Flemish Region;

– in the Brussels-Capital Region a 6.6% rate applies for public interest foundations, a 25% rate for other charities, but then 12.5% will be applied when these entities have federal approval for donation deduction in income taxes; and

– 7% in the Walloon Region. One of the conditions imposed by the Walloon Region was found in breach of EU law by the ECJ in the Missionswerk Werner Heukelbach case: "Article 63 TFEU precludes legislation of a Member State which reserves application of succession duties at the reduced rate to non-profit-making bodies which have their centre of operations in that Member State or in the Member State in which, at the time of death, the deceased actually resided or had his place of work, or in which he had previously actually resided or had his place of work".[290]

A compensatory tax for inheritance tax is levied annually on the total assets which non-profit-making companies (foundations, except public interest foundations) own in Belgium when there assets reach a certain threshold. The tax rate is 0.17%.

In *Denmark*, gifts and donations are in principle taxable, but there are several specific rules. Foundations with public benefit purposes only have to declare gifts and donations if the donator has decided that the gift or donation has to be allocated to donations by the foundation. Gifts and donations that are allotted to the trust funds/locked-up basic capital of the foundation are exempt from taxation.[291] [292] This is not the case if it is decided in the foundation's statute that the gift or donation has to be used for donations by the foundation within a specific period. Gifts or donations to the foundation's locked-up capital are exempt from taxation since distribution of this capital in the form of donations will be taxed.

The above-mentioned regime is only applicable to foundations with public benefit purposes. As a result, so-called family foundations and foundations based in low-tax countries cannot benefit from this tax treatment. Donations to foundations or similar entities based in foreign states with low taxation of foundations are taxed by a 20% rate in so far as the yearly contribution exceeds DKK 10,000. The purpose of this provision is to reduce the incentive to allocate assets to foundations in foreign states with low taxation. The contributor may apply for dispensation from this provision if the donation is made to a foreign foundation with public benefit purposes, in which case the burden of proof regarding the purpose rests with the contributor.

The overall effect of this provision is that contributions to foundations in foreign states – including other EU Member States – by individuals or entities fully subject to tax in Denmark are taxed if the taxation of foundations in the foreign state is low compared to Danish taxation, while contributions and gifts to Danish foundations are – as a rule – tax exempt. According to the Danish report, this seems to infringe European freedom rules[293].

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[289] See for the overview of gift and inheritance taxes, National report of Belgium / Ch. 9, sec. 9.4.2. and 9.3.4 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 193

[290] ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 37.

[291] National report of Denmark / Ch. 10, sec. 10.2.8.3 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 211

[292] Therefore, we could have mentioned Denmark also in the second category of countries, with a general exemption for charity.

[293] National report of Denmark / ch. 10, sec. 10.2.8.4 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 211

Greece does not apply an exemption either. Since 2010[294], Greece imposes a very low gift and inheritance tax rate of 0.5% to charities. The rate is applicable to legal entities receiving assets by way of inheritance, which have been incorporated or are under incorporation in Greece, as well as by the respective foreign legal entities on the condition of reciprocity, as long as these entities are proven to pursue national or religious or in a wider sense charitable, educational or artistic purposes, and furthermore to churches, monasteries, the sacred space of the Holy Sepulchre, the Holy Monastery of Mount Sinai, the Ecumenical Patriarchate Kostantinoupoleos, the Jerusalem Patriarchate, the Patriarchate of Alexandria, the Church of Cyprus and the Orthodox Church of Albania. A foreign tax credit is provided for.[295]

The deduction of the bequests from the assets of the inheritance is subject to the attachment in the inheritance tax return of a certification by the executors or administrators of the bequest or by the foundation, to which the bequest has been made or by the persons exercising its management, certifying that the bequest has been deposited together with any overdue interest.[296]

Cash donations in excess of EUR 1,000 are subject to the same rate of 0.5 %. Foreign legal entities qualify on condition of reciprocity.[297]

France is rather strict on charities, both from a civil law and a tax point of view. The only legal persons (other than public bodies) entitled to receive a legacy or a donation (besides manual gift) are the associations declared of public utility, liturgical associations, congregations, the associations of charity and similar associations. These must make a declaration prior to the acceptance of the donation or the legacy to the local state representative (the préfet) who may forbid the entity to accept the donation or legacy if he considers that the legal entity is not one of those entitled to receive a donation or legacy, or that the legal entity is unable to use the said donation or legacy in conformity with its purpose.

The general gift and inheritance tax rate is 60%. The foundation or association declared of public utility benefits from a reduced rate of 35% and 45 % for the part in excess of EUR 24,430. It is understood that in addition to this, various exemptions apply to specific entities.

Manual gifts are not taxed as such, but the act by which they have been disclosed to the tax authorities is subject to gift tax[298].

Figure 9 reflects the policies of the EU member states on the collection of inheritance taxes, as applied to NPOs.

Theoretically, the inheritance tax payer can be either a testator or an heir. The heir, for example, is taxed in the Czech Republic, France, Greece, Hungary, Ireland, Luxembourg, and the Netherlands. In Belgium, on the contrary, the inheritance or donation tax is levied on testators/donors, although reduced rates are applied[299]. In certain cases, however, the living donor or heir (in the case of a legacy) may be jointly liable for the inheritance tax[300]. In some EU member states, for example in Germany, Poland, and the United Kingdom, testamentary donations to NPOs are tax exempt for both the recipient and the deceased[301].

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[294] Before law 3812/2010, there was a full exemption from inheritance tax of nonprofit legal entities subject to certain conditions: See National report of Greece / Ch. 14, sec. 14.4.1 in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p. 301

[295] Ibid., ch. 14, sec. 14.4.1.

[296] Ibid.

[297] Ibid., ch. 14, sec. 14.4.2.

[298] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

[299] Dehne, A., Friedrich, P., Nam, C., Parsche, R. *Taxation of Nonprofit Associations in an International Comparison* // Nonprofit and Voluntary Sector Quaterly. – 2008. – Vol. 34. – N 4, pp. 709-729

[300] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 26

[301] Dehne, A., Friedrich, P., Nam, C., Parsche, R. *Taxation of Nonprofit Associations in an International Comparison* // Nonprofit and Voluntary Sector Quaterly. – 2008. – Vol. 34. – N 4, pp. 709-729

The countries that tax inheritances do so on the basis of several differing personal links, such as the residence, domicile or nationality of the deceased, and/or the residence, domicile or nationality of the heir[302]. This raises the problem of double taxation of cross-border inheritances, which we will examine in the next paragraph, when considering the problems of taxation of cross-border activities of NPOs.

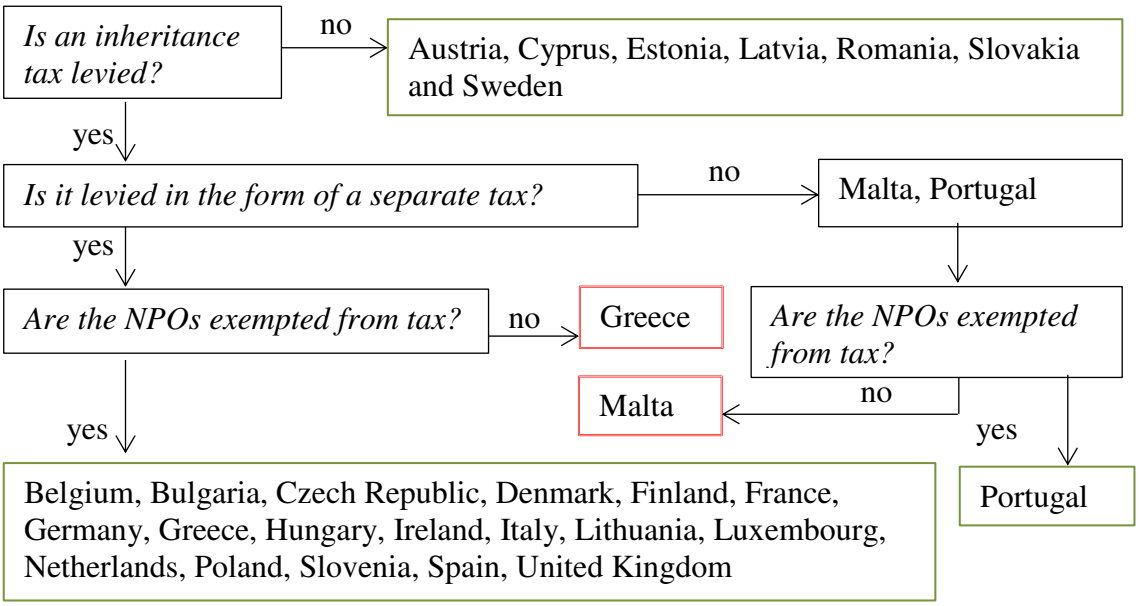

Figure 9[303] – Classification of EU countries with respect to levying inheritance taxes as applied to NPOs

2.3 Taxation of cross-border activities of NPOs in the European Union: tax discrimination problem

In the previous paragraphs we found out which key domestic scenarios, concerning tax benefits are actually applicable in the EU Member States. In this paragraph we discuss, whether foreign-based NPOs are or are not discriminated against, where domestic NPOs and their donors have tax benefits. To these ends we are considering the following questions: What is discrimination according to the provisions of the European law with regard to the taxation of NPOs? What is the mechanism for the emergence of circumstances discriminating the activities of the foreign (EU-based) NPOs? Which legal conditions led to the development of the non-discrimination principle? How the Member States handle the requirements of this principle in practical terms?[304]

Across the Member States of the European Union there is a concept that public benefit activity of NPOs is desirable and should be encouraged by the state. Furthermore, almost all Member States are familiar with the concept of tax exemptions for NPOs (e.g. exemption from inheritance tax and corporate income tax), as well as tax incentives for donors. Many Member States have increased the scope of these incentives considerably during the last 20 years as a means to incentivize philanthropic activities[305].

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[302] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

[303] Compiled by the author

[304] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.10

[305] Ibid., p. 11

The 2009 European Commission Feasibility Study on a European Foundation Statute outlined, that the assets of public benefit foundations in Europe represent a considerable economic weight. The study highlights foundations as a growing sector, with significant economic impact: the foundation sector in Europe consists of approximately 110,000 foundations and numbers are increasing. In Spain, on average one new foundation is created each day, while in Germany the number is two, and by far the majority of them are public benefit foundations. The combined assets of foundations in Europe are estimated at some €1,000 billion, while they make annual expenditures for the public good of around €153 billion. Foundations also contribute to the economy and society in other ways, employing approximately one million full time equivalent staff and engaging around 2.5 million volunteers[306].

NPOs have clearly become more and more active across borders. The EFC estimated that internationalisation has for some years been an important trend within the sector. NPOs, working across myriad fields throughout Europe understand that the challenges they work to help society address and the benefits that they can bring to citizens do not stop at national borders. Whether grantmaking or operating, implementing multi-country projects, pooling resources, seeking to reach more beneficiaries, or raising funds from a wider pool of donors, large numbers of NPOs want and need to be active cross-border to effectively pursue their mission[307].

The feasibility study also reveals that people and assets have become more mobile – donors/founders have international assets and international interests. Their aims and their giving do not stop at national borders[308]. In a more conceptual view fundamental freedoms guaranteed in the EU – free movement of goods, capital, services and labour – forward the development of such a mobility in cross-border context.

Typical examples of cross-border activity of NPOs include the following:

- NPOs collect funds not only within the country of their residence but within the whole territory of the European Union;
- NPOs carry out some kind of operational activity (public benefit, economic related or economic unrelated activities) not only in the country of their residence, but throughout the EU;
- NPOs manage their assets (receives a passive income) not only in the country of residence, but throughout the European Union;
- a donor makes a gift or donation for the foreign (EU-based) NPOs;
- a donor makes a testamentary donation for the foreign(EU-based) NPOs.

In all these scenarios, for internal situations, NPOs, donors, or both of these participants in cross-border processes are seeking a more or less favorable tax regime provided by the national legislation of their countries. In the case of cross-border situations, the tax interests of at least two countries are affected, and tax relief seekers are subject at least to two tax jurisdictions. In the case of commercial entities, such a situation would lead to the emergence of double taxation – a problem that has long and relatively successfully been fought by national governments, in particular, using Double Taxation Conventions.

Double taxation is, first of all, excessive taxation. It arises from the imperfection of international law in situations where the same income or property is subject to the tax jurisdiction of more than one country. The negative impact of double taxation is not discussed - it leads to not only an outflow of investment from national economies, but also generates tax discrimination, both in relation to foreign capital and in relation to domestic capital. Tax discrimination in its turn generates various forms of tax evasion - a problem that has become most relevant in the field of tax law in recent years.

In the case of NPOs, the redundancy of taxation is not so noticeable. As we noted in

[306] Ibid., p. 10
[307] Ibid., p. 11
[308] Ibid., p. 11

the previous paragraphs, in most countries NPOs enjoy tax benefits (often quite extensive), so it is unlikely that the income of NPOs is subject to taxation in two or more jurisdictions at the same time.

However, tax discrimination arises in a different plane. This plane is connected with the implementation of the fundamental freedoms of the EU and the right of EU organizations to an equal tax regime in the territory of the Member States (in comparison with their residents). It means that although each country may independently establish a tax regime for NPOs, this regime cannot be more stringent with respect to foreign (EU-based) NPOs compared to domestic NPOs without significant reasons.

Typical scenarios of discrimination may be seen in the following options:

1) Foreign (EU-based) NPOs pays an income tax within the territory of the country of its income source (in the form of donations received, gifts, incomes from assets management, economic/ commercial activities and etc.) where the tax is absent or the tax rates are reduced for residental NPOs. A much rarer case of such a scenario of discrimination is the case when the national legislation discriminates the domestic NPOs that carry out their activities abroad.

2) Foreign (EU-based) NPOs receive an inheritance from abroad and pay an inheritance tax whereas residental NPOs do not pay such a tax or they pay it at the reduced rates;

3) A donor does not receive the tax deduction of the donation for NPOs in his country because his donation was made in favor of a foreign (EU-based) NPOs.

As stated by the authors of study "Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?", traditionally, Member States have limited eligibility for tax-privileged status to resident NPOs and their donors[309]. Explicit justification for the exclusion of foreign-based NPOs is typically not found in the legal texts. Legal scholars have outlined two main arguments, that countries use when establishing for foreign (EU-based) NPOs a tax regime that is different from the domestic tax regime.

One conceivable reason for the exclusion of foreign-based NPOs from access to tax-privileged status, is that receipt of such support through the tax system is justified by some kind of domestic connection to the state in question. Some experts have tried to explain the traditional "domestic connection" or "landlock" approach to tax incentives in this way: Tax incentives for NPOs are given because those organisations fulfil tasks that are of interest and benefit to the state and should hence benefit the resident public benefit community of the given state.

It should be noted however that in no Member State has there ever been a requirement for a domestic connection so strict that it is necessary that the state be directly financially relieved of burdens/obligations by the philanthropic activity in question. No Member State limits the beneficiary circle of tax-privileged public benefit activities to its own citizens or residents. Rather, all Member States permit that tax-privileged philanthropic activities may benefit foreigners living abroad.

A second possible reason for the traditional exclusion of foreign-based NPOs from access to tax-privileged status is pure practicality: Foreign NPOs are governed by different legal provisions the comparability of which with domestic laws cannot, it is argued, readily be determined. In addition, a foreign NPO is by nature located in another territory, meaning that the national tax authority of the state from which the NPO is seeking tax-privileged status has no direct control over the foreign NPO nor any direct powers of intervention should the foreign NPO flout applicable legislation. While a request for assistance from the foreign authorities would be possible, it would also be cumbersome[310].

[309] Ibid., p. 8
[310] Ibid., p.12

But three aforementioned typical scenarios of discrimination mirror the circumstances of the key European Court of Justice's judgements. They became legal developments which led to the development of the non-discrimination principle. In each of these scenarios, the European Court has rendered decisions that were landmark for the entire non-profit sector. In "Stauffer"[311], "Persche"[312], and "Missionswerk"[313] cases the European Court of Justice (ECJ) has developed a general non-discrimination principle, according to which an EU-based foreign NPO is entitled to hold the same tax privileged status as a national NPO, provided that it can be shown to be comparable to a national NPO[314].

According to settled case law of the European Court of Justice, restrictions on the fundamental freedoms are only permissible if:

(1) they are applied in a non-discriminatory way,

(2) are justified by overriding reasons in the public interest,

(3) are an appropriate means to achieve the objective that they pursue, and

(4) do not go beyond what is necessary and reasonable to achieve this objective[315].

All three cases were analyzed for the existence of justified discrimination of foreign NPOs and their donors[316]. Roughly speaking, the Stauffer case dealt with the discriminative tax regime of foreign (EU-based) NPO, in Persche case there was talk of income tax discrimination of domestic donors who made donations to foreign (EU-based) NPO, the Missionswerk case dealt with the tax discrimination of foreign (EU-based) NPO with respect to inheritance tax.

The European Court was asked a question about whether fundamental freedoms of European Union are infringed, i.e. whether justified or not a more strict tax regime for NPOs established in another Member State and for their donors.

In all three cases the Court held that a denial of the tax incentive would only be permissible if foreign (EU-based) NPO was not (notwithstanding its seat) comparable to a domestic NPO.

The above mentioned cases were far not solitary ones. Laboratoires Fournier[317], Commission v. Austria[318], Commission v. Spain,[319] Commission vs. France[320] cases concerned the different parts of the tax regime of foreign (EU-based) NPOs. As a result, the European Court of Justice has developed a general non-discrimination principle as regards tax law in the area of public benefit activities and has set the following rules for Members States' national tax laws[321]:

1) It is at the discretion of Member States whether or not they wish to provide for tax privileges for NPOs and their donors[322]. Similarly, Member States are in principle free to determine the relevant conditions and requirements. It is theoretically also permissible for the beneficiary circle, namely the recipients of the support of the NPO, to be limited to domestic citizens or to persons living within the domestic territory[323]. Member States are in particular not obliged to automatically grant a status equivalent to that of a domestic NPO to a foreign EU-based NPO recognised as holding tax-privileged public benefit status in its

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[311] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203

[312] ECJ, C-318/07 Persche [2009] ECR I-00359

[313] ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497

[314] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 8

[315] Ibid., p. 14

[316] The arguments of the European Court and the objections of the parties will be examined in detail in the next chapter.

[317] ECJ, C-39/04 Laboratoires Fournier [2005] ECR I-2057

[318] ECJ, C-10/10 Commission v Austria [2011] ECR I-05389

[319] ECJ, C-153/08 Commission v. Spain [2009] ECR I-9735

[320] ECJ, C-485/14 Commission v. France [2015] ECLI:EU:C:2015:506

[321] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 13

[322] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 43.

[323] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, paras. 37f., 57; ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 30

country of origin[324].

2) However, limits to the scope of discretion of the Member States are established by the fundamental freedoms of the Treaty on the Functioning of the EU:

- It is not permitted that foreign EU-based NPOs and their donors are excluded from eligibility for tax privileges if, seat aside, they fulfil all requirements of the national public benefit tax law[325].

- It is not permitted that a (domestic or foreign EU-based) NPO is required to undertake its philanthropic activities in the Member State which grants the tax privilege, unless there are compelling objective reasons for this.

3) It is necessary in cross-border cases that Member States carry out a comparability test to determine whether or not a foreign EU-based NPO meets the requirements of national tax law. Such tests are to be carried out by the national authorities and courts of the Member State concerned[326].

4) Within the framework of the comparability test the competent national authorities may require the foreign NPO, and/or as relevant its donors, to provide any documentation they deem useful for the carrying out of the comparability test[327].

Following the ECJ decisions of Stauffer and Persche, the most EU Member States have amended their rules concerning foreign non-profit entities. In particular, in light of the ECJ case law, tax laws of many European states have expanded the deductions for the benefit of non-profit entities registered within the European Union or the EEA in order to be in conformity with the above jurisprudence. For example, French tax law now gives the right to income tax deductions for gifts made to an entity established in the European Union (or a state of the EEA having concluded a tax treaty with France that includes a clause of administrative cooperation, i.e., Norway and Iceland), when this entity has similar aims and legal characteristics as a French entity that is regarded as a non-profit organization. According to the tax authorities, this implies at least that they are of general interest (according to the French definition). No further details have been given as to the place where the activities are to be carried out. Therefore, it may well be the case that the French tax authorities intend to uphold a requirement which states that at least a part of these activities must be carried out in France or for the benefit of French residents. If the taxpayer makes a donation to a foreign corporation, he is expected – at least in Germany – to cooperate more extensively with the fiscal administration in order to prove the nature of tax-privileged purposes of the recipient[328].

The European Commission, which started infringement procedures in the field of public benefit tax law in 2005, significantly improved the situation in the taxation of cross-border activities of the NPOs. It looked both at the tax treatment of NPOs and at the tax treatment of donors. 28 cases were successfully closed due to changes in legislation[329], and a few cases are still pending (in particular, proceedings against Greece[330] and Spain[331])[332].

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[324] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 39; ECJ, C-318/07 Persche [2009] ECR I-00359, para. 48.

[325] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 46; ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, paras. 30-31.

[326] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 49; ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, paras. 33-34.

[327] ECJ, C-318/07 Persche [2009] ECR I-00359, paras. 53-58.

[328] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[329] The latest closed (completed) procedures for 2014-2016 are the proceedings against France, Italy and Germany.
1) N 20074823 dated on 10/07/2014- France referred to the Court regarding donations to foreign general-interest bodies (Referral to Court Art. 258 TFEU), Cases No 2006/5003, 2007/4203 and 2007/4823. (10/07/2014) Proceedings closed on 24/09/2015 (France changed its legislation);
2) N 20122156 dated on 25/09/2014 - Italy requested to amend discriminatory legislation on inheritance tax (Reasoned opinion Art. 258 TFEU), Cases No 2012/2156 and 2012/2157 Proceedings closed on 26/11/2014 (Italy changed its legislation);

The state of the tax exemptions in each of cross-border scenarios at the moment, years after the European Court's landmark decisions in Stauffer, Persche and Missionwerk cases is performed in the tables 8-11. In fact, it is about whether the EU countries have changed their legislations on the principle of non-discrimination in each of the possible cross-border scenarios.

Table 8 – Income tax regime of NPOs in cross-border scenarios

Country	Where corporate income tax exemptions exist for domestic NPOs, are the same benefits available for comparable foreign EU-based NPO according to the wording of the law?
Austria	Yes
Belgium	Yes, but only for one of the two alternative grounds for obtaining exemption
Bulgaria	Yes
Croatia	No
Cyprus	No
Czech Republic	Yes
Denmark	No
Estonia	Yes, but only applies to EU/EEA-based foundations provided that they fulfil the same requirements that the resident foundations must meet to be considered as public benefit organisations.
Finland	Yes
France	Yes
Germany	Yes
Greece	Yes
Hungary	Yes
Ireland	Yes, but the organisation must be included in a list
Italy	Yes
Latvia	No
Lithuania	Yes
Luxembourg	No
Malta	Yes, but the organisation must be included in a list
Netherlands	Yes
Poland	Yes
Portugal	No
Romania	No
Slovakia	N/a, no tax incentives for public benefit organisations
Slovenia	N/a, no tax incentives for public benefit organisations
Spain	No, only if the foreign foundation would register in Spain
Sweden	Yes
United Kingdom	Yes
Sources: Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement? / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.; Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p.	

3) N 20122159 dated on 16/10/2014 - Commission asks Germany to stop discriminatory taxation of legacies to foreign charities (Reasoned opinion Art. 258 TFEU), Case No 2012/2159 Proceedings closed on 25/02/2016 (Germany changed its legislation).

[330] N 20122134 dated on 26/03/2015 - Greece referred to the Court regarding the inheritance tax treatment of bequests to non-profit organizations, (Referral to Court Art. 258 TFEU), Case No 2012-2091

[331] N 20134086 dated on 19/11/2015 - Commission asks Spain to end discriminatory tax treatment of foreign non-profit entities and of their contributors (Reasoned opinion Art. 258 TFEU), Case No 2013-4086

[332] Official website of the European Commission http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/

As the table shows there are three different solutions employed by Member States:

1) In 18 Member States the wording of the law explicitly provides a non-discrimination rule; 2 of those Member States require a registration of the relevant NPO in a list;

2) In 2 Member States, there is no discrimination because there would be no tax privileges at all in such a case;

3) In 8 Member States according to the wording of the law foreign EU-based NPOs are at least in certain aspects discriminated against, even if they are comparable to a domestic NPO. At the same time the countries experts state, that discrimination is not always evident from the wording of the law[333].

Outside the European Union, there is a clear trend for countries not to provide equal income tax exemptions for foreign-based foundations. To receive tax incentives, a foreign foundation would generally be required to register and/or set up a branch office in the country from which tax incentives are sought[334].

As we noted above, a private and rarely considered in the literature case of discrimination of foreign NPOs in a cross-border context is the restriction of the rights of domestic NPOs in the carrying out cross-border activities. It is a question of termination or restriction of the tax-exempt public benefit status of domestic NPOs performing their activities abroad (within the territory of the EU).

Table 9 contains the data about the consequences of the domestic NPOs foreign activities to obtain a tax-privileged status (or tax exemption) in the country of residence.

Table 9 – The impact of NPOs' activities abroad on the possibility of obtaining tax benefits in the country of residence

Country	Do activities abroad put the tax-exempt status of a NPO or the ability to receive tax deductible donations at risk?
Austria	Yes, foundations operating mainly abroad can lose their special tax status.
Belgium	No, but the ability to receive tax deductible donations might be put at risk in case major activities take place outside EU/EEA unless they are supporting development aid.
Bulgaria	No
Croatia	No
Cyprus	No, provided such activities are in the normal course of the foundation's activities
Czech Republic	No, but tax benefits for donors are not granted, if the foundation does not have a seat in an EU or EEA countries.
Denmark	No
Estonia	No
Finland	No
France	Yes, tax benefits for donors are not granted, if the foundations do not conduct the main part of their activities in France. There are exceptions.
Germany	No, but tax exemption requires that pursuing public benefit purposes abroad possibly has a positive impact for Germany
Greece	No
Hungary	No
Ireland	No

[333] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 33

[334] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p., p.13

Table 9 (cont.)

Italy	No
Latvia	No, but tax exemptions are not applicable to activity abroad
Lithuania	Yes, if activities are being carried on outside of the EEA
Luxembourg	No
Malta	No, in general. There are some conditions which would need to be satisfied for the public benefit foundation to be tax exempt
Netherlands	No
Poland	No
Portugal	Yes, the notion of a legal entity of public utility means that the tax-exempt status is dependent on the requirement that the entity pursues aims of general interest for domestic benefit of national or local scope.
Romania	No
Slovakia	No
Slovenia	No
Spain	No
Sweden	No
United Kingdom	No
Source: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p., p. 42	

The large majority of EU countries allow NPOs to engage in activities abroad without compromising their tax-exempt public benefit status. In a small number of countries (Austria, France, Germany, Portugal) the tax status of a foundation pursuing the majority of its activity outside of its country of establishment may, however, be at risk. In Latvia the NPOs also have a precarious position[335].

Table 10 – Tax incentives for donors in cross-border cases

Country	Can individual/corporate donors giving to comparable EU-based NPOs get the same tax benefits as they would for giving to domestic NPOs according to the wording of the law?	
	Individual donors	Corporate donors
Austria	Yes, but the recipient organisation must be included in a list	Yes, but the recipient organisation must be included in a list
Belgium	Yes	Yes
Bulgaria	Yes	Yes
Croatia	No	No
Cyprus	No	Yes
Czech Republic	Yes	Yes
Denmark	Yes, but the recipient organisation must be included in a list	Yes, but the recipient organisation must be included in a list
Estonia	Yes	Yes
Finland	n/a	Yes, but the recipient organisation must be included in a list
France	Yes, but the recipient organisation must be approved by the tax authorities	Yes, but the recipient organisation must be approved by the tax authorities

[335] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p.

Table 10 (cont.)

Germany	Yes	Yes
Greece	Yes	Yes
Hungary	n/a	No
Ireland	Yes, but the recipient organisation must be included in a list	Yes, but the recipient organisation must be included in a list
Italy	Yes	Yes
Latvia	Yes	Yes
Lithuania	No	No
Luxembourg	Yes	Yes
Malta	Yes	Yes
Netherlands	Yes, but the recipient organisation must be included in a list	Yes, but the recipient organisation must be included in a list
Poland	Yes	Yes
Portugal	No	No
Romania	No	No
Slovakia	n/a	n/a
Slovenia	Yes	Yes
Spain	No	No
Sweden	Yes, but the recipient organisation must be included in a list	No
United Kingdom	Yes, but the recipient foundation must be approved by the tax authority	Yes, but the recipient foundation must be approved by the tax authority
Sources: Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement? // European Foundation Centre (EFC) 2014. - 47 p., p. 28-29; Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p., p. 50-54		

As the chart shows there are three different solutions:

1) In 20 Member States the wording of the law includes a non-discrimination rule; 7 of those Member States require a registration of the relevant NPO in a list.

2) In 3 Member States – Finland, Hungary and Slovakia, the wording of the law does not state a non-discrimination rule, but there is no discrimination because there are no tax incentives for individual donors (In Slovakia there are also no tax benefits for corporate donors);

3) In some Member States according to the wording of the law the domestic donors of foreign EU-based NPOs are (still) discriminated against, even if these NPOs are comparable: 6 Member States in case of individual donors and 7 Member States in case of corporate donors. In some of those countries the exclusion of foreign NPOs is explicit. In other countries there is no explicit exclusion, but the interpretation given by the country experts indicates that foreign NPOs are still discriminated against[336].

Where incentives exist these are in the majority of EU Member States applied equally for donations to domestic and comparable foreign EU-based NPOs. Moreover, even outside of the European Union, more than half of the countries surveyed do offer equal incentives to donors for donations to domestic and foreign-based NPOs[337].

[336] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 29

[337] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p., p.13

Table 11 – Gift and inheritance taxation of foreign NPOs

Country	Where gift/inheritance tax exists and there are exemptions for donations to domestic NPOs, are the same benefits available for donations to a comparable EU/EEA based foreign NPO according to the wording of the law?
Austria	Not applicable, no tax
Belgium	Yes
Bulgaria	Yes
Croatia	No
Cyprus	Not applicable, no tax
Czech Republic	Yes
Denmark	Yes, but the recipient organisation must be included in a list
Estonia	Not applicable, no tax
Finland	Yes
France	Yes, from January 1, 2015. But the recipient organisation must be approved by the tax authorities
Germany	No
Greece	Yes
Hungary	No
Ireland	Yes
Italy	Yes
Latvia	Not applicable, no tax
Lithuania	Yes
Luxembourg	Yes
Malta	Yes (Transfer duty)
Netherlands	Yes, but the recipient organisation must be included in a list
Poland	Not applicable, no tax
Portugal	No
Romania	Not applicable, no tax
Slovakia	Not applicable, no tax
Slovenia	Yes
Spain	Not applicable, no tax levied on legal entities
Sweden	Not applicable, no tax
United Kingdom	Yes
Source: Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement? / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 31	

As in previous cases, the Member States choose different strategies:

1) In 15 Member States the wording of the law explicitly provides a non-discrimination rule; 3 of those Member States require a registration of the relevant NPO in a list or approval of the tax authorities.

2) In 9 Member States, there is no discrimination because there would be no tax privileges at all in such a case (In Malta a transfer duty is applied).

3) In 4 Member States according to the wording of the law foreign EU-based NPOs are at least in certain aspects discriminated against, even if they are comparable to a domestic NPO[338].

From the above tables, we can conclude that most Member States have implemented the nondiscrimination rule of the ECJ in case of tax benefits for foreign EU-based NPOs

[338] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 33

and their donors. It can also be noted, thus far hardly any Member States have resorted to the possibilities referred to by the European Court of Justice to abolish tax privileges for NPOs altogether (which could be considered as negative implementation on the non-discrimination principle), or to limit the beneficiary circle of a NPO holding tax-privileged status to domestic citizens or domestically resident persons.

As T. von Hippel notes, just 10 years ago, the general rule to be found across the Member States was that tax incentives were restricted to domestic NPOs and donors giving to domestic NPOs[339]. At the present day as it is shown in tables the climate for the cross-border activities of NPOs highly improved. But the non-discrimination principle established by the ECJ has not yet been implemented in the text of the national tax laws of all the 28 Member States. There are still 22 out of a possible 84 cases (28 Member States × 3 possible discriminatory scenarios), where the wording of the law appears to discriminate against foreign EU-based NPOs.

According to the general rules of European law the national law must in those 22 cases be interpreted in such a way as to be in conformance with the European non-discrimination principle. This is even the case in the unsatisfactory circumstance that the wording of the law contradicts the actual legal situation (i.e. does not conform to the requirements of European law). Such situations are problematic because uninformed NPOs and donors may, simply on account of lack of clarity of the law, be prevented from obtaining tax incentives to which they are entitled[340].

One example of the difficulties encountered in interpreting the national laws can be seem when considering the Spanish law on foundations: Spanish tax law just refers to a "foundation" according to the Spanish foundation law. Whereas such a reference to the civil law status may be efficient for domestic foundations, it is self-evident that such a reference is not helpful as regards foreign foundations which naturally have a foreign civil law status. In such a case the reference of national tax law will have to be interpreted and two interpretations are possible:

A) The reference means that the foreign-based foundation has to establish itself as a Spanish foundation in order to be eligible to hold tax-privileged status on equal terms to a domestic Spanish foundation.

B) The reference means that a foreign-based foundation has to apply the relevant requirements for the civil law status, which have to be checked by the Spanish tax authorities.

If the first interpretation were applied, the wording of the law would violate the non-discrimination principle of the ECJ as it forces the foreign-based foundation to obtain the civil law status of a Spanish foundation. Only the second interpretation could be in line with the prescriptions of the ECJ (on the condition that the civil law status does not require the foundation to have its seat within the territory of Spain which would be against the non-discrimination rule of the ECJ). Thus only interpretation (B) would be acceptable and the real question is whether the law has to be clarified in order to avoid misleading interpretations like interpretation (A)[341].

However, even where Member states formally no longer discriminate from a tax point of view, significant procedural barriers for cross-border activity of NPOs continue to exist[342].

As it is mentioned in the EFC research "Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe", not all countries recognise the legal personality of foreign-based NPO, requiring registration or even creation of a branch in order for the foreign foundation to be able to operate in their territory.

[339] Ibid., p. 12
[340] Ibid., p. 33
[341] Ibid., p. 29
[342] Ibid., p. 33

One instrument towards such recognition has been the European Convention on the recognition of the legal personality of NGOs[343]. The Convention facilitates the recognition by signatory countries of the legal personality and capacity of foreign based NGOs established in other signatory countries without further steps, although additional requirements may remain in force in certain cases. For instance, Belgium, while recognising the legal personality and capacity of NGOs established in other signatory countries of the Convention, still requires that such organisations register a branch (centre of operations) in case of substantial activity. Similarly, France, while recognising NGOs established in signatory countries of the Convention requires these organisations to seek special recognition of their public benefit status if they intend to carry out their statutory activity in France[344].

Table 12 provides data on recognition of foreign NPOs by EU Member States' legislations.

Table 12 – Recognition of foreign foundations by EU Member States' legislations

Country	Under what conditions does the civil law recognize the legal personality of a foreign NPO/NGO?
Austria	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986
Belgium	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986, but must create and register a centre of activity in case of substantial activity.
Bulgaria	Recognised without further steps
Croatia	Recognised but must establish a branch if it wants to operate in Croatia.
Cyprus	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986
Czech Republic	Recognised without further steps
Denmark	Recognised without further steps
Estonia	Must be registered in Estonia
Finland	Recognised without further steps within EU/EEA but special legal permission is needed for foundations outside EEA.
France	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986, but if it intends to perform its statutory purpose in France, it must seek special authorisation (recognition of public utility status).
Germany	Recognised without further steps
Greece	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986.
Hungary	Recognised without further steps
Ireland	Every charitable organisation that wishes to operate in Ireland must register with the charity regulator.
Italy	Recognised without further steps but must be officially recognised in case it pursues its principal purposes in Italy.
Latvia	Recognised without further steps but to conduct economic activities it must be established as a foundation in Latvia.
Lithuania	Recognised by international treaties or upon its registration of a branch office in Lithuania.
Luxembourg	Recognised without further steps

[343] *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations Strasbourg*, 24.IV.1986 / URL: http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm

[344] *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe* / European Foundation Centre (EFC). – 2015. – 64 p., p. 11

Table 12 (cont.)

Malta	Recognised without further steps but a foreign organisation which carries on an activity in Malta on a regular basis must register with the Registrar for Legal Persons prior to commencing its activities. (Regular activity means activity having a duration of more than 3 months or which is carried out through a permanent establishment in Malta).
Netherlands	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986.
Poland	Recognised but must register a branch if it wants to operate on a more or less regular basis.
Portugal	Recognised without further steps if within the scope of the European Convention on the recognition of the legal personality of NGOs from 1986. Other foreign foundations seeking to pursue their purpose in Portugal must open a branch, which requires authorisation.
Romania	Recognised without further steps
Slovakia	Recognised but must register a branch office in case it wants to operate in Slovakia.
Slovenia	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986.
Spain	Recognised but must register a branch in case it wants to operate in Spain more regularly (requires registration).
Sweden	Recognised without further steps
United Kingdom	Recognised without further steps – signed European Convention on the recognition of the legal personality of NGOs from 1986, but recognition of charitable status is generally not possible/the charitable status could be recognised by applying to the tax authority.
Source: Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe / European Foundation Centre (EFC). – 2015. – 64 p., p. 36	

Thus far, only 11 countries have ratified the Convention and the situation as regards recognition of foreign-based public benefit foundations is far from satisfactory[345].

The non-discrimination principle requires checking comparability of foreign and domestic NPOs when deciding whether to grant tax exemptions. The ECJ held that "where a body recognised as having charitable status in one Member State satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, so that it would be likely to be recognised as having charitable status in the latter Member State, which is a matter for the national authorities of that Member State, including its courts, to determine, the authorities of that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in its territory".[346] The national court must determine the fulfilment of these conditions (host country control)[347].

But also in the remaining 62 (of 84) cases in which the wording of the law does not discriminate against foreign-based NPOs and their donors, it is not at all clear under which circumstances Member States consider a foreign EU-based NPO comparable to a resident one. There is no common approach as to how Member States check such comparability[348].

In the majority of Member States, no formal or uniform approach to the comparability test is foreseen: Usually the competent tax authority decides on a case by case basis wheth-

[345] Ibid., p.11-12

[346] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 49; ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 40 and ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 34.

[347] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[348] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 8

er a foreign NPO is considered comparable to a domestic one. In around 10 Member States, however, at least in certain cases we find formal procedures which set out the binding framework for determining whether a foreign NPO is comparable to a domestic one.

In all Member States the burden of proof within the comparability test lies, in the case of tax incentives sought by a foreign NPO, with that NPO. In the case of tax incentives for donors giving to foreign-based NPOs, the burden of proof generally lies with the donor. The tax authorities often request that certain documents are made available (in translation) by the NPO or the donor. Such documents frequently include the statutes of the NPO and the annual financial report. The procedures to show comparability vary across the Member States and they are often lengthy, costly and accompanied by a certain level of legal uncertainty.

The benchmark for the comparability test is the national tax law of the Member State from which the tax incentives are sought. Despite the differences between Member States' tax laws, it is generally required that in order to receive tax privileges a NPO pursues a public benefit purpose. Typically, it should pursue this purpose exclusively and some Member States have stipulated further requirements. Tax laws differ in their details and it is often unclear at what level of detail the respective national tax law requirements have to be fulfilled in order to show a potential comparability. The practice can even vary from one authority to the other within one country[349].

At the same time following the ECJ, the difficulties in ascertaining in a clear and precise manner whether nonprofit entities meet the conditions imposed by national law are disadvantages of a purely administrative nature. A fundamental principle that has to be respected by national legislators when creating and applying formal requirements is the principle of proportionality. Formal requirements should not exceed what is strictly necessary for the recognition of non-profit tax status, taking into consideration national interests and the fight against tax fraud. This means that to avoid discrimination, additional conditions should not be required for non-resident-entities[350]. [351]

As we referred to above, the issue of non-compliance of the legislation of the Member States to the requirements of the European law will be addressed in time through court cases and infringement procedures initiated by the European Commission. But to overcome the discriminatory barriers it is necessary to build among Member States more trust in each other's systems by being assured that a certain level of control is guaranteed. Examples of attempts to develop simpler practice can be found in some Member States (e.g. model certificate in Luxembourg) and it should be in the interests of all Member States as well as the sector (and society as a whole) to continue to try to simplify and ease the process of the comparability test[352].

[349] Ibid., p. 9

[350] The EU Commission considers that the additional requirement for foreign charities to register in The Netherland is discriminatory, disproportionate and incompatible with the EU rules on the free movement of capital guaranteed by Article 63 TFEU and Article 40 EEA. The European Commission announced on 6 April 2011 that it had decided to refer the Netherlands to the EU's Court of Justice

[351] Jochum, H., Savvaidou, A. *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 61-74

[352] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 9

CHAPTER 3. IMPACT OF THE ECJ CASE LAW ON APPLICABILITY OF EU FUNDAMENTAL FREEDOMS TO NON-PROFIT ORGANISATIONS AND IMPLEMENTATION OF THE NON-DISCRIMINATION PRINCIPLE IN TAXATION OF THEIR CROSS-BORDER ACTIVITIES

3.1 Legal debate on belonging of the NPOs to a single market: "pros and cons"

As we noted in the previous section, one of the most important principles of European law is the principle of non-discrimination. It is guaranteed by specific provisions designed to prohibit discrimination on the grounds of nationality as enshrined in Article 18 of the TFEU[353]. This principle is closely related to the implementation of the fundamental freedoms that are key to the internal market (Art. 3 para. 3 TEU) the European Union committed itself to establish[354]. Defense of four fundamental freedoms – the free movement of goods, persons, services and capital – is the key element in the development of the jurisprudence of the ECJ. Jurisprudence of the ECJ has made very clear that Member States may not exercise its sovereignty right in a manner such that any of the freedoms of movement is restricted or violated. Over the years, the ECJ has expanded the traditional reach of the concept of non-discrimination on the grounds of nationality to the far-reaching notion of "restrictions or impediments to a national of a Member State to exercise any of the freedom of movements, even if these restrictions or impediments apply independent from the nationality of the persons in question"[355].

It may seem trivial to raise the question of the need to include charities within the internal market. However, considering the particular context in which the European case law on nonprofit organizations and activities developed, it appears more than necessary[356].

The internal market, formerly common market,[357] is one of the key objectives of the European Union. A teleological interpretation of European law, and in particular of the European Treaty freedoms of movement and of competition, would tend to limit its scope to persons and activities having economic relevance. Put the matter another way, the legal concept of the internal market contains an implicit requirement to carry on economic activities in order to benefit from the protection of the European Union's legal framework or as it is sometimes referred to, the economic Constitution of the Treaty.[358]

Such an interpretation was clearly supported by the former article 2 of the EC Treaty, which stated that "The Community shall have as its task, by establishing a common market … to promote throughout the Community a harmonious, balanced and sustainable development of economic activities…" This provision was replaced in substance by article 3 of the Treaty on the European Union. However, no explicit reference to economic activities is to be found anymore. Despite this change in wording, it is hard to imagine that the acquis communautaires, which existed previous to the entry into force of the Lisbon Treaty, has

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[353] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[354] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[355] ECJ, 15 Dec. 1995, Case C-415/93, Bosman, FED 1997-176

[356] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[357] On the origin and the (absence of) significance of the distinction between common market and internal market and their implication on market unity (single market), see Barents, R. *The Single Market and National tax sovereignty* / in S. Jansen (ed.), Fiscal Sovereignty of the Member States in an Internal Market, Eucotax series / Wolters Kluwer. –2011. – N 28, pp. 52-56 and references cited.

[358] Hatzopoulos, V. *The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts* // College of Europe, Research Papers in Law. – 2011. – N 6, p. 2

been fundamentally altered.[359] The Treaty of Lisbon primarily brought about a new numbering of the relevant provisions. But well-established concepts developed in respect of the fundamental freedoms have not lost their relevance[360].

Actually, with all the breadth of wording, certain freedoms declared by the EU do not spread (in a strict sense) to NPOs. For example, in its literal wording Article 49 TFEU with reference to Article 54 TFEU (ex Article 43 TEC with reference to ex Article 48 TEC, and even earlier Article 52 of TEEC[361] with reference to Article 58 TEEC) invariably excludes non-profit organizations from the freedom of establishment, which is the second most important freedom of the single market:

> "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital"[362]

Whereas, Article 54 (ex Article 48 TEC and ex Article 58 TEEC[363]) defines the subjects, on which the freedom of establishment extends:

> "'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".

According to T.Ecker, if not elsewhere the interpretation of Article 54(2) TFEU, which defines the term "companies or firms" and resides the main point of discussion. Article 54(2) TFEU includes "companies and firms" constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, "save for those which are non-profitmaking".[364] Consequently, the latter provision extends the right of establishment to legal entities. Generally, two interpretations exist. These are analyzed in the following[365].

It is sometimes argued that Art. 54(2) TFEU refers to the legal entity in toto.[366] Supporters of this interpretation are of the opinion that organizations which are non-profit-making never fall under the personal scope of the right of establishment, regardless of the character of their particular activities. As a result, activities those fall under the factual scope of Art. 49 TFEU would nevertheless be denied the benefit of the right of establishment if this interpretation were followed[367].

According to research of T.Ecker, the prevailing opinion follows a more functional approach, however. They interpret Art. 54(2) TFEU as referring to the particular operations of the NPO. In other words, this means that economic activities that are seen as participation in economic life fall under the scope of the right of establishment, even if per-

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[359] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[360] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[361] Treaty establishing the European Economic Community (TEEC), Art. 52: "Freedom of establishment shall include the right to engage in and carry on non-wage-earning activities, and also to set up and manage enterprises and, in particular, companies within the meaning of Article 58, second paragraph, under the conditions laid down by the law of the country of establishment for its own nationals, subject to the provisions of the Chapter relating to capital".

[362] Consolidated version of the Treaty on the Functioning of the European Union // Official Journal 115, 09/05/2008 P. 0067 – 0067

[363] Treaty establishing the European Economic Community (TEEC), Art. 58: "The term 'companies' shall mean companies under civil or commercial law including co-operative companies and other legal persons under public or private law, with the exception of non-profit-making companies".

[364] Consolidated version of the Treaty on the Functioning of the European Union // Official Journal 115, 09/05/2008 P. 0067 – 0067, Article 54 (ex Article 48 TEC)

[365] Ecker, T. *Taxation of Non-Profit Organizations with Multinational activities – The Stauffer Aftermath and Tax Treaties* // Intertax. – 2007. – Vol.35. – Issue 8-9, pp. 450-459

[366] AG Stix-Hackl Opinion, December 15, 2005, Case C-386/ 04 Stauffer, EU:C:2005:785, points 28 and 29

[367] Ecker, T. *Taxation of Non-Profit Organizations with Multinational activities – The Stauffer Aftermath and Tax Treaties* // Intertax. – 2007. – Vol.35. – Issue 8-9, pp. 450-459

formed by an NPO. Only organizations with mainly charitable purposes and organizations within the sphere of public law in no way connected with the economic objectives of the EC Treaty are excluded from the freedom of establishment.[368] [369]

Various authors take a different path. They argue that the purpose of Art. 54(2) TFEU is the avoidance of distortions of competition, which may occur if charitable organizations were to compete with private institutions. The distortion of competition is a consequence of the preferential treatment of charitable organizations. In cases where activities of an NPO are taxed normally, i.e. if no tax advantage is granted to the NPO in respect of this activity, Art. 54(2) TFEU has to be interpreted teleologically. Following this opinion, the protection of the right of establishment is only denied if the economic activities of NPOs threaten to distort competition[370].

In contrast to the last opinion, Thomas Etcker argues that the distortion of competition is a direct result of the preferential tax treatment of the activities of NPOs. The competitive advantage is based on a political decision[371] and a distortion of competition is therefore politically accepted if it leads to a promotion of the intended purpose. It is the result of a favouritism of the non-profit sector, which is justified by socio-political values.[372] Whether or not these preferential activities, which are accepted as distortive, are conducted by resident or non-resident charities is (and has to be) irrelevant. It is the result, i.e. the fulfillment of a purpose favoured by the state, that counts, not who fulfills it. The questions of distortion of competition and the justification of political decisions causing this distortion should therefore be examined under EC competition rules or state aid aspects.[373]

Furthermore, the ECJ held in respect of the meaning of Art. 54 TFEU in the Sodemare[374] case that:

> "…[a]s regards Article 58 [now Art. 54] of the Treaty, taken in isolation [. . .], it must be borne in mind that the effect of that provision is to assimilate, for the purpose of giving effect to the chapter relating to the right of establishment, 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 Community, to natural persons who are nationals of one of the Member States, although non-profit-making companies are excluded from the benefit of that chapter. Since that provision does no more than define the class of persons to whom the provisions on the right of establishment apply, it cannot preclude, as such, national rules of the kind at issue in the main proceedings".

As can be seen, opinions about the applicability of the freedom of establishment to NPOs differ a lot. The lowest common denominator, so to say, is that purely charitable or cultural associations that do not participate in economic life and do not perform economic activities, do not fall under the scope of the right of establishment. All of the opinions presented here are in agreement on this point[375].

Article 62 TFEU extends the scope of application of Article 54 TFEU also to Chapter 3 related to services. It follows that non-profit entities are also excluded from the freedom of providing services. These are considered to be of residual nature in the system of the

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[368] Smit, H., Herzog, P. *The Law of the European Community: A Commentary on the EEC Treaty* / Project on European Legal Institutions. – 1998. – 642 p.
[369] Ecker, T. *Taxation of Non-Profit Organizations with Multinational activities – The Stauffer Aftermath and Tax Treaties* // Intertax. – 2007. – Vol.35. – Issue 8-9, pp. 450-459
[370] Ibid.
[371] Weisbrod, B. *The Complexities of Income Generation for Nonprofits* / In V. A. Hodgkinson, & R. W. Lyman (Eds.) The Future of the Nonprofit Sector: Challenges, Changes, and Policy Considerations. –1989. – 546 p., p. 113
[372] Ecker, T. *Taxation of Non-Profit Organizations with Multinational activities – The Stauffer Aftermath and Tax Treaties* // Intertax. – 2007. – Vol.35. – Issue 8-9, pp. 450-459
[373] Ibid.
[374] ECJ, 17 June, 1997, Case C-70/95; Sodemare SA and others v Regione Lombardia, ECR I-03395, para. 25, also ECJ, November 6, 1984, Case 182/83, Fearon v Irish Land Commission, ECR 3677, para. 8.
[375] Ecker, T. *Taxation of Non-Profit Organizations with Multinational activities – The Stauffer Aftermath and Tax Treaties* // Intertax. – 2007. – Vol.35. – Issue 8-9, pp. 450-459

four freedoms (and particularly vis a vis freedom of establishment which encompass permanent and stable presence in the hosting Member State)[376].

This exclusion can explain the low level of harmonization of the legislation of the Member States with regard to NPOs. In the case of (for-profit) companies the issue of freedom of establishment was strictly linked with the harmonisation of the company laws of the Member States for the protection of the members. On the contrary, in the case of nonprofit entities there was no such harmonization. Since they were indeed excluded from freedom of establishment, there was no need to harmonise their legal provisions, particularly with respect to the protections of creditors[377].

It should be noted that the discussion on the applicability of fundamental freedoms to NPOs involves in the first place these two unintentional freedoms - the freedom of establishment and freedom of movement of services. Since the freedom of capital movement is subjective freedom, it does not depend on the nature of the subject of the movement of capital. As a consequence, the articles of the Treaty establishing the free flow of capital on the EU internal market are not so categorical in their wording and do not exclude clearly non-profit organizations from personal application[378].

The ECJ decision in *Barbier*[379] indicates that the free movement of capital is a freedom that intends to protect objects rather than persons.[380] The ECJ has concluded that the rights conferred by the rules governing free movement of capital are not subject to the existence of cross-border elements other than the investment in capital by an investor who is a national of a Member State. It is therefore not relevant that any other economic activity has been exercised by a person who is invoking the right of capital[381]. Consequently, the definition of the general prohibition makes clear that persons who are citizens and residents of other countries may invoke the free movement of capital, as the movement of capital is the object of the freedom rather than any quality of the person who is invoking the freedom[382]. An additional point is that, unlike the other freedoms, the application of the free movement of capital remarkably expands outside the territory of the European Union.

As rightly been said by S. Lombardo, the explicit exclusion of non-profit entities from two important freedoms of the European economic system, was decided in a time (almost 60 years ago) when such institutions operated on a local and national dimension. Their activity was considered to be of charitable, philanthropic, scientific, educational character. This activity was of a nature and a purpose which was considered to be different from the commercial, economic character that qualifies for-profit entities[383].

The idea behind this conclusion was based on the traditional classification that proposes associations and foundations as legal entities typically constituted in order to carry on a non-economic activity (i.e. a social, political, cultural, charitable activity possibly differently defined in the single Member States) with an ideal purpose (again, possibly differently defined), unlike companies, which are typically constituted in order to carry out economic activity for a lucrative purpose (but lucratif)[384].

That fact that NPO (mainly foundations and associations) did not (rectius, were not supposed to) carry out an economic activity for but lucratif, caused their exclusion from

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[376] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[377] Ibid.

[378] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[379] ECJ, 11 Dec 2003, Case C-364/01, Barbier v. Inspecteur van de Belastingdienst Particulieren

[380] AG Stix-Hackl Opinion, December 15, 2005, Case C-386/ 04 Stauffer, EU:C:2005:785

[381] ECJ, 11 Dec 2003, Case C-364/01, Barbier v. Inspecteur van de Belastingdienst Particulieren, Secs. 59-60

[382] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[383] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[384] Lussan, C. *Les sociétés dans le marché commun* // Rivista delle Società. – 1958, pp. 979-995, p. 987

fundamental freedoms. The law and economics dimension of the non-profit element and the consideration that non-profit firms are (more) efficient organisers of some economic transactions in comparison to for-profit firms, was not considered by legal doctrine and by the European legislator[385]. Nevertheless, in more recent times non-profit entities, meaning here in primis associations and foundations, have been stressing their importance in the realisation of the single market and pushing for European legislation to grant recognition of their role in the modern market economies of the Member States and consequently also of the single market[386].

In this connection, one can agree with the arguments of S. Lombardo, who in his article proves the inexpediency of exclusion of non-profit-making entities from the right of freedom of establishment of Articles 49 and 54 TFEU. He argues that the exclusion from freedom of establishment is no longer justified on the basis of two arguments. Firstly, a law and economics treatment of non-profit firms as organisations that efficiently provide goods and services in alternative to for-profit firms weakens the reasons for the exclusion. Secondly, the development of the jurisprudence of the European Court of Justice in the fields of competition law, free movement of capital and tax law makes such exclusion systematically no longer tenable[387].

The first argument holds at a plane of law and economics analysis of NPOs, which brings their operations back to the realm of economic activity. The market economy can be properly "occupied" not only by for-profit entities but also by non-profit entities in existence as an economic answer to so-called "market failures" problem.

The systematic study of non-profit entities in law and economics terms was made in a seminal paper by Henry Hansmann in 1980[388]. The study, even if primarily based on non-profit corporations, can be extended to other NPOs. He examines the economic reasons for the existence of non-profit firms in the market, as opposed to the economic reasons that justify the existence of for-profit firms in the same market. Both kinds of firm respond to particular economic problems and are an efficient answer in terms of their economic characteristics (as regards their nature and structure) to the suppression of the market mechanism. The division between for-profit and non-profit firms arises mainly because of the existence of transaction costs. Where the market fails because transaction costs are too high there are non-profit-firms. It explains their natural compatibility with market economy theory, in terms of their economic dimension in pursuing an economic activity on the basis of the non-profit element. In other words, in a law and economics paradigm all elements of the analysis are brought back to their economic dimension, so that the activity becomes (by definition) an economic one. In such a paradigm there is no space for elements (type of activity and type of but) different from economic ones, such as charitable, philanthropic or ideal[389].

Even more, theoretically NPOs are able stand of as efficient competitors of the for-profit firms. The effectiveness of NGOs increases when there is a problem of "market failure". In this case, non-profit firms are an effective alternative to the for-profit firms in the provision of specific (economic) services in the free market.

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[385] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[386] Breen, O.B. *EU Regulation of Charitable Organizations: the Politics of Legally Enabling Civil Society* // International Journal of Notfor-Profit Law. – 2008. – Vol. 10. – Issue 3 / URL: http://www.icnl.org/research/journal/vol10iss3/special_3.htm

Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[388] Hansmann, H. *The Role of Nonprofit Enterprise* // Yale Law Journal. – 1980. – N 89, pp. 835-901; Hansmann, H. *Reforming Nonprofit Corporation Law* // University of Pennsylvania Law Review. – 1981. – Vol. 129. – N 3, pp. 497-623.

[389] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

The single market which is based on the four freedoms of movement and is regulated in terms of competition law. In this light, the basic freedoms of the EU have global objectives: the creation of a more or less uniform corporate law in order to provide companies from different countries with the same conditions for competition. Therefore, NPOs, which 1) can fulfill the functions of commercial organizations, 2) compete for resources and perform compensated services, should have the right to use the main freedoms of the EU.

Without further delving into the economic nature of the activities of the NPO, we note that some scholars[390] argue that non-profit entities carrying on economic activity should be granted freedom of establishment even given the literal wording of Article 54 TFEU[391]. The literal wording of Article 54 TFEU excludes "non-profit-making" legal persons from freedom of establishment. Nevertheless, NPOs can make and often make a profit from their activities. A school of thought, the only difference with usual business activity, organised in the form of for-profit-firms, is that it is carried out by firms with a nondistribution constraint[392]. According to this opinion, the scope of the entity does not specify in terms of type of activity (economic, charitable, philanthropic) or but (lucratif or ideal) but only on the possibility of the distribution of possible incomes deriving from the activity[393].

Actually, in paragraph 2.2 of the thesis, we concluded that most European jurisdictions allow NPOs to carry out economic activities and make a profit. The European uniform framework requires only that the NPO does not distribute profits (which can be occasional, habitual or even systematic). The non-distribution constraint requires profits not to be distributed to members in whatever kind (financial advantages and benefices) but instead to be invested in the provisions of the services. In this regard, some researchers, for example, S.Lombardo, conclude that it is not the existence of a profit goal that is important for accessing basic freedoms, but rather the type of activity (economic or non-economic, i.e, charitable or philanthropic). It seems that the researchers suppose, therefore, that the wording and use of the term "'non-profit-making' legal persons" applies exclusively to organizations that carry out exclusively non-economic (charitable and philanthropic) activities. Correspondingly, it looks logical that to the extent that the activity is economic, both for-profit and non-profit firms enjoy fundamental freedoms. An indirect proof of the correctness of this assumption is the fact that co-operatives, explicitly included among the entities enjoying freedom of establishment, are a kind of entity whose nature in terms of category, activity and purpose could be considered hybrid[394].

The arguments in favor of the right of NPOs can also be found in another level, where the emphasis on the mandatory availability of an economic element in the activities of NPOs is not being done. On the contrary, in this level of analysis, it should be recalled that non-economic goals are listed among the objectives of the European Union in the founding Treaties. Among these objectives mentioned in article 3 of the TEU, it is worth mentioning freedom, security and justice, social justice and cohesion, cultural diversity, the safeguarding of the European cultural heritage, the protection of the rights of the child and the protection of the environment. Besides, protection against discrimination on the grounds of nationality is not only ensured by the four freedoms of movement, but also by the more

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[390] Becker, F. *Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, Judgment of the Court (Third Chamber) of 14 September 2006* // Common Market Law Review. – 2007. – Vol. 44. – Issue 3, pp. 803-816; Helios, M. *Taxation of non-profit organizations and EC law* // EC Tax Review. – 2007. – Vol. 2, pp. 65-73; Eicker, K. *Do the basic freedoms of the EC Treaty also require an amendment to the national tax laws on charities and non-profit organizations?* // EC Tax Law. – 2005. – N 3, pp. 140-144, p. 143

[391] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[392] For example, Hansmann, H. *The Role of Nonprofit Enterprise* // Yale Law Journal. – 1980. – N 89, pp. 835-901, p. 880 and Hansmann, H. *Reforming Nonprofit Corporation Law* // University of Pennsylvania Law Review. – 1981. – Vol. 129. – N 3, pp. 497-623, p. 504.

[393] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[394] Ibid.

general articles 18 and 21 of the TFEU,[395] which incorporate the concept of EU citizenship, disconnected from its economic dimension. Moreover, Protocol 26 to the Treaty on the European Union acknowledges the existence – and importance – of the services of general interest in the Member States[396]. Those services are defined as such by Member States and may be either economic or non-economic, depending on their nature. A reference to the services of general economic interest is also to be found in article 14 of the TFEU, which emphasizes their role in the promotion of social and territorial cohesion and provides for an EU legal framework in which they operate, as well as in article 36 of the Charter of Fundamental Rights of the EU. A special subcategory of those services is formed by social services of general interest, which according to the Commission, "include social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role".[397] In a 2011 Communication, the Commission explicitly recognizes that "foundations which have as their mission to provide public benefit play an increasing role in providing and financing social services of general interest in the EU".[398] [399].

The presence of non-economic objectives in the EU Treaties and the recognition of services of general interest could help to justify in some cases the application of protective European rules to non-profit bodies and activities, at least in the cases where the non-application of these European rules to a non-profit activity would put in jeopardy the attainment of those others objectives[400].

The second argument in defense of the effect of fundamental freedoms to NPOs is in the practical level and follows from the case law of the ECJ.

Irrespective of the discussion on the economic (or non-economic) nature of the activities of NPOs, in case law the European Court touched on the application of fundamental freedoms for non-profit organizations. The core of EU law consists of rules regulating the relations between economic operators in the internal market, as well as the relationship between them and the public authorities, whether European or national. This is the case for competition law, labour law, public procurement law and of course tax law. In each of these areas, the ECJ has developed case law aiming at determining precisely the personal scope of application of EU law, by defining the nature of the activities that had to be carried on by those claiming EU protection. In all these cases, the Court showed how a clear and essential distinction had to be made between economic activities (with or without charitable purpose), and non-economic activities. The ECJ established this distinction in order to ensure the effectiveness of the objectives of European integration, by prohibiting Member States to justify breaches of EU law by simply referring to characteristics of entities related to the legal structure or their statutory aims, and not to the substance of their activities.

The case law of the European Court confirms the application of the provisions of the relevant provisions of various areas of EU law to non-profit organizations. Let's consider in more detail some examples.

1) NPOs and competition law. In the area of competition law, which is very important in the construction of a single market, S.Lombardo the Court examined several times whether competition rules could apply to persons and activities which, prima facie, could

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[395] Former Art. 12 and 18 TEC

[396] Protocol (No. 26) on services of general interest / Consolidated version of the Treaty on European Union // OJ 115, 09/05/2008 P. 0308 - 0308

[397] Commission Communication of 26 April 2006, *Implementing the Community Lisbon Programme: Social services of general interest in the European Union*, COM (2006) 177

[398] Commission Communication of 20 December 2011. *A quality framework for services of general interest in Europe* COM (2011) 900

[399] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[400] Ibid.

potentially be treated as noneconomic, or at least not-for-profit. This case law allowed the ECJ to build a line of reasoning according to which these provisions of the Treaty only applied to "undertakings", intended as any entity, organized on a stable basis and engaged in an economic activity regardless of the legal status and the way in which it is financed.[401] The definition of undertaking was completed by an even broader definition of economic activity as "any activity consisting in offering goods and services on a given market" for remuneration.[402] Although EU primary law does not define the term "undertaking", it has been widely interpreted by the ECJ. The Court tends to adopt a functional approach of this notion, focusing on the economic nature of the activities carried out by the entity. ECJ case law bases the definition of economic activities on three requirements: the entity must offer goods or services on the market; bear the economic or financial risk and have the potential to make profit from the activity.[403] If these conditions are met,[404] it does not matter that the body is not actually making profit[405] or that it has not been set up for an economic purpose.[406] Moreover, the term "undertaking" appears as a relative concept since an entity might be considered as falling inside the scope of the competition rules for only part of its activities[407].

Case in point is MOTOE case[408]. In this judgment the Court decided that a Greek non-profit association (ELPA) carrying out an economic activity which consists in organising and marketing motorcycling sports events is an undertaking and for this reason is subject to European competition law[409]. The ECJ held in the MOTOE case that "the fact that, for the exercise of part of its activities, an entity vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities". [410] An interesting aspect of ECJ case law is that in order to make a clear distinction between economic activities falling within the scope of EU competition rules and social policy activities, excluded from the application of competition law, the ECJ considered that the criterion of the absence of a profit motive was not decisive alone, but had to be combined with another criterion based on the principle of solidarity.[411] With respect to NPOs, the test that has been used for defining the economic nature of the activity refers to the possibility that the activity could be carried out also by for-profit entities. This comparability test ends up in a competition test between non-profit and for-profit entities for the definition of the notion of economic activity. It has actually been extended in MOTOE. Indeed, the AG refers to the possibility that nonprofit entities may be in competition with for-profit entities but also that they could be

[401] ECJ, 23 Apr. 1991, C-41/90, Höfner and Elser v. Macrotron GmbH, ECR I-1979, para. 21. This definition has been constantly repeated by the Court. E.g. see ECJ, 17 Feb. 1993, Joined Cases C-159/91 and C-160/91, Poucet and Pistre; ECR I-637, para. 17; ECJ, 16 Nov. 1995, Case C-244/94, Fédération Française des Sociétés d'Assurance, ECR I-4013, para. 14; ECJ, 12 Sept. 2000, C-180/98 to C-184/98, Pavlov e.a., para. 74.

[402] ECJ, 16 June 1987, Case 118/85, Commission v Italy, ECR 2599, para. 7; ECJ, 18 June 1998 Case C-35/96 Commission v Italy, ECR I-3851, para. 36; ECJ, 12 Sept. 2000, C-180/98 to C-184/98, Pavlov e.a., para. 75.

[403] E.g. see The opinion of Advocate General Jacobs delivered on 23 Mar. 2000 in C-Pavlov e.a. (C-180/98 to C-184/98), paras. 107-111.

[404] Fallon, M. *Droit matériel général de l'Union européenne* / Academia Bruylant. – 2003. – pp. 265-277

[405] ECJ, 21 Sept. 1999, C-67/96, Albany International, ECRI-05751, para. 74.

[406] ECJ, 30 Apr. 1974, C-155/73, Italy v. Sacchi, ECR 409, para. 14

[407] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[408] ECJ, 1 July 2008, Case C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio

[409] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[410] ECJ, 1 July 2008, Case C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio

[411] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

in competition among themselves (para 41). This argument was accepted by the Court (para 28).[412]

2) NPOs and State aid law. As for State aid law, the Court faced similar problems in the definition of the personal scope of application of the State aid provisions and solved them in the same manner.[413] In the area of tax aid, the landmark case concerns the application of State aid rules to Italian banking foundations.[414] It concerned the specific favourable tax regime granted to foundations (charities) closely linked to Italian banks. This regime consisted in an exemption from withholding tax on dividends accruing to "banking foundations" that held shares in banking companies and pursued exclusively aims of social welfare, education, teaching and study, and scientific research. The Court confirmed the relativity of the undertaking concept as well as the fact that activities are carried out without any profit purpose is irrelevant to qualify an activity as economic or not. Moreover, concerning the nature of the foundations' activities, the Court stated that a distinction had to be made between the simple payment of contributions to non-profit-making organizations and the activity carried on directly in those fields. When carrying on an activity limited to the payment of contributions to non-profit-making organizations, those banking foundation could not be treated as an undertakings. According to the Court, "that activity is of an exclusively social nature and is not carried on in competition with other operators. As regards that activity, a banking foundation acts as a voluntary body or charitable organization and not as an undertaking". The Court considered, however, that when a banking foundation acted itself in the fields of public interest and social assistance, by effecting financial, commercial, real estate and asset operations necessary or opportune to pursue this aim, it was offering goods or services on the market in competition with other operators, and therefore had to be regarded as an undertaking, engaged in an economic activity, notwithstanding the fact that the supply of goods or services is made without profit motive.[415] [416]

3) NPOs and public procurement law. The principles developed by the ECJ as far as competition law is concerned are reiterated in the public procurement law. This was notably the case in Commission v. Italy (C-119/06),[417] in which the Court stated that the lack of any lucrative motive does not preclude that such activities may be considered as economic and therefore have to respect the public procurement rules. The Court decided by referring to the FFSA and Pavlov competition law cases that a contracting authority awarding ambulance services had to follow the procurement rules described in the services Directive 92/50/EC.

4) NPOs and labour law. The interpretation of the concept of undertaking also plays a very important role in the area of labour law. It is used as a key figure in order to determine whether an employee or a group of employees may benefit from the protection of Directive 2001/23/EC safeguarding the employee's rights in the wake of transfers of undertakings.[418] As previously seen in public procurement law and competition law, the ECJ once again confirmed that the fact that an undertaking is engaged in non-profit-making activities is not in itself sufficient to deprive such activities of their economic character or to remove the

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[412] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[413] On the notion of undertaking in State aid law, see Nicolaides, P., Kekeklis, M., Kleis M. *State Aid Policy in the European Community* / Wolters Kluwer, 2nd ed. – 2008. – pp. 16-21

[414] ECJ, 10 Jan 2006, C-222/04, Cassa di Risparmio di Firenze SpA et alii, ECR I-289

[415] Ibid., paras. 119 to 123.

[416] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142.

[417] ECJ, 29 Nov. 2007, C-119/06, Commission v. Italy, ECR I-168

[418] The Acquired Rights Directive, also known as ARD Directive, 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses // Official Journal L 082 , 22/03/2001, pp.16-20, p. 16.

undertaking from the scope of EU law.[419] In the Commission v. UK case, in which the Commission successfully challenged the UK implementation of the ARD for not applying to not-for-profit undertakings, Advocate General Van Gerven elegantly summarized the ECJ case law on economic activity in European Union law:

> 22. In my opinion, the underlying principle must be that the EC Treaty, by virtue of the fundamental provision in Article 2, covers "economic activities" "throughout the Community" and that the Community, in order to promote a harmonious (and henceforth also a balanced) development of those activities, has as its task to establish a common market. The Court has consistently conferred a broad meaning on the term "economic activities". As early as its judgment in Donà, the Court held that:
>
> "the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty".
>
> In order for an activity to be described as economic, it is thus evident that it must be performed for remuneration. It is clear from the Court's judgment in Lawrie-Blum that the decisive importance does not attach to the sector within which the activity is performed or even the legal provisions under which it takes place. In Lawrie-Blum, the Court ruled inter alia as follows:
>
> "All that is required for the application of Article 48 is that the activity should be in the nature of work carried out for remuneration, irrespective of the sphere in which it is carried out (see the judgment of 12 December 1974 in Case 36/74 Walrave v Union Cycliste Internationale [1974] ECR 1405). Nor may the economic nature of those activities be denied on the ground that they are performed by persons whose status is governed by public law since, as the Court pointed out in its judgment of 12 February 1974 in Case 152/73 (Sotgiu v Deutsche Bundespost [1974] ECR 153), the nature of the legal relationship between employee and employer, whether involving public law status or a private law contract, is immaterial as regards the application of Article 48".
>
> 23. In its case law on the provision of services, the Court has defined the term "remuneration". (33) In its judgment in Humbel, the Court ruled in that connection that:
>
> "The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service".
>
> The judgment in Steymann, in particular, makes it clear that the element of remuneration, in the sense of economic consideration, does not necessarily presuppose the existence of a profit-making motive. In that case, which concerned inter alia the question of the extent to which specific tasks performed by a member of the Bhagwan Community could be regarded as an economic activity within the meaning of the EC Treaty, the Court ruled:
>
> "In so far as the work, which aims to ensure a measure of self-sufficiency for the Bhagwan Community, constitutes an essential part of participation in that community, the services which the latter provides to its members may be regarded as being an indirect quid pro quo for their work".
>
> 24. It follows from the foregoing that the economic activities covered by the EC Treaty must not be confined to those performed with a view to making profit or with the acceptance of commercial risks. On the contrary, the term covers all activities performed directly or indirectly for remuneration in the sense of economic consideration.
>
> It is in this light that the term "undertaking" within the meaning of Directive 77/187 must be understood. In the absence of a specific definition in the directive itself, that term must cover all undertakings which pursue an economic activity within the meaning of the EC Treaty and certainly not only profit-making undertakings (although this will be the case in most instances). Under this interpretation, which is entirely consistent with the judgments in Dr Sophie Redmond Stichting (36) and Watson Rask, (37) there is in no way a breach of the legal basis of the directive, in view of the fact, as stated here, that the expression "common market co-

[419] ECJ, 8 June 1994, C-382/92, Commission v. United Kingdom of Great Britain and Northern Ireland, I- 2435, para. 45.

vers, pursuant to Article 2 of the Treaty, the entire panoply of economic activity within the Community.[420]

5) ECJ decisions in the field of tax law. The most developed case law of the European Court in relation to NPOs was received within the framework of the tax law[421] (due to a wide range of various tax privileges granted to NPOs by European governments).

A series of rulings by the European Court of Justice set out a "non-discrimination principle", according to which Member States must award equal tax concessions to charities based in other Member States where the foreign charities can be shown to be "comparable" to domestic organisations holding charitable tax status[422]. The turning point for the NPOs was the decision of the European Court in Stauffer case[423]. On the argument of this case the Court later relied on in a number of cases – in Persche case[424], in Missionwerk[425] case, and others.

Both the written and oral stages of the proceeding before the Court in Stauffer were dominated by the question as to whether non-profit organizations can even seek protection by appealing to the "economic freedoms"[426]. The Stauffer case began with a number of arguments raised before the Court claiming that the situation lay beyond the reach of free movement provisions; in particular, it was claimed that the tax rules in question had a social and cultural content and that the application of free movement provisions required an institution to carry out activities with an economic profit-making purpose. AG Stix-Hackl denied that a social or cultural policy objective precludes the application of free movement provisions, and called on the Court to assess appeals to the fundamental freedoms on the basis of whether the institution carries out an economic activity.[427] The free movement of capital, the freedom of establishment, and the freedom to provide services were considered separately and weighed against each other[428]. The ECJ endorsed an expansive interpretation of the notion of economic activity[429]. The AG argued that the Walter Stauffer foundation participates in the economic system by renting out the real property, which is an activity engaged in for remuneration - an activity which is no bagatelle. The AG replaced the profit seeking criterion under Art. 48 with the notion of exercising an economic activity. Accordingly, in the course of this approach both non-profit organizations and philanthropic organizations are protected by the freedom of establishment if they carry on an economic activity[430] [431]. Notwithstanding the ECJ held that the freedom of establishment could not be invoked by Walter Stauffer, his decision was based on the fact that the mere renting out of real property did not constitute a permanent presence in Germany. However, The ECJ did not deny the possibility of the application of the freedom of establishment actual to the Walter Stauffer foundation, thereby implicitly following the opinion of AG Stix-Hackl[432].

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[420] Joined opinions of Advocate General Van Gerven delivered on 2 Mar. 1994 in C-382/92 and C-383/92, Commission v. UK, ECR, I-2435, paras. 22-23.

[421] According to statistics, most of the legal proceedings in the EU Internal Market are cases involving EU taxes and levies, as well as the environment in EU. Arabey, E. *Vnutrenniy rynok: garmonizatsiya* (in Russian) / URL: http://eulaw.ru/content/vnutrenniy-rynok-garmonizaciya

[422] *Cross-border Philanthropy in Europe. No European Philanthropic Union yet!* / URL: http://www.transnationalgiving.eu/en/article/2014/10/13/cross-border-philanthropy-in-europe/4/

[423] ECJ 14 Sept. 2006, C-386/04, Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften

[424] ECJ, 27 Jan 2009, C-318/07, Hein Persche v Finanzamt Lüdenscheid

[425] ECJ, 10 Feb. 2011, C-25/10, Missionswerk Werner Heukelbach eV v Belgien

[426] Thömmes, O., Nakhai, K. *EC Tax Scene: AG Stix-Hackl rules on German tax exemption for non-profit organizations* // Intertax. – 2007. – Vol. 34. – Issue 3, pp. 172-173

[427] AG Stix-Hackl Opinion, December 15, 2005, Case C-386/ 04 Stauffer, EU:C:2005:785, paras 22–24.

[428] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[429] For example, ECJ, 12 Dec 1974, Case C-36/74, Walrave en Koch (regarding sports)

[430] See ECJ, 17 June, 1997, Case C-70/95, Sodemare SA and others v Regione Lombardia, ECR I-03395 (Italian non-profit organizations are deemed to carry on economic activities in the context of the freedom of establishment).

[431] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[432] Ibid.

Anachronically, we note that in the Stauffer case and in a number of other cases the Court considered more acceptable the application of free movement of capital - an "object-related" freedom, independent of the nature of the organization's activities. The court clearly recognized the right of the NPO to enjoy the freedom of movement of capital, and recognized that the discriminatory tax regime for comparable foreign NPOs violates the freedom of movement of capital. The essence of these and other cases, the Court's arguments with regard to the application of fundamental freedoms to non-profit organizations in general and separately, the decisions of the Court regarding NPOs in the field of tax law will be examined in detail in paragraph 3.2.

We can conclude that ECJ case law aims at coherently defining the notion of undertakings in all the branches of EU law as encompassing not-for-profits organizations, providing that they offer goods and/or services for remuneration on a market where they are in competition with other operators.[433] The Court also confirmed that exercising this activity for the public interest does not preclude the application of EU law.[434] Therefore, there are very few clear-cut exclusions from the notion of undertaking acknowledged by the ECJ. One of them concerns (economic) activities resulting from the exercise of prerogatives of public power. In such as case, the Court admitted that "even if is assumed that those activities [have] aspects of an economic nature, they could only be ancillary".[435] However, this notion seems to receive a rather narrow interpretation also in the area of labour law, since the Court has already accepted that the ARD could apply to transfer of workers within the public administration or between public authorities.[436] In any case, it appears quite unlikely that this exclusion could play a role in the context of charities, which are in their overwhelming majority private legal entities. Another exclusion applies to bodies that are not involved in activities for remuneration and carrying out their tasks in traditionally not-for-profit areas, such as social security and assistance, education, culture and the like. In Schwarz and Gootjes-Schwartz, a tax case, the ECJ held for these reasons that the freedom to provide services was not applicable to "a system of public education, normally financed from the public purse and not by pupils or their parents".[437] Even if in this case, the Court referred to an activity carried out by the state, there is no reason to think that the same principles could not be applied to similar tasks carried out by private entities such as charities[438].

The analysis of ECJ case law in various areas of European law shows that the Court tends to adopt a rather uniform conception of the notion of economic activity and to consider it as a precondition for the application of Treaty rules and secondary legislation. Under the Court's analysis, it appears rather clearly that non-profit aims or other characteristics based on the pursuit of general interest goals cannot per se serve as a valid justification to exclude NPOs from the application of European law. The Court seems indeed more concerned with the substance of the operations than with the legal nature of the operators, or with their motivations. Provided that a non-profit organization, whether public or private, carries on activities having an economic nature, EU law will generally apply similarly to activities carried out by businesses and by not-for-profits bodies[439].

Thus, the discussion of the ECJ case law on non-profit entities in relation to several fields of European law has shown that non-profit entities are treated as "active and proud

[433] ECJ, 10 Dec. 1998, joint cases C-173/96 and C-247/96, Sánchez Hidalgo and Others, ECR I-8237.
[434] In the context of the ARD (labour law), see ECJ, 26 Sept. 2000, Mayeur, C-175/99, ECR I-7755.
[435] See ECJ, 15 Oct. 1996, Case C-298/94, Henke, ECR I-4989, para. 17
[436] ECJ, 6 Sept. 2011, C-108/10, Scattolon, paras. 53-59; ECJ, 14 Sept. 2000, Case C-343/98, Collino and Chiappero, ECR I-6659, paras. 31 and 32 and case law cited.
[437] ECJ, 11 Sept. 2007, Case C-76/05, Schwarz and Gootjes-Schwarz, ECR I-6849, para. 39.
[438] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[439] Ibid.

consumers" of European law. As for-profit entities they enjoy the different kinds of rights deriving from European primary and secondary legislation because they are an essential part of the economic landscape of the single market[440]. The literal wording of Article 54 TFUE limiting freedom of establishment only to for-profit entities should be overcome by a systematic analysis of the position reached by non-profit entities in the ECJ case law and the development of the single market[441].

With regard to the identification of economic activities to determine whether the NPO falls within the sphere of influence of the fundamental freedoms of the EU, the Court in its case law could ubiquitously apply a functional approach as the one adopted in competition law.

The inclusion of non-profit entities that carry on economic activity within freedom of establishment could be interpreted by the Court in a way consistent with the actual definition of economic activity used for competition law purposes. More in particular, the Court could ask whether the activity carried on by the non-profit entity in the hosting Member State(s) in the form of primary or secondary establishment is (potentially) subject to competition law as economic activity or excluded from competition law precisely because of its non-economic nature. If the activity is economic (for competition law purposes) it can be carried on by way of freedom of establishment (Articles 49 and 54 TFEU) both by for profit firms and by non-for profit firms. In this way, the literal wording of Article 54 TFEU would be escaped by pointing attention not to the nature of the target (profit making or not) per se but rather to the nature of the activity[442].

3.2 Application of the TFEU fundamental freedoms to NPOs and their donors

It may seem indeed paradoxical, at least at first glance, to try to apply a set of rules, whether contained in the EU treaties or in secondary law, to persons and activities that were manifestly not taken into consideration by the drafters of these rules[443] – we mean the literal wording of articles 49 and 54 of the TFEU, which restricts the application of two of the basic freedoms in relation to NPOs, as it was discussed in the previous section.

Despite the relatively small number of cases decided by the ECJ on the application of the Treaty freedoms to tax treatment of not-for-profit organizations, considerable attention has been devoted to this problem in European tax literature. This is partly due to the fact that those few cases had an important impact on the legislation of the Member States. Most of them grant indeed beneficial tax treatment to charities, whether direct or indirect and (used to) limit them to resident charities. Besides the European-wide legislative impact of these judgements, they deserve particular attention since they gave the opportunity to the ECJ to address the controversial issue of the application of economic freedoms to entities not traditionally associated with economic/business activities[444].

The main, landmark cases in the ECJ case law were (in chronological order) Stauffer case (C-386/ 04), Persche case (C-318/07), Commission v Spain case (C-153/08), Missionswerk case (C-25/10), Commission v Austria case (C-10/10), Commission v France case (C-485/14). Let's briefly run through the essence of the disputable situations, intermediate deductions and the final decision of the Court regarding the discriminatory regime and infringement of the Treaty freedoms for each of these cases.

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[440] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[441] Ibid.

[442] Lombardo, S. *Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU* / (June 30, 2012). ECGI - Law Working Paper No. 192/2012. / URL: http://ssrn.com/abstract=2115107 or http://dx.doi.org/10.2139/ssrn.2115107

[443] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[444] Ibid.

[A] Income Tax Regime for Non-profit Organizations: Stauffer case (C-386/ 04)[445].

The case: An Italian foundation with its seat in Italy awards, in accordance with the purposes set out in its statutes, scholarships to young people from Switzerland, particularly those from Bern, to pursue studies in music. The foundation is the owner of a building in Germany from which it obtains rental income. The rental activity is dealt with by a German property management company. German tax law exempts NPOs from corporate income tax for this kind of rental income. However, this exemption would not be applied to foreign-based public benefit organisations, even if they fulfil all the requirements outlined under German tax law.

The question was whether this rule infringes the fundamental European freedoms (in other words, whether tax discrimination is justified).

Findings of the Court: The ECJ argued, that rental income is protected under the free movement of capital. The less favourable treatment of foreign EU-based NPOs is not, in the view of the European Court of Justice, justifiable according to these criteria.

Conclusion: The rule of the German tax law is therefore invalid. A denial of the tax incentive would only be permissible if the Italian foundation was not (notwithstanding its seat) comparable to a German NPO. In this case the tax authority did not carry out a comparability test[446].

[B] Tax Treatment of Donations: Persche case (C-318/07)[447]

The case: German resident Mr Persche requested in his personal income tax declaration of 2003 a special deduction for an in-kind donation of bed and bath linen, walking frames, and other equipment. This donation was made in favour of the Centro Popular de Lagoa, a Portuguese PBO working on a number of social issues including providing care homes for the elderly. German tax law provides for a deduction for a donation made to a PBO. However, this tax incentive was not applied for donations to foreign EU-based PBOs, even in cases when the organisation in question met all the requirements set out in the German tax law. The fiscal authorities therefore rejected the request for the tax deduction. The Court of justice was asked a question, whether this rule infringes the fundamental European freedoms (in other words, whether tax discrimination is justified).

Findings of the Court: Donations (including in-kind donations) are protected under the free movement of capital. The discrimination in this case is not justifiable. The European Court of Justice recalled its remarks made in the Stauffer judgement, to which it explicitly referred several times.

Conclusion: The rule of the German tax law is therefore invalid. A denial of tax incentives would be permissible only in the concrete case that the Portuguese organisation were not (notwithstanding its seat) comparable to a German PBO. In this case the tax authority did not carry out a comparability test[448].

[C] Inheritance and Gift Taxes: Missionswerk case (C-25/10)[449]

The case: Missionswerk is a public benefit association with its registered seat in Germany. Mrs Renardie, a Belgian citizen, who had lived her whole life in Belgium, died on 12 June 2004 in Malmedy, Belgium, having appointed Missionswerk as her heir. The Belgian regional tax authority applied inheritance tax at a rate of 80%, amounting to €60,038.51 of tax payable on the inheritance Missionswerk was to receive. Missionswerk sought to have the reduced tax rate of 7%, which the tax authority of the Walloon region provides for legacies to resident PBOs, applied instead. The tax authority rejected the request for the application of the reduced tax rate on the grounds that it was only to be ap-

[445] C-386/04, Centro di Musicologia Walter Stauffer

[446] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.

[447] C-318/07, Hein Persche

[448] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.

[449] C-25/10, Missionswerk Werner

plied to foreign EU-based PBOs in cases where the testator had lived or worked in the country in which the foreign organisation was based. The Court of justice was asked a question, whether this rule infringes the fundamental European freedoms.

Findings of the Court: Legacies are protected under the free movement of capital. The discrimination in this case is not justifiable. The European Court of Justice recalled its remarks made in the Stauffer and Persche judgements, both of which it explicitly referred to several times.

Conclusion: The rule of the Belgian regional tax authorities is therefore invalid: a restriction on tax incentives would be permissible only in the concrete case that the German association were not (notwithstanding its seat) comparable to a Belgian NPO. In this case the tax authority did not carry out a comparability test[450].

[D] Tax Incentives for Research and Education: Commission v. Austria case (C-10/10)

The case: National law (Paragraph 4 of the Law on income tax (Einkommensteuergesetz - EStG) in the version of the Law on tax reform of 2009 (BGBl. I, 26/2009) provides that operating expenses are to be deducted from the profit. Paragraph 4a(1) of the law, which concerns gifts out of operating capital, lists a number of gifts which are also deemed to be operating expenses[451]. However Paragraph 4a(1)(a) to (d) of EStG authorizes the deduction from tax of gifts to research and teaching institutions exclusively where those institutions are established in Austria, to the exclusion of gifts to comparable institutions established in other Member States of the EU or the EEA. According to the Commission, it is contrary to the free movement of capital as guaranteed by Article 56 EC and Article 40 of the EEA Agreement[452].

Findings of the Court: The Court noted that the system of tax deductions in question entails, for taxpayers making gifts to research and teaching institutions established in Member States other than the Republic of Austria, a greater tax burden than for taxpayers making gifts to the institutions listed in Paragraph 4a(1)(a) to (d) of the amended EStG. Since the possibility of obtaining a tax deduction can have a significant influence on the donor's attitude, the non-deductibility of gifts to research and teaching institutions established in Member States other than the Republic of Austria may discourage taxpayers from making gifts to them. Consequently Paragraph 4a(1)(a) to (d) of the amended EStG therefore constitutes a restriction of movements of capital prohibited in principle by Article 56(1) EC[453]. The European Court of Justice recalled its remarks made in the Stauffer and Persche judgements, to which it explicitly referred several times.

Conclusion: The Austrian law had to be amended to the effect that a restriction would only be applied if the foreign-based research institution were not (notwithstanding the location of its seat) comparable to an Austrian research institution[454].

[E] Tax Exemption for Lottery Winnings: Commission v. Spain case (C-153/08)

The case: Article 7 of Law No 35/2006 of 28 November 2006 on personal income tax and partially amending legislation on the taxation of corporations, non-residents' income and wealth (BOE No 285 of 29 November 2006, p. 41734) ("the law on income tax"), which provides that certain income is exempted from income tax, exempts from income tax "winnings from lotteries and betting organised by the public body "Loterías y Apuestas del Estado" (the Spanish public-law body in charge of lotteries and betting) or by bodies or entities of the Comunidades Autónomas (Autonomous Communities), and winnings from draws organised by the Spanish Red Cross or by the Organización Nacional de Ciegos Es-

[450] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.
[451] C-10/10, Commission v Austria, paras 4-5
[452] Ibid., para.15
[453] Ibid., para.26-27
[454] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.

pañoles (the Spanish national association for the blind) ("ONCE"). Under other provisions of the law on income tax, in particular Articles 33(1), 45 and 63(1) thereof, winnings from lotteries, games of chance or betting organised by other national or foreign bodies, including those established in other Member States of the European Union or the European Economic Area, are added to the taxable amount and subject to progressive rates of income tax[455].

Findings of the Court: The Court agreed with the opinion of Advocate General pointed out in point 66 of his Opinion[456], that public bodies and entities pursuing social or charitable non-profit-making activities established in Member States other than the Kingdom of Spain and having the same objectives as those of the bodies and entities referred to in Article 7(ñ) of the law on income tax, are in a situation comparable to that of the latter. In those circumstances, it must be concluded that the fiscal exemption provided for in Article 7(ñ) of the law on income tax, since it has the effect of treating winnings distributed by the bodies and entities listed in that provision more favourably, constitutes a discriminatory restriction on freedom to provide services, to the detriment of public bodies and entities pursuing social or charitable non-profit activities established in a Member State other than the Kingdom of Spain and having the same objectives as the bodies and entities listed in that provision[457].

Conclusion: By maintaining in force fiscal legislation which exempts winnings from lotteries, games of chance and betting organised in Spain by certain public bodies and entities established in that Member State and pursuing social or charitable non-profit activities, without that same exemption being granted to winnings from lotteries, games of chance and betting organised by bodies and entities established in another Member State of the EU or EEA and pursuing the same type of activities, the Kingdom of Spain has failed to fulfil its obligations under Article 49 EC and Article 36 of the EEA Agreement[458].

[F] Tax Exemption for Gifts and Inheritances: Commission v. France case (C-485/14)[459]

The case: In accordance with Article 777 of Code Général des Impôts (later on "CGI"), donations and property bequeathed to public institutions or public benefit organizations are taxed at rates of 35% or 45%. This article of CGI, however, provides for two exceptions: one is established in article 794 of CGI, with respect to regional or local public authorities, and the other in article 795 of CGI, with respect to a wide range of non-profit, charitable, educational, cultural and religious organizations[460]. However the note of General Directorate of Public Finance (phrase "*la direction générale des finances publiques"*), contained in document DB 7 G 261 of the Ministry of economy and finance, states that exemptions from the tax on gratuitous transfer established by CGI in favor of certain organizations and institutions are applied, in principle, only to French organizations and institutions. Foreign NPOs can derive these benefits only if there is an appropriate mutual agreement between France and the country of origin of this non-profit organization. This principle of reciprocity must be the result of an international agreement or a separate agreement.The list currently contains 40 countries, including the Kingdom of Belgium, the Kingdom of Spain, the Italian Republic, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden, as well as tax conventions on avoid-

[455] C-153/08, Commission v. Spain, paras. 4-5
[456] Opinion of Advocate General Mengozzi delivered on 16 July 2009 in Commission of the European Communities v Kingdom of Spain (C-153/08)
[457] C-153/08, Commission v. Spain, paras. 33-34
[458] Ibid, (Commission v. Spain (C-153/08), para. 49
[459] C-485/14, Commission v. France. Hereinafter in relation to this case, an unofficial translation from the French language is used
[460] Ibid., paras. 6-8

ance of double taxation of Gifts and Inheritances, concluded between Member States and The French Republic[461].

Findings of the Court: According to the Court opinion, this national law creates a situation where gifts and bequests are taxed more when they are transferred to organizations and institutions established in a different member state than in the French Republic, and therefore have the effect of reducing the cost of these donations and inheritance. In addition, the possibility of obtaining exemption from taxes is likely to have a significant effect on the attitude of the taxpayer, and the absence of exemptions for donations and wills to organizations and institutions established in a member state other than the French Republic is likely to deter taxpayers from making gifts or bequeathing property for the benefit of oneself[462]. The Court recalled its judgments made in Persche case (point 38), Commission v Austria case (point 26), Missionswerk Werner Heukelbach case (point 25).

Conclusion: The Court declares that, by exempting from "droits de mutation à titre gratuity" (duty payable on transfers for which no consideration is given) gifts and legacies to public bodies or to charitable bodies only where such bodies are established in France or in another Member State or in another State which is party to the Agreement on the European Economic Area of 2 May 1992, which has concluded a bilateral agreement with it, the French Republic has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area[463].

In these proceedings the fundamental freedoms – in particular the free movement of capital, the freedom of establishment, and the freedom to provide services were considered separately and weighed against each other[464]. Relying on the available rigorous theoretical studies[465], description of the Court's arguments and the Court's judgments, let's consider under what heading NPOs and their benefactors are entitled to the advantages of the EC Treaty, in other words, which of these four mentioned freedoms that are foreseen under the EU Treaty, are most likely to apply to NPOs.

3.2.1 Free movement of capital (Article 63 TFEU)

As S. Heidenbauer notes, contrary to the other freedoms already mentioned, "this provision has had a strong impact on the national tax legislation of the Member States in the field of charity taxation".[466] The first landmark case in relation to discriminatory taxation of NPOs – the Stauffer case - was also decided by the court within the framework of free movement of capital.

According to article 63(1) of the TFEU, "within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited".[467] The reliance upon this freedom may appear surprising at first glance, but a closer analysis demonstrates that such an application results from the Court's established approach. Although Article 63 TFEU prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third countries, the EU Treaties contain no definition for the terms "movements of capital" and "payments". It has become settled case law that, in

[461] Ibid., para 9(40)
[462] Ibid., paras. 24-25
[463] Ibid., para 32
[464] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[465] For example, Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[466] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p.153.
[467] Article 63(1) of the TFEU

order to give substance to these terms, the Court refers to the nomenclature annexed to Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) as having some indicative value; furthermore, the list set by the Directive is not exhaustive and is seen as a starting point rather than "an instrument of restricting the scope of the principle of full liberalization of capital movement". [468] Despite the criticism of this interpretative approach and the requests for more "hallowed techniques",[469] it has been consistently followed.[470] [471]

In Stauffer, the Court concluded that by holding commercial property in Germany, the foundation had invested in the real estate of another Member State. This type of transaction was linked to Heading II "Investments in real estate" of Annex I to Council Directive 88/ 361/ EEC.[472] The investment in real estate had been considered to constitute the movement of capital on a number of other occasions,[473] such that the Court's decision in Stauffer – even if it extended the application to the administration of such property – cannot be seen as a departure from earlier cases.[474] A similar approach was also taken in the subsequent cases.[475] Heading XI "Personal capital movements" of Annex I to Council Directive 88/ 361/ EEC includes gifts and endowments, inheritances and legacies. Therefore in Persche case, the free movement of capital was applied to donations made to a charity established in another Member State, notwithstanding the fact that the donation in question was in kind and in the form of everyday consumer goods.[476] Noting that Heading XI "Personal capital movements" of Annex I to Council Directive 88/ 361/ EEC refers to inheritances and legacies, in Missionswerk case the Court used the example of assets transferred from a deceased person to heirs in order to illustrate the application of the free movement of capital to transactions made both in money and in kind.[477] In Missionswerk, the Court followed other cases in which inheritance taxes were considered under the free movement of capital,[478] and in Commission v. Austria it referred to gifts and endowments covered under Heading XI "Personal capital movements" of Annex I to Council Directive 88/ 361/ EEC.[479] [480]

Unlike the Court, the AG in Stauffer raised the question as to whether non-profit organizations are excluded from the scope of the free movement of capital on the basis of their nature, by virtue of Article 54(2) TFEU. The answer was in the negative. The AG referred to "the wording and the scheme" of the Treaty that directly links Article 54(2) TFEU to the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 62 TFEU), whilst keeping the free movement of capital as an "object-related" freedom (similar to the free movement of goods) with "no connection with the

[468] Annex I to Council Directive 88/ 361/ EEC of 24 Jun. 1988 for the implementation of Art. 67 of the Treaty (repealed by the Treaty of Amsterdam) [1988] OJ L178, 5 (Directive 88/ 361/ EEC).
[469] AG Colomer Opinion, C-463/00, Commission v. Spain, and C-98/ 01, Commission v. United Kingdom, para. 36.
[470] , C-222/ 97, Trummer and Mayer, para. 21; to this effect, see also C-513/ 03, Van Hilten-van der Heijden, para. 39.
[471] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[472] C-386/04, Centro di Musicologia Walter Stauffer, paras 21-24.
[473] C-222/ 97, Trummer and Mayer, paras 22–24; C-302/ 97, Konle, para. 22; C-423/ 98, Albore, para. 14; C-464/ 98, Stefan, paras 5–6; C-515/ 99, Reisch and Others, para. 30; C-512/ 03, Blanckaert, para. 35; C-376/ 03, D., para. 24.
[474] C-386/04, Centro di Musicologia Walter Stauffer, para. 24
[475] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[476] C-318/07, Hein Persche, paras 24–27; to this effect see C-513/03, van Hilten-van der Heijden, para. 42; C-11/07, Eckelkamp, para. 39.
[477] C-318/07, Hein Persche, para. 26.
[478] C-25/10, Missionswerk Werner, paras 15-17; see, inter alia, C-364/ 01, Barbier, para. 58; C-513/ 03,Van Hilten-van der Heijden, para. 39; C-11/ 07, Eckelkamp, para. 38; C-43/ 07, Arens-Sikken, para. 29; and C-510/ 08, Mattner, para. 19.
[479] C-10/10, Commission v Austria, para. 24.
[480] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

person of those involved".[481] In Persche, the German government, supported by several intervening governments, tried to elaborate the "object-related" argument by claiming that the Treaty only covers capital movements that have an essentially economic purpose and does not apply to gifts made for "altruistic motives" to nonprofit-making bodies.[482] In both instances, the Court did not engage in this debate, leaving these arguments without response.

Commenting on the CJEU's interpretation of the free movement of capital, legal academics rightly point out that "[o]ne striking feature of the discussion so far is that, unlike the case law on free movement of persons, it is only very rarely that the Court has added the additional requirement that the capital movement be an "economic activity".[483] Strictly speaking, scholars' commentaries differ: whereas some consider that "the Court assumes that a movement of capital within Article 63 to be economic", [484] others explain that "there is no economical activeness requirement in the application of the free movement of capital".[485] [486]

In our opinion, the arguments of the latter look quite convincing. E.Traversa, for example, argues that high eligibility of this freedom in NPOs' tax law in compare with other freedoms derives exactly from the fact that "there is no economical activity requirement in the application of the free movement of capital (hereinafter FMC), neither on the personal scope, nor on the substantive scope"[487].

This group of researchers put forward the following arguments[488]:

1) First, the categories of persons that can benefit from the application of the free movement of capital are rather loosely defined by the Treaty: both capital providers and capital recipients are protected, and no reference is made to economic actors (undertakings or workers). Non-economic operators may also benefit from the free movement of capital. According to the wording of article 63(1) of the TFEU, it is not necessary that charitable bodies seeking to rely on the free movement of capital be "profit making".[489]

2) The Nomenclature annexed to Council Directive 88/361/EEC, except economic, includes purely non-economic activities and operations such as gifts and inheritances.

3) Unlike other fundamental freedoms, no consideration or remuneration for the listed operations is required. This strengthens the view according to which no economical requirements form part of the conditions of application of the free movement of capital [490].

Based on this, the authors conclude that, as regards the requirement of economic activeness, the free movement of capital exceeds the other fundamental freedoms in scope.[855] Subject to the principal aspect of a case, this may open up protection for those of a chari-

[481] AG Stix-Hackl Opinion, 15 Dec., 2005, Stauffer, C-386/ 04, paras 56–61.
[482] C-318/07, Hein Persche, para. 21.
[483] Barnard, C. *The Substantive Law of the EU: The Four Freedoms* / Oxford: Oxford University Press. – 2010, p. 564
[484] Ibid.
[485] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[486] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[487] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[488] Ibid.
[489] AG Stix-Hackl Opinion, December 15, 2005, Case C-386/ 04 Stauffer, paras. 57 to 61. See also Case C-364/10, Barbier, paras. 59-60 and Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 320.
[490] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

ty's activities which are due to their purely charitable nature, not covered by the other fundamental freedoms[491].

Despite different interpretations of academic lawyers, investigation of case law of the ECJ leads to a main conclusion: in defining the application of Article 63 TFEU, the Court adopts an "object-related" approach and focuses on the substance of the transaction, disregarding the non-profit-making nature of organizations.[492] When interpreting the substance of the transaction, the Court adopts a broad approach, supplementing the list provided by Directive 88/361/EEC with underlying presumptions and transactions that are seen as "indissociable from a capital movement".[493] The application of the free movement of capital in relation to non-profit organizations should, thus, be considered as an inescapable consequence of this loose interpretation[494].

It can be said that the freedom of movement of capital of charities, among other not-for-profit organizations is guaranteed under different ways. First, charities may be protected as investors (in the Walter Stauffer case). Secondly, charitable bodies may be protected as recipient of gift and legacies – contemplated by section XI (B) of the nomenclature list (in the Belgian Missionwerk Heukelbach case[495]). Finally, charities enjoy indirect protection of the free movement of capital, since this freedom also applies to the donor. That was established as regards the preferential tax regime limited to donations to resident beneficiaries for its donation in the Persche case,[496] concerning charities and in Commission v. Austria, [497] on universities and similar research and teaching institutions.

Such an evolution constitutes a remarkable departure from the traditional interpretation of the Court in all areas of European law connected in one way or another with the concept of the internal market. At first glance, it may seem a little awkward to expand the scope of application of the freedom that historically has been most linked to the achievement of the internal market[498] in its purely economic (and even capitalistic) conception. Nevertheless, from a conceptual point of view, it would not have been very coherent with the definition of the internal market, not to say morally questionable, to simply exclude movements of capital from the scope of the Treaty freedoms just because they were motivated by charitable purposes. Besides very strong textual arguments based on the list included in Directive 88/361/CEE, there are therefore strong logical and teleological reasons to approve the ECJ's position in this regard[499].

3.2.2 Freedom of establishment (Article 49 TFEU)

Concerning the freedom of establishment, the wording of the provisions of the Treaty does not leave much room for discussion as to whether non-economic bodies could fall into its scope of application. As we noted in section 3.1, article 49(2) of the TFEU refers to the notion of "undertaking", while article 54(2) of the TFEU even more explicitly states that: "Companies or firms' means companies or firms constituted under civil or commer-

[491] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[492] AG Stix-Hackl Opinion, C-386/ 04, Stauffer, para. 59.

[493] C-35/ 98, Verkooijen, paras 28-29.

[494] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[495] C-25/10, Missionwerk Werner

[496] C-318/07, Hein Persche

[497] C-10/10, Commission v. Austria

[498] There is indeed a historical connection between the free movement of capital (as a directly applicable freedom) and the notion of internal market.

[499] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

cial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".[500]

The Court interprets Article 49(2) and 54(2) of the TFEU as requiring for their applicability the presence of economic activity on a stable and continuous basis [501]. Let's turn again to Stauffer case. In the Walter Stauffer case,[502] Centro di Musicologia Walter Stauffer brought the case before the German Bundesfinanzhof and considered that "according to the case law of the Court, the concept of establishment within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons".[503] Therefore, the Bundesfinanzhof referred the matter to the ECJ asking,

> Whether the provisions of the EC Treaty relating to the right of establishment, the freedom to provide services and/or the free movement of capital preclude a Member State, which exempts from corporation tax rental income received in its territory by charitable foundations with, in principle, unlimited liability to tax if they are established in that Member State, from refusing to grant the same exemption to a charitable foundation governed by private law in respect of similar income on the basis that, as it is established in another Member State, it has only limited liability to tax in its territory.[504]

Despite this rather broad conception of establishment, the ECJ decided that the charity in Stauffer case does not fall into the scope of freedom of establishment. However, the reason of the Court's decision is more to be found in the absence of a permanent presence or of an active management of immovable property in Germany than in the legal status of the taxpayer. For the Court, the simple fact of owning property does not constitute an economic activity, even if this property yields revenues.

At this stage it should be explained that although the free movement of capital and the freedom of establishment are closely connected and often "apply in parallel"[505], the conditions for their application are fundamentally different. AG Stix-Hackl in Stauffer suggested the following criteria to differentiate between these freedoms in the context of investments in real estate: the free movement of capital applies to the cross-border acquisition of property for the purpose of investment, whereas the freedom of establishment prevails in exercising this right for the sake of a permanent profit-making activity.[506] The freedom of establishment, thus, entails a permanent autonomous profit-making activity and the existence of a fixed establishment. The AG argued that even if non-profit organizations do not aim to "maximize their profits", they may still "carry on a profit-making activity";[507] she concluded, however, that the activity of the property management agent does not amount to a fixed establishment[508]. Following this argument, the Court refused to apply the freedom of establishment in Stauffer[509]. Yet, the reasoning was crafted more concisely: even if the concept of "establishment" is interpreted broadly, the Court, as a rule, requires a permanent presence and, in situations where immovable property is owned, it should be actively managed.[510] The freedom of establishment was, thus, refused on a factual basis.

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[500] Ibid.
[501] Ibid.
[502] C-386/04, Centro di Musicologia Walter Stauffer
[503] Cf. the concept of undertaking as interpreted by the ECJ in the Acquired Rights Directive (see above), in particular C-108/10, Scattolon, para. 42 and case law quoted.
[504] C-386/04, Centro di Musicologia Walter Stauffer, para. 14.
[505] AG Stix-Hackl Opinion, Stauffer, C-386/ 04, paras 35–36. To this effect, see C-446/ 04, FII GL 1, (parallel application); C-524/ 04, Thin Cap GL, (freedom of establishment).
[506] AG Stix-Hackl Opinion, C-386/ 04, Stauffer, para. 39.
[507] Ibid., paras 44-49.
[508] Ibid., paras 50-55.
[509] C-386/04, Centro di Musicologia Walter Stauffer, paras 19-20.
[510] C-386/04, Centro di Musicologia Walter Stauffer, paras 18-19; see, to that effect, C-2/ 74, Reyners, para. 21; C-55/ 94, Gebhard, para. 25.

In Stauffer neither the AG nor the Court directly addressed the question as to whether non-profit organizations should be excluded from the personal scope of the freedom of establishment by virtue of Article 54 TFEU. The AG's reasoning, however, points towards a broad functional approach: if an entity is engaged in economic activities that follow under the ratione materiae of the freedom of establishment, it can be invoked. For instance, in its infringement case against the Netherlands the Commission argued that exempting domestic charities from taxation on income from substantial donations while taxing such income when received by foreign charities restricts the freedom of establishment.[511]

Therefore, it can be inferred from this case law that charities, despite the wording of article 49 of the TFEU, could theoretically invoke the protection of the freedom of establishment, provided that they could justify, on the one hand, the exercise of an economic activity in the sense given to this expression in EU law, i.e. the offering of goods and services on a market, and on the other hand, a permanent presence in the Member State concerned.[512] However, the first of the two conditions could lead to exclude most of the charities from the scope of this freedom: it is therefore unlikely that article 54 of the TFEU could serve as a solid basis to offer them a reasonable degree of protection against landlocked barriers contained in the tax legislation of Member States[513].

3.2.3 Freedom to provide services (Article 56 TFEU)

Another possible legal basis could be the freedom to provide services. Article 56(1) of the TFEU states that "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended". According to ECJ case law, the provision covers three types of situations. First, the provider may temporarily provide a service in another Member State where the recipient is located. The second situation aims at the reverse situation in which the recipient temporarily goes to another Member State to receive the service. Third, the service crosses the border with both the recipient and the provider staying in their respective Member State. In all three of these situations, both the provider and the recipient of the service are protected by article 56 of the TFEU.[514]

If the circumstances allow the application of the freedom to provide services, another difficulty emerges specifically in the context of non-profit organizations. Articles 56 and 57 TFEU indicate that "services" are "normally provided for remuneration" and "on a temporary basis". The need to prove a direct economic link between the provider and the recipient of services might be problematic due to the nature of non-profit-making activities. Although there is no condition in this regard for the person providing the service to be seeking to make a profit[515], the activity must not be provided for nothing.[516] [517]According

[511] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[512] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p.124 et seq.
[513] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[514] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p. and the cases cited therein: C- 150/04, Commission v. Denmark; C-290/04, FKP Scorpio Konzertproduktionen GmbH/Finanzamt Hamburg-Eimsbüttel; C-55/98, Skatteministeriet v. Vestergaard; C- 118/96, Safir; C-422/01, Skandia and Ramstedt v. Riksskatteverket
[515] In the Jundt case the ECJ considered that "there is no need … for the person providing the service to be seeking to make a profit".[515] Thus, the profit intention does not appear to constitute a necessary condition for the applicability of the freedom to provide services.
[516] C-157/ 99, Smits and Peerbooms. paras 47–59; C-281/ 06, Jundt, paras 28–34.
[517] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

to the Court, "the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character, that is to say, the activity must not be provided for nothing".[518] [519] In limited circumstances, that would be possible in connection with non-profit organizations: in Commission v. Spain, the Court did rely upon the freedom to provide services.[520] Discussing the personal scope of the freedom in that case, the Court followed other judgments in which lottery winnings were considered under Article 56 TFEU,[521] pointing out that the freedom to provide services benefits both providers and recipients[522]. There was no discussion of whether organizations pursuing social or charitable activities should be excluded from the ambit of the freedom to provide services by virtue of Article 62 TFEU, which extends the limitation applied to "non-profit-making" bodies appearing in Article 54 TFEU to this freedom. Nor was the prioritization of freedoms at stake: the Commission did not challenge the Spanish provisions on the grounds of the free movement of capital[523].

In the same way as regards the freedom of establishment, also the applicability of the free movement of services is determined by the principle of segmentation and a respective functional approach[524]. Charities fall into the scope of the freedom to provide services in so far as they exercise economic activities. As has been shown in other areas of EU law, the attention of the Court focuses on the service itself and not on the lucrative nature of the provider. The remuneration criterion appears fundamental in order to establish the economic nature of the activity. Although EU primary law does not define the term "remuneration", it may be inferred from ECJ case law that it refers to the economic "consideration for the service in question". Although the ECJ assumes that remuneration should be "normally agreed upon between the provider and the recipient of the service",[525] it does not require that the service be paid for directly by those benefiting from it.[526] This latter characteristic leaves the door open for a potential application of the freedom to provide services to not-for-profit organizations[527].

However, if charities do indeed provide services within the meaning of the TFEU, which is not the case for most of them, treaty protection would only cover a limited part of their activities, while the core of it would remain excluded from the scope of this freedom. Following the Court's analysis in the Casse di risparmio di Firenze State aid case, purely charitable activities – such as the fact of receiving donations – appear to be excluded from the scope of article 56 of the TFEU.[528] Firstly, the existence of a service presupposes a legal agreement between the provider and the recipient on the nature and value of the service and may thus bring issues to the particular case of charities, since in many cases not only the donator decides unilaterally the amount of the donation, but moreover no legal relation exists between the donor and the recipient. Secondly, most "services" provided by charities

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[518] C-281/ 06, Jundt, paras. 32-33.
[519] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[520] C-153/ 08, Commission v. Spain, para. 29.
[521] C-275/ 92, Schindler, paras 16–37; C-42/ 02, Lindman, paras 28-29.
[522] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p. and the cases cited therein.
[523] Ibid.
[524] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.
[525] Joined cases C-372/09 and C-373/09, Josep Peñarroja Fa, para. 37; C-169/08 Presidente del Consiglio dei Ministri, para. 23; C-355/00 Freskot, paras. 54 and 55.
[526] Joined cases C-51/96 and C-191/97, Deliège, para. 56; Case 352/85 Bond van Adverteerders and Others v. Netherlands State, para. 16.
[527] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[528] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p.143.

are per definition gratuitous, i.e. without remuneration, except perhaps the moral reward of the benefactors, which cannot be assessed in terms of money and therefore does not trigger the application of articles 56-57 of the TFEU. In limited cases, charities could nevertheless enjoy the protection of this freedom as recipients of services provided by economic operators.[529]

3.2.4 Free movement of goods (Articles 28 TFEU) and persons (Article 45 TFEU)

As follows from the studies of A.Yevgenyeva and S.Heidenbauer, the Stauffer-Persche line of cases also illustrates doubtful prospects for invoking the free movement of goods and the free movement of persons. Even though in-kind donations consist of "goods", a teleological interpretation of the provisions on the free movement of goods reveals the freedom's inapplicability regarding the establishing of the tax regime of NPOs. Neither the facts of a case involving cross-border donations nor a legislation enacted to bestow preferential tax treatment on charitable giving relate to the gist of that freedom[530]. In Persche, the Court refused the argument of the Greek government that a gift of consumer products should be considered within the scope of the free movement of goods[531] [532]. The idea of the Greek government was that the free movement of goods, rather than that of capital, was the freedom of choice in respect of the cross-border movements of goods at issue. Advocate General Mengozzi rebutted this argument on the grounds that the restriction claimed by Mr. Persche concerned cross-border charitable giving rather than the export of the goods donated.[533] [534] Moreover, following its settled case law, the Court considered the purpose of the legislation concerned in order to determine the freedom applicable in this context.[535] Since the legislation that excluded the deductibility of gifts did not distinguish between those made in money or in kind, it could not be attributed to the free movement of goods.[536] [537]

In Missionswerk, the Court refused to apply the free movement of persons on the grounds that it was irrelevant to succession duties.[538] Although this freedom is unlikely to play a major role, in the infringement case against the United Kingdom concerning tax relief for gifts to charities, the Commission (quite unconvincingly) referred to the free movement of persons on the grounds that "workers and self-employed persons moving to the United Kingdom might wish to make gifts to charities established in the Member State where they came from". [539]

Considering, the scope of each of the fundamental freedoms, for greater practical clarity, we will compile an overview of the applicability of the fundamental freedoms of the EU in relation to the various activities of NPOs and donors.

[1] The management of immovable property.

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[529] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[530] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[531] C-318/07, Hein Persche, paras 28-29.

[532] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[533] Opinion of AG Mengozzi 14 October 2008, C-318/07, Persche, point 40

[534] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[535] C-157/05, Holböck, para. 22 and the case law cited.

[536] C-318/07, Hein Persche, para. 29.

[537] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[538] C-25/10, Missionswerk Werner, para. 14.

[539] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

A charity's activities pertaining to the management of immovable property may have a touch of both the freedom of establishment and the free movement of services. The active and remunerated letting of property makes a charity participate in economic life and, hinging on the intensity at which its connection to the host Member Stale occurs, it will either be covered by the freedom of establishment (where it maintains a permanent presence on the territory of the host Member State enabling it to participate in the economic life of that Member on a stable and continuous basis) or the freedom to provide services (where this hurdle is not surmounted). The mere passive ownership of premises does not give rise to the type of activity covered by either freedom.

The free movement of capital also may further protect the activities of charities involved in the management of immovable property[540].

[2] Participating in the capital of a company

A charity participating in the capital of a company may be protected by either the freedom of establishment or the free movement of capital. Delineation is of decisive importance, in particular with a view to the former's narrower personal scope and the latter's broader territorial scope. Depending on whether national law actually permits a charity to hold a share allowing it to exercise definite influence on the target, the situation will be protected by the freedom of establishment. Less significant holdings enjoy the worldwide protection of the free movement of capital. The benchmark is factual and the actual size required for a shareholding to fall into one of these categories is an open issue and depends on each individual case[541].

[3] Charitable activities of NPOs and donors

As the Court explicitly considered charitable giving to be covered by the broad notion of "capital", both the NPO and its donor may effectuate a cross-border donation under the protection of the free movement of capital. Under the free movement of capital, both the capital provider and the capital recipient are protected without personal constraints. The requirement of the last clause of Art. 54 TFEU, i.e. the requirement that the entity must be "profit-making", does not concern the free movement of capital so that all respective questions of interpretation can be omitted.

Donors who effect cross-border donations, may, under rather particular circumstances and subject to delineation, rely on the free movement of workers and the freedom of establishment (for example where a donor leaves his home country as a moving worker or in exercise of his freedom of establishment and subsequently seeks to support a charitable entity based in his former home country). However, the link a cross-border donation maintains to the free movement of capital is much more immediate than that maintained to the two personal freedoms. While with respect to the latter, the right to effectuate a cross-border donation safe from discriminatory tax treatment is a mere corollary to the right of personal free movement, it alludes to the former's very essence - both in terms of facts and legislative purpose. It follows that the free movement of capital will unfold to protect the cross-border situation. Where the specific circumstances relating to the free movement of workers or the freedom of establishment are not in point, the free movement of capital is the only freedom applicable so that there is no need for delineation. The free movement of services is inapplicable[542].

[540] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.
[541] Ibid.
[542] Ibid.

3.2.5 The hierarchy in application of the fundamental freedoms to NPOs

Thus, scenarios involving charity or donor taxation may be covered by more than one fundamental freedom at a time[543]. Since the use of certain freedoms is less restricted than the application of others, it is necessary to examine whether there is a hierarchy in the application of various freedoms and whether these potentially applicable freedoms enter into conflict with each other.

With a view to the question of multiple protection, legal literature has identified two approaches taken by the ECJ which severely differ in result: the theory of parallel applicability and the principal aspect theory.[544] According to the former, one set of facts may be concurrently protected by more than one freedom. The Court's case law, in this respect, takes two different shades. In the majority of cases, the Court abnegates examination in the light of one freedom after having identified a restriction on another freedom based on the grounds that there is simply "no need" (or that it is "not necessary") to examine whether the exercise of another freedom was additionally restricted - true to the motto: One (unjustified) restriction suffices in order to make a national provision incompatible with Union law. A more overt but, at least in the context of preliminary procedures, rather rare approach is the express simultaneous examination of two or more freedoms - be it to identify a restriction of or compliance with a number of freedoms[545].

A "principal aspect approach" is that the Court accepts that, in principle, a certain fact pattern may trigger applicability of two or more fundamental freedoms; priority, however, is to be given to the principally affected one, a possible restriction on the other being a mere "unavoidable", or "inevitable", consequence of a restriction on the former not justifying an independent examination of the respective legislation in the light of the other. [546]

Judging by the origins of the landlocked tax barriers and the above-described possibilities of applying each of the freedoms to tax situations, as a rule, it is a question of disputes "the free movement of capital versus the freedom of establishment" and "the free movement of capital versus the freedom to provide services".

As I. Koele notes, the landlocked tax provisions generally have as a common denominator that a foreign resident philanthropic organization is treated less preferentially because of the lack of an establishment in the host country. Consequently, the character of the landlocked tax provisions predominantly refer to the free movement of capital. Only where a foreign philanthropic organization has a presence in the host country (for example in the form of a branch) which however does not qualify as a philanthropic organization under domestic laws, a direct conflict between the freedom of establishment and the free movement of capital may be present. However, as it would be counter-intuitive and undesirable to make a sharp distinction between the situation where a foreign philanthropic organization would or would not have a (non-qualifying) presence in the domestic country, the ECJ tends to associate the character of the relevant law (i.e. the tax exemption of philanthropic flows of money) with the free movement of capital rather than with the freedom of establishment[547].

In Fidium Finanz[548] (decided almost simultaneously with Stauffer), the Grand Chamber concluded that the Treaty does not impose any order of priority on the freedoms.[549] [550].

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[543] For discussion on differentiation between these two freedoms, see also Hemels, S., et al. *Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority?* // EC Tax Review. – 2010. – Vol. 1, pp. 19-31

[544] Details of these approaches S. Heidenbauer analyses in Chapter 3.2.3.3.2.2, p. 170

[545] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[546] Ibid.

[547] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[548] ECJ, 3 Oct. 2006, C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht

[549] C-452/04, Fidium Finanz AG, para. 32.

So we can conclude that the basis in the choice of freedom is to what extent the landlocked tax barriers affect each of them. The Court used a "principal aspect approach" and concluded that the freedom which is primarily affected should be taken into account exclusively:

> Where a national measure relates to the freedom to provide services and the free movement of capital at the same time, it is necessary to consider to what extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other. The court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it[551].

In Fidium Finanz case ECJ made a judgement on applicability of freedom to provide services. The Court found that although making financial services offered by companies which are established outside the European Economic Area less accessible for clients established in Germany, national rules effectively make these services less attractive for clients, and, therefore, reduce cross-border financial traffic relating to those services, however, that is merely an unavoidable consequence of the restriction on the freedom to provide services [552] [553].

The Stauffer judgment illustrates an inconsistency in the CJEU's approach towards the issue of which freedom has priority when the freedom to provide services is one of the options[554]. This freedom may be seen as secondary (subordinate): "services shall be considered to be "services" within the meaning of the Treaties … insofar as they are not governed by the provisions relating to freedom of movement of goods, capital and persons" (Article 56 TFEU).[555] Even though the Court has indicated its move towards the "centre of gravity" approach,[556] it has not been entirely consistent.[557] Considering the freedom of establishment and the free movement of capital, on the one hand, and the freedom to provide services, on the other hand, AG Stix-Hackl in Stauffer expressed a preference for interpreting the latter as having a "subsidiary" role and, as such, it should be examined only if neither the freedom of establishment nor the free movement of capital applies.[558] This aspect was not discussed by the Court in detail, as it used a "parallel applicability approach" and simply stated that the "free movement of capital covers both the ownership and administration of such property and it is not therefore necessary to consider whether the foundation acts as a provider of services".[559], Yet, the fact that the freedom to provide services was not refused on substantive grounds (like the freedom of establishment, discussed above) is indicative of the consistent position of the Court[560].

It should be noted that, although the discussion about the hierarchy in the application of fundamental freedoms and conflict between them there is, it, however, is largely of an academic nature in circumstances like those in Stauffer[561].

At the end of the review of application of Treaty freedoms to charities and donors we can conclude that the ECJ case law through the Stauffer case set the foundations for pro-

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[550] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[551] C-452/04, Fidium Finanz AG, para. 34.
[552] Ibid., para 48.
[553] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.
[554] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[555] C-55/ 94, Gebhard, para. 22.
[556] ECJ, 3 Oct. 2006, C-452/04, Fidium Finanz AG, paras 32–34 and 49; see also C-287/10, Tankreederei I, para. 35.
[557] C-384/ 08, Attanasio Group, para. 39.
[558] AG Stix-Hackl Opinion, Stauffer, para. 32.
[559] C-386/ 04, Walter Stauffer, para. 24.
[560] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[561] Ibid.

tection provided by EU law to non-profit organizations concerning their tax treatment in the cross-border context. In this landmark judgment, the Court arrived at a logical conclusion, which can hardly be disputed from a legal standpoint. The line of reasoning laid down by AG Stix-Hackl and the Court in 2006 has been consistently followed in other CJEU cases that involved the special tax treatment of non-profit organizations. This, however, does not imply that all legal issues have been resolved. As has been demonstrated, the free movement of capital provides the most extensive protection to non-profit organizations and their donors in view of the Court's broad interpretation of what constitutes the movement of capital, as well as its lenient approach towards the "economic" component of this freedom[562]. The free movement of capital can independently apply where the invocation of the freedom of establishment or the free movement of services fails on grounds of substantive or personal inapplicability[563]. The scope of protection provided by other freedoms still contains some open questions; even in cases where their application has been addressed by the Court, not all aspects have been clarified[564].

3.3 Justifications for territoriality of tax incentives for NPOs and the Court's position on the issue

According to overview made in the previous paragraph, in the past few years, the question of the tax treatment of non-profit organizations in the cross-border context has often revisited the agenda of the Court of Justice of the European Union. In 2006, the Court delivered its first landmark judgment in Stauffer[565], which was followed by Persche[566], Commission v. Spain[567], Missionswerk[568], Commission v. Austria[569] and Commission v. France [570].

This, the so-called the Stauffer-Persche line of cases, for the first time raised an issue of the applicability of four freedoms enshrined in EU treaties to NPOs, provoking a legal discussion on this topic. In these cases the ECJ, in implementing the principle of non-discrimination, first established restrictions for a differentiated tax regime for NPOs from other Member States, opening new horizons for cross-border activity for NPOs. However, the specific nature of NPOs, the variety of terms used to characterize them, the possibility of maneuvering considerable financial resources in combination with the diffuse geographical boundaries of their activities, caused the unwillingness of Member States to grant them tax breaks. Therefore, through the trials Member States try to use the possibilities of the EU Treaties to justify their national landlocked tax regimes, which grant tax benefits only to domestic (resident) NPOs.

According to the TFEU, Member States exercise full tax sovereignty in the field of direct taxation and therefore they are free to determine the criteria for levying taxes and to circumscribe the scope of favourable tax regimes for charities. Since the national tax legislations have to be in accordance with EU law, the main issue for the ECJ is to reconcile national sovereignty and EU Treaty freedoms. Thus, the ECJ has to secure optimal coordination between EU principles and national preferences in tax policy, i.e. to ensure that na-

[562] Ibid.
[563] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.
[564] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[565] ECJ C-386/04, Centro di Musicologia Walter Stauffer [2006] ECR I-08203
[566] ECJ, C-318/07, Persche [2009] ECR I-00359
[567] ECJ, C-153/08, Commission v. Spain [2009] ECR I-9735
[568] ECJ, C-25/10, Missionswerk Werner Heukelbach [2011] ECR I-00497
[569] ECJ, C-10/10, Commission v Austria [2011] ECR I-05389
[570] ECJ, Case C-485/14, Commission v. France [2015] ECLI:EU:C:2015:506

tional preferential tax regimes do not exclude cross-border situations from their scope without adequate justification.[571]

As has already been mentioned, the Court admits the application of fundamental freedoms to charities, which means that – unless justified – territorial limitations to tax advantages granted by Member States to charities or their donors constitute infringements of the Treaty[572].

As we noted in paragraph 2.3, according to settled case law of the European Court of Justice, restrictions on the fundamental freedoms are only permissible if:

(1) they are applied in a non-discriminatory way;

(2) are justified by overriding reasons in the public interest;

(3) are an appropriate means to achieve the objective that they pursue; and

(4) do not go beyond what is necessary and reasonable to achieve this objective[573].

As regards, in particular, the free movement of capital - the freedom applied to the majority cases of the Stauffer-Persche line, - Article 65(1)(a) TFEU permits EU Member States to 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 and Article 65(1)(b) allows the taking of all requisite measures to prevent infringements of national law and regulations or those that are justified on the grounds of public policy or public security[574].

With the exception of Commission v. Spain (in which a different freedom was at stake), in each of the above-referenced cases the issue of comparability was closely examined by the Court at a later stage in light of the express derogation envisaged by Article 65 TFEU. The Court applies a standard (parallel) approach to Article 65 TFEU, building upon its early case law on the freedom of movement: national tax provisions that distinguish on the grounds of residence of taxpayers are compatible with EU law if they apply to situations that are not objectively comparable (Schumacker case) or can be justified by overriding reasons in the general interest (Bachmann case).[575] Although this approach makes "[t]he inclusion of the exception in the Treaty … superfluous",[576] it allows a more coherent interpretation of the Treaty provisions[577].

These two elements are considered in turn.

[1] The Comparability of Domestic and Foreign Non-profit Organizations

In the specific field of charity and donor taxation, the ECJ gives the right to the Member States, which argue that there are no grounds to extend the benefit of tax incentives granted to domestic charities to cross-border situations since they are not in a comparable situation[578]. The Member States exercised this right. In the Stauffer-Persche line of cases it was addressed the Court that domestic and foreign NPOs are not objectively comparable: neither functionally nor from a legal perspective. From a functional point of view, incompatibility is based on a special social function performed by domestic non-profit organiza-

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[571] Englisch, J. *Tax coordination between Member States in the EU-role of the ECJ* / in Lang, M., Pistone, P., Schuch, J., Staringer, C. (eds.) Horizontal Tax Coordination / IBFD. – 2012, pp. 16-21

[572] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142.

[573] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p.

[574] Article 65(1)(a) and Article 65(1)(b) TFEU

[575] ECJ, C-279/93 Schumacker [1995] ECR I-00225 and ECJ, C-204/90 Bachmann [1992] ECR I-00249, see AG Stix-Hackl Opinion, Stauffer [2006] ECLI:EU:C:2005:785, para. 72.

[576] Peers, S. *Free Movement of Capital: Learning Lessons or Slipping on Spilt Milk.* / in Barnard, C., Scott J. (eds.) The Law of the Single European Market Oxford / Hart Publishing. – 2002. – pp. 348-349.

[577] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[578] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

tions[579]. Domestic NPOs have a close link with the community which can not be provided by foreign NPOs. The legal incompatibility is due to freedom of Member States to apply "different concepts of benevolence as well as different requirements for recognition"[580], as well as distinction in the legal definition of non-profit organizations and activities among Member States.[581]

[a] Special Social Function of NPOs and their Link with Community

This line of argument sought to prove a special relationship between a Member State and the activities of non-profit organizations that are provided with tax benefits. The most basic form of this argument can be found in Stauffer, where the German government reasoned that the tax exemption for domestic charities recognized their important social function and contribution to general welfare, which would otherwise be carried out by and at the expense of the state (whereas the Italian charity in question was carrying out its activities for the benefit of non-residents). In response, the Court noted that, indeed, EU Member States "are entitled to require a sufficiently close link between foundations upon which they confer charitable status for the purposes of granting certain tax benefits and the activities pursued by those foundations", but such a connection was found "irrelevant" in the context of Stauffer.[582] On the basis of the referring court's submission, the Court concluded that the German Tax Code makes no distinction between entities that pursue charitable aims in national territory or abroad, such that the requirement to promote the interests of the general public cannot be interpreted in such a way that the charitable activities must benefit German nationals or inhabitants.[583] [584] Due to the limited relevance for the case in question, the Court did not enter into a detailed explanation of what may qualify, in fact, as "a sufficiently close link". Instead, it more broadly stated that EU Member States "are free to determine what the interests of the general public they wish to promote are", but may not refuse the benefit "solely on the ground that it is not established in its territory"[585] [586].

The notion of a "sufficiently close link" reflects the Court's implicit recognition of the special social function of charities.

EU Member States enjoy broad discretion in deciding which social benefits to grant and linking them to specific criteria that are used to assess the extent of the connection between the beneficiary and the State. The case law on social benefits, however, illustrates that, in its interpretation of these requirements, the Court is engaged in a sensitive balancing exercise. For instance, the United Kingdom was precluded from providing loans only to students settled in national territory conditioned by a three-year residence period that excluded the time of studies;[587] whereas the Dutch condition of five years' uninterrupted residence for the purpose of guaranteeing maintenance grants to students was accepted as appropriate to establish the required degree of integration into the society of the host Member State.[588] In the context of non-profit organizations, the crucial elements of this balancing exercise are still to be found and this aspect is likely to be litigated further[589].

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[579] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[580] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[581] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[582] ECJ C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 37
[583] Ibid., para. 38.
[584] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[585] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, paras 39–40.
[586] Ibid.
[587] ECJ, C-209/03 Bidar [2005] ECR I-02119
[588] ECJ, C-158/07 Förster [2008] ECR I-08507
[589] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

In Persche, the German and several intervening governments claimed that comparability cannot be established, due to the special status of tax benefits that compensate domestic NPOs' contribution towards certain objectives that would otherwise have to be undertaken by public authorities at their budgetary expense.[590] Quite predictably, the Court reconfirmed, with reference to Stauffer, that a Member State may decide what charitable causes are to be incentivized and then further added that the Member State cannot grant such advantages only to bodies that are established in its own territory even if their activities are "capable of absolving it of some of its responsibilities".[591] The argument of budgetary compensation was refused on the grounds that, like the need to prevent the reduction of tax revenues, it is not capable of justifying a restriction.[592]

The Belgian government in Missionswerk sought to prove that when the Walloon legislation took as its criterion for the purpose of granting a reduced rate of succession duties that the location of the non-profit body's centre of operations must be either in Belgium or in a Member State in which the deceased had resided or had had his place of work, it exercised the discretion to require "a sufficiently close link" and to determine the public interests that were worth promoting.[593] An interesting feature of this provision is that the Walloon legislature had already modified its wording in 2003 under the pressure of an infringement procedure launched by the European Commission against the legislation in force in the three Belgian Regions. The earlier version was indeed clearly discriminatory since it limited the benefit of the reduced rate to Belgian bodies and institutions. Therefore, the provision at stake was not the mere product of a legislature, which adopted the text at a time where European constraints were not yet in force, or at least when none could have been reasonably foreseen of the extent that the ECJ would have given to the fundamental freedoms in the area of taxation. It was rather a very conscious attempt to find a compromise between the need to comply with European standards and a particular conception of the link between the granting of a tax advantage by an authority and the territory on which this authority exercise its competences [594].

But in its judgment, the Court considered that,

> [B]y taking the centre of operations of the body concerned as the criterion for establishing the existence of a close link with the Belgian community at large, not only does the legislation at issue in the main proceedings treat bodies which have their seat in Belgium differently from those which do not, even where the latter have a close link with that community, it also treats all bodies which have their centre of operations in Belgium in the same way, whether or not they have established a close link with that community.[595]

In other words the Court decided that the centre of operations cannot easily be seen as a criterion for establishing a close link with the Belgian community at large. It further concluded that the legislation at issue "does not enable the objective pursued – the provision of tax advantages only to bodies whose activities benefit the Belgian community at large – to be achieved".[596]

In Commission v. Austria, the Court clarified the scope of Member States' discretion to restrict tax benefits to bodies pursuing certain public interest objectives. The Austrian government claimed that it aimed to incentivize establishments that contributed to the strengthening of Austria's position as a centre of learning and teaching and:

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[590] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 42.
[591] Ibid., para. 44.
[592] Ibid., para. 46; see, to that effect, ECJ, C-319/02 Manninen [2004] ECR I-7477, para. 49; ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 59 and other cases cited therein.
[593] ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 27.
[594] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[595] ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 36.
[596] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

> if exceptionally there were education, research and academic institutions in other Member States pursuing aims serving the common good in Austria in the field of learning, these organizations could also be subsumed by way of paragraph 4a(1)(e) EStG within the scope of the preferential tax treatment scheme.[597]

This was, seemingly, along the lines of what is permitted by EU law. The AG's Opinion shed more light on the extent of this discretion: Austria could restrict beneficial tax treatment to institutions that conduct research in areas that are "of particular significance at national level, such as avalanche research", even if the consequence of such limitation would be that, in practice, only donations to domestic establishments benefitted from the tax scheme.[598] Crucially, however, the Austrian rule was phrased "in general terms", so that almost all resident education, research and academic institutions would satisfy it, whereas "there is not a single example of an institution in another Member State that meets that objective"; it thus "comes down to a pure criterion of location".[599] The Court agreed with the AG and concluded that such formulation of the objective pursued constitutes indirect discrimination, narrowing it down to prohibition established earlier in paragraph 44 of Persche (tax advantages may not be granted on the basis of location).[600] [601]

As can be seen, EU law constrains the choices of EU Member States in creating a stimulating environment for non-profit organizations within national borders. Even though the Court admits that the requirement of "a sufficiently close link"[602] is valid and that "the desire to grant the tax exemption only to charitable foundations which pursue the policy objectives of that Member State may, prima facie, appear legitimate",[603] that possibility is assessed against the freedoms. In none of the cases considered above was the Member State's argument regarding its discretion in determining the general welfare accepted. It was dismissed on the basis of: (i) the purpose of the legislation in question (Stauffer), (ii) settled case law that Member States cannot limit tax benefits on the basis of budgetary considerations (Persche), (iii) a lack of correlation between the legal requirements and the goal of establishing a close link with the community at large (Missionswerk), and (iv) the consideration that the legislative requirement was, essentially, a hidden / explicit differentiation on the basis of residence (Commission v. Austria / Commission v. France)[604].

[b] Differences in Member States' Legal Definitions

In Stauffer, it was put forward before the Court that the national concepts of charitable status and charitable purposes, as well as the requirements imposed by law, vary between Member States. Due to these diverse national approaches, the entities established abroad would differ and, thus, could not be regarded as objectively comparable to domestic non-profit organizations. The Court ruled that, at the current stage of harmonization[605]

> "[I]t is not a requirement under Community law for Member States automatically to confer on foreign foundations recognized as having charitable status in their Member State of origin the same status in their own territory. Member States have discretion in this regard that they must exercise in accordance with Community law…. In those circumstances, they are free to determine what the interests of the general public they wish to promote are by granting benefits to associations and foundations which pursue objects linked to such interests in a disinterested manner[606].

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[597] AG Trstenjak Opinion C-10/10 Commission v. Austria [2011] ECLI:EU:C:2011:126, para. 53
[598] Ibid., para. 55.
[599] Ibid., para. 56.
[600] ECJ, C-10/10 Commission v Austria [2011] ECR I-05389, paras 33–35.
[601] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[602] ECJ C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 37.
[603] Ibid., para. 57.
[604] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[605] Ibid.
[606] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 39

However, even if the Court acknowledges that Member States are under no obligation of automatic recognition of the charitable status of a foreign entity considered as charitable in another Member State, they are nevertheless bound to grant such a status to non-resident bodies fulfilling the criteria set up in domestic legislation, apart from a residence criteria, which would be in such a case incompatible with EU law. The benchmark for the comparison is the tax legislation of the state granting the tax advantage. Thus, Member States may require foreign charities to fulfil their national notion of charitableness, i.e. the charitable objectives, before granting the tax incentive. It is up to the national courts to assess the fulfilment of these requirements[607].

According to the referring court, the Centro di Musicologia Walter Stauffer satisfied the requirements for exemption under German statutory provisions. Furthermore, even when the tax exemption was provided on the basis of the identity of the entity (such as the Spanish Red Cross and the Spanish National Association for the Blind in Commission v. Spain), the Court decided that any entity pursuing social or charitable non-profit-making activities established in another Member State and having the same objectives is comparable.[608] [609]

Thus, even though non-profit organizations may rely upon free movement provisions in order to claim equal treatment, EU law does not require a Member State to automatically recognize the charitable status of foreign entities. In other words, there is no "mutual recognition". From a legal standpoint, the CJEU's approach follows doctrinal orthodoxy and arrives at a fairly uncontroversial conclusion. However, the requirement of "host-state control" rather than "home-state control", combined with the burden of proof carried primarily by the taxpayer, does not represent a completely satisfactory policy solution for the non-profit sector. It creates a considerable administrative burden for organizations, which increases with geographical expansion of activities.

In Persche, the situation was the inverse of that considered in Stauffer; it was a donor who sought the tax benefit rather than a non-profit organization. Nevertheless, the Court treated the case in a similar manner. The German government and several others argued that comparability could not be established, due to the differences in the concept of and requirements for charitable acts across countries and the difficulty of monitoring compliance with imposed requirements aboard.[610] In response, the principle of equal treatment was reiterated by the Court and the difference in control over requirements was found not to preclude considering the situations to be comparable.

As Anzhela Yevgenyeva notes, in relation to donors, the Court's solution appears even less satisfactory. One can safely assume that, in most cases, the cross-border activities of non-profit organizations are undertaken on a continuous basis, whilst the potential administrative burden associated with occasionally-made contributions is more disproportionate and may influence donors' choices to a far greater extent. Further, the benefit of equal treatment may not have an immediate effect, due to a lack of awareness among taxpayers of such regulatory liberalization and difficulties in informing potential donors that a particular non-profit institution qualifies for exemption under national law. Since such obstacles are likely to be overcome only by institutions with the strongest economic potential, the extension of beneficial tax treatment may result in smaller local non-profit organizations facing higher international competition for scare sources of donation. Nevertheless, these

[607] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[608] ECJ, C-153/08 Commission v. Spain [2009] ECR I-9735, para. 33.

[609] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[610] Persche, C-318/ 07, EU:C:2009:33, para. 42.

critical comments largely illustrate the limits of negative harmonization as such, rather than defects in the judicial approach taken to these particular cases[611].

[2] Elicitation of the overriding requirements of general interest

Once a restriction was established and the situations were found to be comparable, the Court moved on to analyse the overriding requirements of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty[612].

In Stauffer, four broad categories of justifications of the unequal treatment were asserted:

- Promotion of culture and exception to state aid;
- The need for effective fiscal supervision;
- The need to safeguard the cohesion of a tax system; and
- Combating crime.

These overriding justifications of discrimination are analysed below[613].

[a] Promotion of culture and exception to state aid

This argument is based on the fact, that the TFEU contains an overriding reason in the general interest, as it provides for an exception to the general prohibition of state aid for any aid to promote culture and heritage conservation[614] and contains a special article on the furtherance of culture within the EU[615].

In Stauffer this argument touches upon the relation between the fundamental freedom articles and the prohibition of state aid as foreseen in the EC Treaty. Both sets of rules are interconnected, as has been determined in a series of the ECJ decisions.

The prohibition of State Aid, as currently foreseen in Art. 107(3) TFEU (ex. Article 87 TEC), intends to prohibit national measures that aim to support a Member State's own economic or social purposes. However in Article 107(3) TFEU a number of measures are enunciated that may be deemed by the European Commission to be compatible with Art. 107 TFEU, in particular: "any aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the Common interest".[616] Also, the general European policy article on the enhancement of culture within the EC[617] was cited by the German tax authorities in support of their position in Stauffer.

In Stauffer, the German tax authorities, after citing the above provisions of the EC Treaty, argued that tax privileges enjoyed by national NPOs pursuing cultural goals fall under the Article 87(3)(d) EC Treaty (now Article 107 (3)(d) TFEU), and under Article 151 TEC (to date, Article 167 TFEU) and thus, that the derogating rules applicable to national foundations pursuing exclusively objects relating to education and training are compatible with Community law.[618]

However, the ECJ rejected these arguments. With regard to the argument concerning state aid, the ECJ held that the tax exemption scheme at issue does not appear to constitute aid governed by Articles 87 and 88 of the EC Treaty (now Article 107 and Article 108 TFEU), as it is clear from the applicable German tax law that the tax exemption "is not

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[611] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[612] Ibid.
[613] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.
[614] Art. 107(3)(d)TFEU (ex. Art. 87(3)(d) TEC)
[615] Art. 167 TFEU (ex. Art. 151 TEC)
[616] Art.107(3)(d) TFEU (ex. Art. 87(3)(d) TEC)
[617] Article 167 TFEU (ex. Article 151 TEC): "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore"
[618] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 44

based on the premiss that the activities pursued by charitable foundations must benefit the national general public"[619] [620].

Para. 45 of the Court's decision in Walter Stauffer is especially noteworthy, as it strongly suggests a general relationship between the scope of the exemption of philanthropic organizations and the issue of eventual prohibition of that exemption on the grounds that it constitutes forbidden state aid. When extrapolating this argument, the general statement can be made that a law which does not contain any landlocked provisions in an EC context generally may not contain any forbidden state aid. In the German literature, it has been argued that most philanthropic purposes that qualify for tax relief under current German tax law can be said to promote the execution of an important project of common European interest[621], which is a literally phrased exception to the prohibition of state aid that may be considered by the European Commission. By contrast, however, a law that takes an isolationism, and therefore strict, landlocked approach with regard to "public purposes" is likely to be scrutinized by the European Commission as possibly constituting forbidden state aid[622].

Apart from the issue of state aid, the ECJ in Stauffer concluded that "while certain objects connected with the promotion at the national level of culture and high-level training may constitute overriding reasons in the general interest, the fact remains that it does not appear that the tax exemption scheme at issue pursues such objectives[623]. In this regard, reference is made to the ECJ decisions in Case C-198/89 Commission v Greece [1991] ECR I-727[624], and Case C-153/02 Neri [2003] ECR I-13555[625].

In addition to these two cases, another case to consider is the recent ECJ decision in Laboratoires Fournier SA, where a similar justification argument was rejected in a very general way, referring to the general Community policies on different facets of European life. This case concerned French tax law providing for a tax credit for research, which credit was available solely for research activities carried out in France. The ECJ stated:

> Although the promotion of research and development may, as argued by the French Government, be an overriding reason relating to public interest, the fact remains that it cannot justify a national measure such as that at issue in the main proceedings, which refuses the benefit of a tax credit for research for any research not carried out in the Member State concerned. Such legislation is directly contrary to the objective of the Community policy on research and technological development which, according to Article 163(1) EC is, inter alia, "strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level". Article 163(2) EC provides in particular that, for this purpose, the Community is to "support [undertakings]" efforts to cooperate with one another, aiming, notably, at enabling [them] to exploit the internal market potential to the full, in particular through […] the removal of legal and fiscal obstacles to that cooperation.[626] [627]

[b] The need to safeguard the cohesion of the tax system

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[619] Ibid., para. 45

[620] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[621] Art.107(3)(b TFEU (ex. Art. 87(3)(b) TEC)

[622] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[623] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, п.45

[624] ECJ, C-198/89 Commission v. Greece [1991] ECR I-00727. The ECJ held that the general interest in the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of country can constitute an overriding reason, provided that the measure is in proportion to that interest.

[625] ECJ, C-153/02 Neri [2003] ECR I-13555, para. 46. The ECJ held "Whilst the aim of ensuring high standards of university education appears legitimate to justify restrictions on fundamental freedoms, such restrictions must be suitable for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to retain it.

[626] ECJ, C-39/04 Laboratoires Fournier [2005] ECR I-2057, para.23

[627] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

Another argument that was offered as a justification for the discriminatory treatment of Walter Stauffer referred to the desire to preserve the cohesion of the German tax system[628] [629].

The German Government maintained that it would threaten the cohesion of the national tax system to exempt from corporation tax income received by nonresident foundations in respect of the management of property they own in Germany. According to that Government, the effect of such an exemption would be to remove liability to tax in respect of activities devoted to the public interest pursued by charitable foundations. In so far as such foundations assume direct responsibility for the common good, they act as substitute for the State, which may, in return, grant them tax benefits without breaching its obligation of equal treatment[630].

One can notice a significant similarity of this argument with the requirement to have a close link with community and to promote the interests of the general public in that community, which is used as a proof of comparability or incompatibility of domestic and foreign NPOs, and was discussed above. As E.Traversa notes, the use by Member States of expressions like "connexion with society" or "close link with the community" in defence of the tax advantages they have granted to charities and donors has to be understood, in their perspective, as a matter of "coherence"[631]. This line of reasoning used in the Stauffer-Persche line of cases, came into being on the basis of an earlier concept of "coherence", accepted by the ECJ in the earlier Bachmann and Commission v. Belgium cases (1992), and, more recently, in Commission v. Belgium and Commission v. Hungary (2011), i.e. "a direct link… established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy". [632] [633]

S. Heidenbauer also notes that earlier justification based on classical understanding of the coherence principle[634]. Concisely, it is based on the idea, that to the extent that charitable foundations assume direct responsibility for the common good, they act as a surrogate for the state, which may, in return, grant them tax benefits without breaching its obligations of equal treatment[635]. In other words, financial resources that are not received by the state due to the provision of NPO benefits are compensated to the state in the form of budgetary savings on expenditures for public goods, which NPOs partially take on themselves. With reference to Case C-204/90 Bachmann [1992] ECR I-249, para. 28, and Case C-300/90 Commission v Belgium [1992] ECR I-305, para. 21 the Court has acknowledged that the need to safeguard the cohesion of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty[636].

For an argument based on such a justification to succeed, the Court requires "... that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined

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[628] ECJ C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, п.51

[629] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[630] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para.51

[631] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[632] ECJ, C-204/90 Bachmann [1992] ECR I-00249, ECJ, C-300/90 Commission v Belgium, [1992] ECR I-00305, ECJ, C-250/08 Commission v. Belgium [2011] ECR I-12341, para. 71 and ECJ, C-253/09 Commission v. Hungary [2011] ECR I-12391, para. 72

[633] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[634] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[635] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[636] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para.52

in the light of the objective pursued by the rules in question".[637] [638] For example, as is shown by paragraphs 21 to 23 of the judgment in Bachmann and paragraphs 14 to 16 of the judgment in Commission v Belgium, those judgments are based on the finding that, in Belgian law, there was a direct link, in relation to the same taxpayer liable to income tax, between the ability to deduct insurance contributions from taxable income and the subsequent taxation of sums paid by the insurers[639].

In A.Yevgenyeva view, although CJEU jurisprudence on NPOs' taxation calls to example of CJEU jurisprudence on social welfare (*and also for one thing* of CJEU jurisprudence on *taxation of insurance proceeds, as it was in Bachmann case* – italics added), "the similarities between these two types of cases may be misleading as there are obvious differences in context. Unlike the system of social benefits, *(as well as insurance schemes* – italics added*),* the relationship between the State and those potentially benefiting from favourable tax treatment is non-linear and de-personalized"[640].

Therefore, it seems logical that in respect of the income tax advantages granted to charities and donors, there is no "particular tax levy" which serves to offset the benefit and which could hence explain why cross-border scenarios are excluded from preferential treatment. Moreover, a mere "general and indirect link between the tax concession for the taxpayer and the benefit ostensibly accruing to the State is not sufficient for the purpose of the requirements derived from the case law resulting from Bachmann". As a consequence, the justification based on this classical understanding of the coherence principle - also referred to as "micro", "internal", or "strict" coherence - is prone to fail[641].

In Stauffer, however, the German government introduced a modified and certainly broader, more political or territorial understanding of the idea of cohesion[642] and raised the whole concept to the meta-level. The attempt was to justify the restrictive provision with reference to the fact that, through their charitable activities, resident charities ease the burden on the German State[643]. Nevertheless, and in such a broader formulation both the Advocate General and the Court dismissed this argument.

The ECJ rejected the argument concerning fiscal cohesion for the following reasons:

- Firstly, a tax advantage consisting of exemption from tax of rental income does not correspond to a charge levied on foundations which, in principle, have unlimited tax liability. In other words, there is no direct link, from the point of view of the tax system, between that exemption and the offsetting of that advantage by a particular tax levy[644].

- Secondly, whilst the desire to grant the tax exemption only to charitable foundations which pursue the policy objectives of that Member State may, prima facie, appear legitimate, the fact remains that, relevant German legislation is not based on the premiss that measures promoting the interests of the general public are required to benefit the German general public[645]. On that basis, the national court concludes that the foundation in question in the main proceedings may be entitled to the exemption if, whilst retaining the same objects, it established its seat in Germany[646].

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[637] Ibid., para.53

[638] Earlier the Court made such a statement in ECJ, C-484/93 Svensson and Gustavsson [1995] ECR I-3955, para 18; ECJ, C-107/94 Asscher [1996] ECR I-3089, para 58; ECJ, C-264/96 ICI [1998] ECR I-4695, para 29; ECJ, C-55/98, Vestergaard [1999] ECR I-07641, para 24; ECJ, C-436/00 X e Y [2002] ECR I-10829, para 52)

[639] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 54

[640] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[641] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[642] See AG Stix-Hackl, 15 December 2005, C-386/04 Stauffer [2006] ECR I-8203, points 100 et seqq.

[643] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[644] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 56

[645] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[646] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 57

- Thirdly, "whilst, for the Federal Republic of Germany, recognition of the right to exemption from corporation tax for non-resident charitable foundations would entail a reduction in its corporation tax receipts, it has been consistently held in the case law that reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom". [647] [648]

These remarks of the Court show, that for the ECJ, such an argument amounts to simply invoking budgetary reasons to justify a breach of EU law, grounds always rejected by the Court in its case law[649]. According to the Court,

> [T]he possibility that a Member State may be relieved of some of its responsibilities does not mean that it is free to introduce a difference in treatment between, on the one hand, national bodies which are recognised as pursuing charitable purposes and, on the other, bodies established in another Member State which are recognised as pursuing charitable purposes, on the ground that legacies left to the latter cannot, even though the activities of those bodies reflect the same objectives as the legislation of the former Member State, have compensatory effects for budgetary purposes.[650]

Therefore, the possibility to require "the cohesion of the tax system" in practice might be expected to be of limited use in these types of cases; the subsequent cases of the Stauffer-Persche line that tested the ambiguous nature of that clause confirm this conclusion.

[C] Effectiveness of Fiscal Supervision over Recipients and Donors

In *Stauffer* the German tax authorities (joined by the governments of the United Kingdom and Ireland) asserted as a justification for the difference in tax treatment the need for effective fiscal supervision. The tax authorities specifically referred to (1) the difficulty of ascertaining whether, and to what extent, a charitable foundation which is established abroad actually fulfils the objects laid down in its statutes in accordance with national law and (2) the need to monitor the effective management of that foundation[651].

After it was accepted by the Court some 30 years ago, in a non-tax case, that restrictive measures "may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision", this justification ground frequently emerged in direct tax jurisprudence. The overall common concern among the Member States relates to the way how income and donations received are spent and, more generally, whether the charity actually complies with the requirements enshrined in its statutes and in the law[652].

In the Stauffer-Persche line of cases the effectiveness of fiscal supervision was argued before the Court in two different contexts: (i) when beneficial tax treatment was requested by a non-profit organization, and (ii) when beneficial tax treatment was requested by a donor[653]. In these cases the Court acknowledged the relevance of this justification for charity taxation and accepted that a Member State could apply measures in order to ascertain "in a clear and precise manner whether the foundation meets the conditions imposed under na-

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[647] Ibid., para. 59

[648] The Court referres to ECJ, C-35/98, Verkooijen [2000] ECR I-04071, para. 59; ECJ, C-136/00 Danner [2002] ECR I-8147, para. 56; ECJ, C-436/00 X e Y [2002] ECR I-10829, para. 50; and ECJ, C-319/02 Manninen [2004] ECR I-7477, para. 49

[649] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[650] See ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 31; ECJ, C-318/07 Persche [2009] ECR I-00359, paras. 45-48; ECJ C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 37.

[651] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[652] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[653] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

tional law in order to be entitled to the exemption".[654] [655] The Court took into consideration the arguments of some Member States, which claimed the difficulty or impossibility to ascertain whether and to what extent a non resident charitable body actually follows the objectives laid down in its statutes in accordance with their legislation. Nevertheless, the Court did not go as far as fully accepting the argument as a valid justification to merely exclude non-resident charities from the benefit of the tax concession[656].

In rejecting the argument based on the need for effective fiscal supervision, the Court provided a detailed analysis.

In the first context, it was decided in Stauffer that, to ensure effective fiscal supervision, tax authorities could exercise their discretion (a) to verify, "in a clear and precise manner", whether the entity in question meets the statutory requirements to obtain the right to tax exemption, and (b) to monitor its operation through, for instance, annual reporting. Difficulties associated with such verification were found to be a "purely administrative" matter that could not justify the limitation of freedom[657] [658]. According to the Court, other means, more in line with the principle of proportionality, were available to the Members States to check whether the foreign charity would comply with national requirements. The Court suggested Member States request information to the authorities of other Member States within the framework of the Mutual Assistance Directive (formerly Directive 77/799/EEC, replaced by Directive 2011/16/EU)[659] or even to make "the taxpayer (…) able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the expenditure incurred in other Member States".[660] [661]

In the second context, it was argued before the Court in Persche, first, that a Member State that grants a deduction had no obligation to obtain the information required for assessment of tax liabilities by its own means or through the use of EU mutual assistance mechanisms; further, that it would violate the principle of proportionality to oblige the donor's Member State to verify compliance with the requirements imposed on charitable bodies for every gift, regardless of value.[662] [663]

With a reference to the modal verb "may" in Art. 2 para. I of the Mutual Assistance Directive, the Court emphasised that:

> Directive 77/799 does not require the donor's Member State to have recourse to the mechanism of mutual assistance under that directive each time that the information provided by that donor is not sufficient to establish whether the recipient body fulfils the conditions laid down by the national legislation for the grant of tax advantages[664].

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[654] ECJ C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, paras. 48-50; ECJ, C-318/07 Persche [2009] ECR I-00359, paras. 51-70. See also: ECJ, C-254/97, Baxter and Others [1999] ECR I-4809, para. 16; ECJ, C-39/04 Laboratoires Fournier [2005] ECR I-2057, ECJ, C-248/06 Commission v. Spain [2008] ECR I-00047.

[655] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[656] Ibid.

[657] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 48.

[658] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[659] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L64, 11.3.2011, pp. 1-12.

[660] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 53. See also ECJ, C-254/97, Baxter and Others [1999] ECR I-4809, para. 20, and ECJ, C-39/04 Laboratoires Fournier [2005] ECR I-2057, para. 25

[661] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[662] ECJ, C-318/07 Persche [2009] ECR I-00359, paras 33-34.

[663] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[664] ECJ, C-318/07 Persche [2009] ECR I-00359, para.64 et seq. Similar ECJ, C-184/05 Twoh International [2007] ECR I-7897, para. 34

And indeed, the Directive itself grants the tax authorities the right to submit a request for information; as per its explicit language, it is not an obligation to ask for the other Member State's tax authorities' assistance[665].

In response, the Court ruled that the principles that were established in Stauffer in relation to non-profit organizations that receive contributions also apply in the context in which tax authorities deal with and should obtain the necessary information from "the actual donor".[666] The Court did suggest that tax authorities could require such proof as they considered necessary for assessment and for making a decision as to whether the deduction should be granted.[667]

The same reasoning is true with regard to gift and inheritance tax, as such taxes do not appear to be covered by the Mutual Assistance Directive.[668] Support for this argument is found in a recent ECJ decision in which the European Commission successfully brought an action against Denmark and Sweden in order to compel them to release their landlocked income tax treatment of pension premiums. The Swedish government, which was granted leave to intervene in support of Denmark, asserted that the Mutual Assistance Directive cannot effectively be used in many situations. In response, the Court held as follows:

> 54 The fact that Article 8(1) of the Directive imposes no obligation on the tax authorities of Member States to collaborate where the conditions laid down in that provision are met cannot justify the lack of deductibility or exemption of contributions paid to pension schemes. There is nothing to prevent the Danish tax authorities from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing to allow deduction or exemption where such proof is not forthcoming[669] [670]

It follows that the difficulties connected with the exchange of information in view of Directive 77/799, insofar as the latter does not permit effective verification of whether foreign pension schemes meet the conditions to which the contested legislation makes deductibility or exemption subject, do not justify the obstacles set out in paragraph 45 of the present judgment.

Following its previous cases, the Court noted that difficulties in verifying whether the charity satisfies the requirements imposed by national laws cannot justify the exclusion of the tax deduction and that the possibility of providing relevant documentary evidence to tax authorities should not be excluded "a priori" and "absolutely".[671] [672] So, referring to the *Laboratoires Fournier* case, the Court points out that national law which absolutely prevents the taxpayer from submitting such evidence cannot be justified on the grounds of the need for effective fiscal supervision[673]. In *Laboratoires Fournier,* the ECJ added that the possibility cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and authenticity of the research expenditures incurred in other Member States (the case involved the tax credit for research which, under French tax law, is available only for research activities carried out in France).[674] [675] In Persche the

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[665] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p.

[666] ECJ, C-318/07 Persche [2009] ECR I-00359, paras 55-56.

[667] Ibid. para. 54; see, to that effect, ECJ, C-136/00 Danner [2002] ECR I-8147, para. 50, and ECJ, C-422/01 Skandia and Ramstedt [2003] ECR I-06817, para. 43

[668] The Mutual Assistance Directive applies to "taxes on income and capital"

[669] ECJ, C-150/04 - Commission v Denmark, supported by Kingdom of Sweden [2007] ECR I- 01163, paras. 54-56. See, to that effect, ECJ, C-204/90 Bachmann [1992] ECR I-00249, paras 18, 20, and ECJ, C-300/90 Commission v Belgium, [1992] ECR I-00305, paras. 11, 13

[670] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[671] ECJ, C-318/07 Persche [2009] ECR I-00359, paras 51, 53 and 60; ECJ, C-254/97, Baxter and Others [1999] ECR I-4809, para. 20, and ECJ, C-39/04 Laboratoires Fournier [2005] ECR I-2057, para. 25.

[672] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer.* / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[673] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 49

[674] ECJ, C-39/04 Laboratoires Fournier [2005] ECR I-2057, para. 25

Court adheres to this line of reasoning and notes that even if the donor does not possess all the required information for the verification as to whether the recipient satisfies the conditions imposed by national laws, it would normally be possible to receive the confirmation of "the amount and nature of the gift made, identifying the objectives pursued by the body and certifying the propriety of the management of the gifts which were made to it during previous years".[676] In any event, the determination of whether the tax deduction is worth such administrative hurdles should be left up to the donor and the recipient.[677] [678]

Likewise, the tax authorities can rely upon the Mutual Assistance Directive to obtain all the information needed to correctly assess a taxpayer's liability for tax.[679] That possibility should be considered by the tax authorities as a right to be exercised where deemed appropriate.[680] The Court acknowledged that, in some circumstances, information might be difficult to verify, due, in particular, to the limited nature of the Mutual Assistance Directive.[681] Thus, the Court held that if the evidence required for a correct assessment of the tax was not provided, the tax authorities could refuse to grant the benefit:[682]

> "Indeed, even if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, nothing prevents the tax authorities concerned refusing the deduction applied for if the evidence that they consider they need to effect a correct assessment of the tax is not supplied". [683]

In relation to third countries, the Court confirmed its settled case law that restrictions on the exercise of the freedoms of movement within the EU cannot be transposed in their entirety to movements of capital between Member States and non-Member States, as such movement takes place in a different legal context. The fact that the mechanisms for the exchange of information may be more limited than those available within the EU could be accepted as a legitimate justification for the tax authorities to refuse the tax benefit.[684]

As can be seen, the Court created a legal fiction of comparability, leaving the actual assessment thereof to national authorities. The enforcement of CJEU rulings may vary: by requiring "relevant supporting evidence", some national authorities unavoidably impose a higher administrative burden than others. This also concerns the exercise of discretion to refuse the tax benefit if sufficient evidence has not been supplied. The Court did not adopt the wording proposed by AG Mengozzi in Persche that would have obligated tax authorities to take into account "the difficulties encountered by that taxpayer in collecting the evidence requested in spite of all the efforts he has already made" and to analyse whether the evidence can be obtained with the assistance of foreign tax authorities under the Mutual Assistance Directive or a relevant bilateral tax convention.[685] This Court's decisions put taxpayers in a fully dependent position: if the administrative requirements are disproportionate or overly burdensome, it could take many years before the problem is properly identified and resolved through the mechanisms created by EU law[686].

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[675] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.
[676] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 57
[677] Ibid., para. 59
[678] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[679] ECJ, C-318/07 Persche [2009] ECR I-00359, paras. 61-62.
[680] Ibid., paras. 64-65.
[681] Ibid., para. 69.
[682] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[683] Ibid., para. 69. See, to that effect, ECJ, C-204/90 Bachmann [1992] ECR I-00249, para. 20; ECJ, C-451/ 05 ELISA [2007] ECR I-08251, para. 95; and ECJ, C-101/05 Skatteverket v A [2007] ECR I-11531, para. 58.
[684] Ibid., para. 70.
[685] AG Mengozzi Opinion, 14 Oct. 2008, C-318/07 Persche [2009] ECLI:EU:C:2008:561, para. 110.
[686] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

Perhaps, this approach is taken as a counterbalance to difficulties that Member States' authorities may encounter in verifying information about foreign NPO. The scale of control over non-profit activities and the availability of information vary greatly between EU Member States. Whilst some countries maintain a generous system of tax exemptions and relief and, thus, impose strict control over non-profit organizations, other countries take a more liberal approach.[687] This factor on its own, however, should not play any role in the assessment[688].

[d] Combating crime

NPOs and philanthropic organizations are finding themselves in an era when the regulatory paradigm is shifting from a tax-based regulatory environment to a regulatory environment modelled on the fight against money laundering and terrorism[689]. In 2002 the FATF (Financial Action Task Force) - the premier intergovernmental body responsible for developing and promoting global policies to combat money laundering and terrorism financing - adopted a series of Special Recommendations specific to terrorist financing. These included the Recommendation that countries review the adequacy of laws and regulations that relate to non-profit entities, as these are particularly vulnerable for the financing of terrorism.[690] The FATF suggests that countries take steps to promote effective supervision and monitoring of their non-profit sector. In practice, countries should have measures in place requiring that NPOs, for example:

(1) have appropriate controls to ensure that all funds are fully accounted for and are spent in a manner that is consistent with the purpose and objectives of the NPO's stated activities;

(2) follow a rule to know your beneficiaries and associate NPOs. This means that an NPO must make its best effort to confirm the identity, credentials and good standing of its beneficiaries and associate NPOs. An NPO must also make its best effort to document the identity of its significant donors and to respect donor confidentiality; and

(3) maintain, for at least five years, and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organization[691].

This was followed by an EU communication at the end of 2005 on "The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector",[692] mirroring the above-mentioned recommendations, which are formulated as a framework for a code of conduct for NPOs to promote transparency and accountability best practices[693]. The 2009 OECD "Report on Abuse of Charities for Money-Laundering and Tax Evasion" identified multiple ways in which charities could be used for tax evasion purposes and recommended several strategies to national tax authorities for addressing those risks.[694] [695]

Therefore, it is likely that the requirement of the effective financial supervision of cross-border giving will become increasingly intertwined with the expanding regulatory

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[687] OECD (2009), *Report on Abuse of Charities for Money-Laundering and Tax Evasion*

[688] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[689] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[690] FATF *Special Recommendation VIII* / URL: www.fatf-gafi.org

[691] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[692] Commission Communication *The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector*, COM (2005) 0620

[693] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[694] OECD (2009), *Report on Abuse of Charities for Money-Laundering and Tax Evasion*

[695] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

provisions aimed at preventing and combating involvement of charities with terrorism financing[696]. Consequently, calls for greater control and even for the limitation of tax benefits for non-profit organizations are often made at the national level due to their potential use in abusive tax practices; those voices become even stronger when the beneficial treatment expands to a cross-border context with fewer control mechanisms[697].

The ECJ has provided a brief insight on this subject, noting that the foreign residence of a charitable foundation cannot give rise to a general assumption of criminal activity and therefore, the argument that terrorist organizations may assume the legal status of a foundation for the purposes of money laundering and the illegal cross-border transfer of funds, cannot be used as a justification of a provision that interferes with a fundamental freedom.[698] Moreover, a total denial of exemption would not be proportionate to the objective to combat crime, as such a measure can be regarded as going beyond what is necessary to combat crime because a number of other measures are available[699].

In conclusion of the paragraph, we can draw the following conclusions:

1) The free movement of capital does not allow a Member State to apply the discriminatory regime to a foreign NPO only on the residence criterion, if on other criteria this foreign NPO is comparable to domestic (domestic) NPOs. The governments' attempts to justify their landlocked tax regimes and counter-arguments of the Court, obtained during the trial of cases of the Stauffer-Persche line, showed that countries are in a very limited range of possibilities for establishing different tax regimes for domestic and foreign NPOs. On the one hand, EU Member States maintain discretion in defining which public interests they are willing to promote; on the other hand, the territoriality of tax benefits is a sensitive issue. States are compelled to balance between a "sufficiently clear domestic link", which EU Member States may require, and a "pure criterion of location", which amounts to a direct or indirect discrimination prohibited by EU law[700].

2) Debates about justifications for the "territoriality" of tax benefits for NPOs showed that the only rationale for the existence of landlocked provisions in tax laws relating to cross-border philanthropic transfers is found, inherently, in the legitimate concern regarding (1) control on the proper expenditure of the funds in accordance with public purposes and (2) the maintenance of the effectivity of specific requirements for tax relief on philanthropic organizations. Analysis of the arguments used by the Member Countries showed, that no conceptual arguments can be found to support and explain the existence of landlocked tax provisions. According to the Court opinion, the concern of control and maintenance of the essential requirements applicable to philanthropic organizations does not justify the harshness of a strict requirement of domestic residence if this requirement goes beyond what is necessary in order to attain the objective of pursuing control and enforcement of domestic law (the proportionality principle). With regard to Stauffer-Persche line of cases the ECJ offers to use of other conceivable measures that would allow governments to achieve the intended result without maintaining residence-based discrimination[701]

3) It can be seen in existing case law that the Court appears reluctant to admit Member States' justifications as an overriding reason in the public interest capable of neutralizing the protection granted to taxpayers by the fundamental freedoms. Moreover, in cases concerning charities and donors' taxation, the Court does not always consequently establish a

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[696] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[697] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[698] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para.61

[699] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[700] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[701] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

distinction between the analysis of, on the one hand, the justifications of the difference in treatment and, on the other, the comparability between the two categories of taxpayers at stake. Although it can be argued that the latter should come before the former in the Court's reasoning, both issues are sometimes dealt with simultaneously.[702]

3.4 Non-profit organizations and European Union fundamental freedoms: unresolved issues

Although the European Court of Justice shed light on the right of NPOs to enjoy the fundamental freedoms of the EU, its decisions, however, didn't answer all questions related to the realization of this right. Moreover, settled case law, and also the discussion about the admissibility of different justifications, protecting the landlocked tax treatment of charities raises other more general issues on the intertwinement of European rules pursuing mostly economic objectives and national social policies. These issues need if not solving, then at least in thinking about them. Often the ECJ' approach which tends to cover the cross-border activity of NPOs by EU fundamental freedoms looks so "natural" and "right" that the calls for adjusting and mitigating this approach are hardly perceived. However, the scientific literature proposes some logical reasoning which we tend to accept. In particular E.Traversa[703] gives a list of such debatable issues. Below we take a look at some of them.

1) The need to leave Member States enough room for manoeuvre in designing policies in areas remaining of their exclusive competence

As is known, the tax sovereignty of the Member States can't transcend beyond the EU fundamental freedoms. The Court has repeatedly stated in the above-mentioned case law, Member States cannot exclude cross-border situations and non-resident citizens and entities from the scope of their preferential regimes without adequate justification and proportionality[704]. But this rule is applicable also in the opposite direction: protection of the fundamental freedoms is restricted by the sovereignty of the Member States. It means that under article 5 of the TEU direct taxation still remains an area of exclusive competence of the Member States.

However, as I.Koele noted, in some decisions of the ECJ, it seems as if the Court is paying more attention to the comparability between purely domestic and foreign situations in comparison to the sovereignty of a Member State[705]. As an example of this approach the scholars cites *Verkooijen*, *Schumacher*, *Walter Stauffer*, *Schempp* and *Manninen* cases[706].

It can be assumed, that if territorial tax incentives for NPOs would be systematically considered unjustified violations of EU law by the ECJ, which they appear to be in most cases, Member States would be hindered in the exercise of their taxing powers in various ways.

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[702] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[703] Ibid.; Traversa, E. *Is There Still Room Left in EU Law for Tax Autonomy of Member States' Regional and Local Authorities?* // EC Tax Review. – 2011. – Vol.20. – N 1, pp. 15-21

[704] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[705] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[706] ECJ, C-35/98 Verkooijen [2000] ECR I-04071; ECJ, C-279/93 Schumacker [1995] ECR I-00225; ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203; ECJ, C-403/03 Schempp [2005] ECR I-06421 and ECJ, C-319/02 Manninen [2004] ECR I-7477. For example in Manninen the ECJ concluded that an imputation credit that is granted with regard to a dividend from a domestic Finnish company should also be granted with regard to a dividend from a foreign company; in this situation the Finnish government must reimburse a Finnish resident taxpayer for any corporate income tax that has not been levied in Finland (or, in other words, an extra-territorial obligation is imposed by the ECJ).

First, even if the ECJ has systematically refused to consider the loss of revenues as a valid cause of justification,[707] the budgetary impact on Member States' public finances of the extension of the scope of a preferential tax treatment to cross-border situations should not be underestimated. Looking at the effects in the area of dividend taxation of the *Verkooijen* and *Manninen cases* on imputation systems in several Member States (Finland, France, the United Kingdom and Germany), it could eventually lead to the disappearance of the tax incentives in question. Moreover, one should have regard to the horizontal spill-over effects stemming from the application of non-discrimination principles in the areas of tax incentives. Extending their scope to cross-border situations will in fine contribute to encourage a particular behaviour not only in the Member State that has adopted the measure but also in other Member States. Thus, for instance in the Persche case[708], by the extension of the tax deduction for a gift to a charitable body made in Portugal, Germany is compelled to fund indirectly the Portuguese national policy on poverty. Therefore, not only Germany suffers a loss of revenues, but this loss will have an impact on the national policy of a foreign state. It is recommended that the Court take more explicitly into consideration the possible interference of measures taken by a Member State in policies of another Member State in an area of purely domestic competence, at least at the level of proportionality and not the existence of a restriction to the fundamental freedoms. Otherwise, not only could the strict position of the ECJ put unnecessary constraints on national policies through tax expenditures, but, moreover, it could cause undesirable extraterritorial influences of policy choices made by one Member State on others[709].

2) The need to avoid too formal distinctions in the control of the compatibility of national measures with EU law

Another disturbing aspect of the case law of the ECJ on charities comes to light when comparing the differences in treatment observed in EU law between measures that seem to be prima facie similar, at least from an economic perspective. It is common knowledge that tax measures may not only serve budgetary purposes but also be used as instruments to encourage specific behaviour in the framework of economic, social and/or environmental policies. The essence of these preferential tax provisions is to reduce the tax burden that would be normally imposed upon certain taxpayers. Therefore, they are often seen as alternatives to government spending programs or, more convincingly, as governmental subsidies. Tax incentives and direct subsidies have similar purposes and are most of the times assorted with the similar conditions, in order to adequately target the objective pursed.[710]

By imposing rather severe justification requirements to territorial restrictions to tax incentives, ECJ case law in its actual stand seems to implicitly contain a bias in favour of direct subsidies and against tax expenditures. According to the Stauffer and Persche cases, a charity not established in a Member State could indeed easily rely on previous case law to force this Member State to grant tax relief to resident donors who would support it, thereby receiving an indirect subsidy. On the contrary, it appears very unlikely that a charity could successfully oppose a national legislation imposing a requirement of activity on the territory of the Member State in question to benefit from a direct subsidy.[711] This situation also seems to indicate that Member States could more easily escape the application of non-discrimination principles by adopting tax and non-tax measures directly applicable to

[707] ECJ, C-264/96 ICI [1998] ECR I-4695, para. 28; ECJ, C-307/97 Saint-Gobain [1999], ECR I-6163, para. 50

[708] ECJ, C-318/07 Persche [2009] ECR I-00359

[709] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[710] There are of course differences in these two types of measures, the main difference being that direct subsidies – contrary to tax incentives – can be granted to beneficiaries who, for example because of the low level of income, are not subject to tax or are exempted from it.

[711] Hemels, S., Stevens, S. *The European Foundation Proposal: A shift in the EU tax treatment of charities?* // EC Tax Review. – 2016. – Vol. 6, p. 304

the intended economic beneficiaries, instead of favouring them indirectly, by encouraging third persons, such as users or donors, to "invest" in them.[712] This side effect of protecting of fundamental freedoms can arise as another reaction of Member States, as an alternative to the complete abolition of tax benefits. This decision is also quite radical: as we noted in the first chapter of the dissertation, for a number of reasons tax incentives are much more effective tool of NPOs' supporting than the direct subsidies, and their substitution with subsidies does not look attractive from the point of view of society.

3) Interaction between Treaty freedoms and State aid

A last point of attention concerns the interaction between the fundamental freedoms and the State aid provisions. As we noted in paragraph 2.2, under certain circumstances, charitable activities may be subject of competition law - the Court has admitted that charities can in some circumstances be qualified as undertakings, provided that they carry on an economic activity.[713] Assuming that this condition is fulfilled, favorable tax regimes granted under a territorial requirement – which would trigger the application of the fundamental freedoms – could also be considered as selective State aid and therefore be prohibited under EU law, unless justified and/or duly authorized by the European Commission. In such a case, there would be a potential simultaneous application of both sets of Treaty rules. As the Court has admitted, the application of Treaty freedoms does not exclude by itself the application of State aid rules. Under ECJ case law, the European Commission could not authorize a Member State to apply a tax measure that is incompatible with the Treaty freedoms.[714] However, the Commission's practice shows what could appear as a rather clear deviation from the Court's stringent standards on territoriality. The Commission allowed several Member States to impose territorial restrictions for the granting of a preferential tax regime in the area of audiovisual works. In this case the tax advantage was linked to the obligation for the beneficiary to invest a very significant part of the aid within the territory of the Member State granting the advantage[715]. Far from being isolated cases, those decisions are based on a general Commission Communication "On certain legal aspects relating to cinematographic and other audio-visual works", in which "the Commission accepted that Member States may require a certain part of the film production budget to be spent on their territory as an eligibility criterion for aid. This is based on the reasoning that a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation. This should be limited to the minimum degree required to promote cultural objectives".[716] Nevertheless, it leaves the question open whether by accepting on the grounds of the promotion of culture tax regimes requiring that up to 80% of the production expenditure should be spent in one Member State, which grants the tax advantage, the Commission did not act ultra vires by authorizing a breach of the free provision of services. There appears to be little difference indeed between such an aid scheme and a national measure that, for instance, would authorize the deductibility of gifts to charitable organizations active in the cultural sector, provided that 80% of the amount of the donations is actually spent on the territory of the Member State. However, there are strong arguments to consider this latter measure, due to its similarity with the measure struck down in the Persche case, as incompatible with EU law. In order to avoid disturbing inconsistencies, some clarifications

[712] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142 and the case law cited therein: ECJ, C-318/05 Commission v. Germany [2007] ECR I-6957; ECJ, C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-06849; ECJ, C-56/09 Zanotti [2010] ECR I-6844

[713] In particular ECJ, C-222/04 Cassa di Risparmio di Firenze SpA et alii [2006] ECR I-00289.

[714] For example, ECJ, C-156/98 Germany v Commission [2000] ECR I-06857

[715] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[716] Commission Communication *On certain legal aspects relating to cinematographic and other audiovisual works*, COM 2001 0534 final / OJ C043, 16/02/2002

should be made[717]. In this respect, E.Traversa is of the opinion that a softening of the prohibition of territorial requirements for tax incentives would not put into jeopardy the achievement of the internal market of philanthropy. Although excluding non-residents taxpayers from the benefits of preferential tax regime on the sole grounds of residence should remain prohibited, assorting the granting of tax benefits of conditions, among which the obligation to carry on a part of the activities on the territory of the Member State, should be allowed. It could be argued in favor of this reconsideration that, independently of the justifications based on hypothetical substitution-effects of third-sector organizations in favor of public institutions, which are questionable, public authorities are entitled to require from the beneficiaries of the advantages (whether under the form of a subsidy or through tax expenditures) to use the public funds in a certain manner or to act in a certain way. It is a matter of coherence, or better said, of reciprocity in the relationship that is created between the Member State granting the advantage and the beneficiary. Moreover, by requiring a minimum activity in the Member State granting (directly or indirectly) the advantage, the above-mentioned undesirable spill-over effects[718] could be avoided. But such a softening of the acceptance by the Court of the territoriality of tax incentives in the area of social policy as an overriding public interest requirement would only apply in the absence of harmonizing or coordinating measures taken at the European level in the form of an act of secondary legislation introducing uniform criteria on the mutual recognition of charitable organizations, such as the European Foundation statute[719].

Thus, although the ECJ case law opened up new opportunities for NPOs to develop their cross-European activity being under protection of the fundamental freedoms of the EU Treaty, the approaches chosen by the Court in regulating the tax regimes of such activity can create the potential for global negative changes in national non-profit tax legislations in the future.

The regulatory approach imposed by the Court in relation to the fundamental issues of the tax treatment of non-profit organization in the cross-border context raises a number of concerns not only for national governments, but also for all major stakeholders (i.e., non-profit organizations, donors, and tax authorities). These issues will be discussed in more detail in the next chapter when adressing the existing and possible solutions to the problem of taxation of NPOs in a cross-border context, in the light of positive and negative integration. A special place in this part of the research is given to the studying of the decision of the European Court on the use of host-country control, as well as its shortcomings from the point of view of NPOs and their donors.

[717] Traversa, E. *Is There Still Room Left in EU Law for Tax Autonomy of Member States' Regional and Local Authorities?* // EC Tax Review. – 2011. – Vol.20. – N 1, pp. 15-21

[718] Spill-over effect refers to the impact that seemingly unrelated events in one nation can have on the economies of other nations

[719] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

CHAPTER 4. POSSIBLE SOLUTIONS TO THE PROBLEM OF DISCRIMINATIVE TAX TREATMENT OF NPOS' CROSS-BORDER ACTIVITIES: AN OVERVIEW

Citizens of Europe are more and more mobile – donors have international assets and international interests and the public benefit organisations that philanthropists are donating to and founding are increasingly working to address issues that do not stop at national borders. Cross-border activity of NPOs is clearly increasing and it needs an enabling environment to unleash its full potential[720]. On the one hand, the discretion Member States are given in determining their ideas of charitableness has to be exercised in accordance with Union law. This means that the Member States are obliged to obey the principle of non-discrimination in designing their charity tax laws[721]. On the other hand, governments haven't lost hope to justify their landlocked favorable tax regimes, so reluctantly provide domestic tax incentives to foreign actors, thereby contributing to tax discrimination. However, researchers and practitioners make numerous attempts to find solutions that would satisfy all stakeholders - the NGOs themselves, their donors, governments of the Member States and the European Commission.

In this chapter we will discuss a number of solutions by which the landlocked problem could be solved, and also evaluate the effectiveness of each solution taking into account its affiliation with positive or negative integration.

4.1 The solution of the ECJ: host-country control and its shortcomings

The case law of the European Court of Justice discussed in the previous chapter in fact is one of the ways to solve the problem of discrimination of European NPOs involving into cross-border activities. This method, along with the ensuing infringement procedures of the European Commission derived from it, is an expression of negative integration. In this section, we examine in more detail the solution to the problem of landlocked tax reliefs of NPOs proposed by the Court of Justice. To this end, we focus on the peculiarities of this solution in comparison with other solutions, as well as on its impact on the stakeholders.

Although in the Stauffer-Persche line of cases the ECJ was pretty adamant to reject numerous arguments of Member States, justifying the landlocked tax benefit for domestic NPOs, in principle, the Court did not oblige the Member States to adjust the national legislation to foreign NPOs. In Stauffer the ECJ observed that it is not a requirement that Member States automatically confer the charitable status on foreign foundations recognized as having charitable status in their Member State of origin. The ECJ leaves Member States free to determine what interests of the general public they wish to promote by granting benefits to charities[722]. In fact, the Court insists on the use of broader wording of national provisions on tax benefits that would not differentiate NPOs on the basis of their residency, but it does not prevent the Member States from requiring the foreign NPOs to have a link with the national territory that domestic NPOs do have a priori.

At the same time in paragraph 40 of Stauffer case the ECJ continues that "where a body recognised as having charitable status in one Member State satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, so that it would be likely to be recognised as having charitable status in the latter Member State, which is a matter for the national authorities of that Member State, including its courts, to determine, the authorities of

[720] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 7

[721] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 191

[722] ECJ 14 Sept. 2006, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para.39

that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in its territory"[723].

In fact, "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations"[724].[725] Therefore in its judgments in the *Stauffer* and *Persche* cases, the FCJ made clear that the taxpayer's (i.e. the charity's or the donor's) right to non-discriminatory treatment depends on whether the foreign charitable entity passes the test of comparability with a domestic charity[726]. With respect to the definition of comparability the ECJ has stated that:

> [A] body which is established in one Member State but satisfies the requirements imposed for that purpose by another Member State for the grant of tax advantages, is, in respect of the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State[727].

In other words, in order to receive tax benefits on a par with domestic NPOs, the foreign NPO has to satisfy the requirements imposed in respect of charitable status by the law of the levying Member State. By this approach the Court established a host-country control principle that requires the Member States to conduct a comparability test and authorizes national courts to take the final decision on the equivalence/inequivalence of domestic and foreign NPOs.

Assessment of comparability is necessary to obtain tax benefits in the host country. This suggests itself, of course, where the taxpayer concerned is the charity itself. However, also in the case of donor taxation, the status of the receiving entity is an integral part of the regimes of income tax relief and hence is of decisive relevance[728].

The requirement of comparability assessment is important not only from functional perspective; it also becomes the reference point for the Court in all cases related to NPOs. As I.Koele noted, while in older case law of the ECJ comparability was relatively easily assumed and the focus was more concentrated on the eventual justification of the discrimination, in more recent case law the ECJ has examined the question of comparability in greater detail and not infrequently has concluded that there is a lack of comparability[729]. Moreover, as we noted in the previous chapter, in the Stauffer-Persche line of cases the ECJ carefully focused on signs of comparability of domestic and foreign NPOs and considered the arguments of national governments to support a lack of comparability in parallel with their justifications for discrimination. This has led to the conclusion in literature that although the ECJ gives the impression that this does not constitute a shift in its case law, as comparability has always been one of the key steps when the ECJ examines whether a provision infringes upon the fundamental freedoms, the modified approach goes hand in hand with a change in the substance of the arguments[730] [731].

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[723] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 40, ECJ, C-318/07 Persche [2009] ECR I-00359, para. 49, and ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 32.

[724] See, amongst many, ECJ, C-279/93 Schumacker [1995] ECR I-225, para. 30; ECJ, C-80/94 Wielockx [1995] ECR I-2493, para 17; ECJ, C-107/94 Asscher [1996] ECR I-3089, para. 40; also Stauffer and Persche.

[725] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 187

[726] Ibid., p. 251.

[727] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 50 and ECJ, C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-00497, para. 33

[728] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 187

[729] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

[730] Lang, M. *Direct Taxation: Is the ECJ Heading in a New Direction?* // European Taxation. – 2006. – September, pp. 421-430, p. 422

[731] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p.

Departing from the theoretical provisions of host-country control approach, we note that in practice apart from rare bilateral situations where the equivalency of foreign qualifying non-profit organizations is (agreed to be) assumed by the States[732], States do not automatically recognize foreign non-profit organizations as qualifying for purposes of exemption from domestic taxation[733]. The information provided by the country experts in the study "Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?" shows that to date no Member State has introduced automatic recognition of a foreign EU-based NPOs with a tax exempt status in its country of origin[734].

As I.Koele noted, it is unrealistic to expect States to automatically recognize the tax-privileged status of a non-profit organization under any foreign statutory law (recognition of the lex fori principle). Firstly, it would overrule the state's tax sovereignty over a matter that has not been the subject of legal harmonization between states at all[735]. Secondly, there is too much diversity within the European Union, both from a civil law and a tax law perspective to simply consider that even in the absence of harmonization charities should enjoy the benefits of mutual recognition.[736]

Even in Europe the various legal traditions and systems define and treat NPOs rather differently[737]; and registration, legal practices and oversight regimes vary accordingly, sometimes even within the same country, as is the case in Germany or Switzerland. The end result is a complicated terminological tangle: what is defined as a foundation in one country may not qualify as such in another. The Swedish "company foundations" like the Knut och Alice Wallenberg Foundation and the Norwegian "commercial foundations" would find it difficult to get passed the English Charity Commission, the independent public agency overseeing voluntary associations and foundations; likewise many English foundation could not exist as such according to French law, nor would the Charity Commission itself for that matter. The Austrian "private foundation" and the Liechtensteinian family foundation could hardly expect the approval of the Belgian Ministry of Justice; and many Danish foundations would expect long-drawn out and uphill legal battles in Italian courts should they ever decide to re-establish themselves south of the Alps. In contrast, they would receive a much warmer welcome in Spain or the Netherlands[738].

One of the influencing factors is also the legal traditions affecting European countries. Researchers distinguish three interrelated but still different legal traditions of non-profit organizations regulation: 1) the European tradition, the so-called civil law – legal tradition of continental Europe deriving from Roman law, 2) Anglo-American, based on the legal traditions of England and the former British colonies as well as of the United States - the so-called common law; and 3) the Soviet tradition, which continues to influence the devel-

[732] For example, US income tax treaties with Canada, Mexico and Israel
[733] Ibid., p. 360
[734] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 34
[735] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 360
[736] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[737] See also Van der Ploegh, T. *A Comparative Legal Analysis of Foundations: Aspects of Supervision and Transparency* / in H. Anheier and S. Toepler (eds.) Private Funds and Public Purpose. Philanthropic Foundations in International Perspectives / Plenum Publishers. – 1999. – 264 p., pp. 55-78; Gallop, B. *Cross-border Issues facing Foundations and their Donors* / in A. Schülter, V. Then and P. Walkenhorst (eds.) Foundations in Europe: Society, Management and Law / Directory of Social Change. – 2001. – 875 p.
[738] Anheier, H. *Foundations in Europe: a comparative perspective* / Civil Society Working Paper series, 18 / Centre for Civil Society, 2001. – 34 p., p. 2

opment of non-profit law in the countries of the former USSR and countries of Central and Eastern Europe[739].

Another important factor is the difference in the non-profit sector monitoring systems. The scale of control over non-profit activities and the availability of information vary greatly between EU Member States. Whilst some countries maintain a generous system of tax exemptions and relief and, thus, impose strict control over non-profit organizations, other countries take a more liberal approach.[740]

Comparability (equivalency) test aims to eliminate these differences. As I.Koele notes, the equivalency test is a rather technical legal exercise, it must be supported by a joint effort of foreign and domestic specialized counsel giving their combined opinion regarding whether the foreign philanthropic organization meets the essential criteria for equivalency as determined under domestic tax law[741].

In theory, the use of the host-country control approach is a real solution of the problem of discriminatory tax regime for foreign (EU-based) NPOs. Regardless of the result of the comparability test the issue of discrimination disappears by itself: if the foreign NPO is equivalent to the domestic one, it either (1) benefits from the same tax treatment as a domestic NPO, as it was established by case law, or (2) remains under a differentiated tax regime justifiable by the overriding reasons of general interest (when there are convincing arguments of the Member States). If as a result of the comparability test the equivalence of a foreign NPO is not confirmed, a differentiated tax regime will be rightfully applied to this NPO, and the issue of discrimination will be settled.

Unfortunately, in practice the implementation of the comparability test is not so simple.

It should be recalled that domestic NPOs are also subjects of certain test. Such test determines whether the NPOs have public benefit status and thus whether they may claim the privileged tax regime (in detail this issue was examined in paragraph 2.1 of the dissertation). But when socially beneficial activities are carried out in a Member States other than the state in which the non-profit organization is established, some difficulties in the assessment of formal requirements can arise[742].

The reasons for this situation can be objective, related to distance, language barrier, communicative constraints and lack of information - to all that in fact always creates difficulties in cross-border activity. It is much worse when such a situation is caused by the direct interest of Member States in the refusal to provide domestic tax benefits to foreign NPOs. So, a violation of the freedoms as foreseen in the EC Treaty may be found when (1) national provisions make cross-border flows of charitable money more difficult or less attractive as compared to domestic situations and (2) this has the potential to deter non-profit organizations or their benefactors from making such cross-border transfers. However, if it can be said that the situation of a foreign NPO and a domestic one are not comparable (for whatever reason), the landlocked provisions do not constitute a violation of any EC fundamental freedom[743]. Accordingly, the Member States are interested in proving that the foreign NPOs do not comply with the national requierements imposed for obtaining tax benefits. That's way a more careful analysis of the Court's approach suggests that contrary to the appearances, there may be a bias towards comparability between resident and for-

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[739] Ondrushek, D., et al. *Reader for non-profit organizations* (in Russian) */ Center for Conflict Prevention and Resolution* / Partners for democratic change, Slovakia. Open society foundation Bratislava. – Bratislava. – 2003

[740] OECD (2009)*, Report on Abuse of Charities for Money-Laundering and Tax Evasion*

[741] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 381

[742] 34

[743] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 325

eign charities[744].

As for the methodology of the comparability test, some fundamentally relevant aspects that determine its procedure can be distinguished:

1) The choice between general provisions applicable also to domestic NPOs and special test regime specially set for checking of comparability of foreign organizations;

2) The choice between a general decision, acceptable for the evaluation of a number of similar NPOs (on any signs), and case by case decision;

3) The choice between horizontal and vertical comparability analysis.

4) The choice of specific criteria of comparability test.

Let's take up each methodological aspect in more detail.

1) Special regime vs. general provisions

As we noted above no Member State has introduced automatic recognition of a foreign EU-based NPO with a tax exempt status in its country of origin. The Member States can be guided by:

- special regime according to the specifications of which the comparability test for foreign EU-based NPO is conducted, or
- general provisions of national legislation.

Different or hybrid approaches are of course also possible, putting in place specific provisions for the comparability test applying only to certain types of taxes and thus in turn to only certain scenarios, with other situations still governed by the general rules.

As illustrated in the "Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?" a special procedural regime for foreign EU-based NPOs is the exception, while recourse to general provisions is common. Thus in most cases the content of the procedural law applied in assessing the eligibility of a NPO for access to tax-privileged status is the same whether it is a domestic or a foreign EU-based organisation whose eligibility is being assessed. As the analysis will show, this approach presents some challenges for foreign EU-based NPOs and donors giving cross-border as to how much evidence/proof of fulfilment of the legal requirements the donors have to provide[745].

2) General decision vs. case by case decision

An important differentiation that can be identified is whether the comparability test is undertaken to apply only for the single specific case in which the tax concession is sought or whether it is carried out in such a way as to grant a more general access to tax privileges; namely whether eligibility for access to tax-privileged status for a foreign EU-based NPO is assessed on a case by case basis, or a general decision as to the status of that NPO is taken by an authority. Often it depends on whether the local tax authority - where the seat of the NPO seeking the designation is located - is responsible for making the necessary checks, or whether the responsibility lies with a central tax authority that oversees the awarding of tax-privileged status in a particular region or throughout the whole country.

The study "Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?" showed that the case by case decision is most commonly found, but a general binding decision about elements of the status as tax-privileged NPO, which is then generally kept in a list is taken in some Member States (Table 13 below)[746].

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[744] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

[745] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.34

[746] Ibid., p. 34

Table 13 – Awarding tax-privileged status by the competent authority in cross-border cases: Is this a general decision (YES) or case by case decision (NO)? (For three scenarios: taxation of the NPO itself (Stauffer scenario), taxation of donors (Persche scenario), and inheritance taxation (Missionswerk scenario)[747].

Country	Persche scenario	Stauffer scenario	Missionswerk scenario
Austria	Yes	No	No such tax
Belgium	No	No	No
Bulgaria	No	No	No
Croatia	No	Yes	No
Cyprus	Yes	Yes	No such tax
Czech Republic	No	No	No
Denmark	Yes	No	Yes
Estonia	No	No	No such tax
Finland	Yes	No	No
France	No	No	No
Germany	No	No	No
Greece	No	No	No
Hungary	No	No	No
Ireland	Yes	Yes	Yes
Italy	No	No	
Latvia	No	No	No such tax
Lithuania	No	No	
Luxembourg	No	No	No
Malta	Yes	Yes	No
Netherlands	Yes	No	Yes
Poland	No	No	No
Portugal	No	No	No
Romania	No	No	No such tax
Slovakia	No	No	No such tax
Slovenia	No	No	No
Spain	No	No	No
Sweden	Yes	No	No such tax
United Kingdom	Yes	Yes	Yes
Source: Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From land-lock to free movement? / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.34			

In case of a general decision, the following procedural rules are common:

The decision is usually made ex ante (before the donor can ask for tax exemption for this recipient NPO or the NPO carries out activities) by a centralised authority, typically a tax authority or a ministry. The NPOs that have fulfilled the requirements of the comparability test are usually listed in a list or register. The status as tax-privileged NPO will typically remain valid until it is revoked. In some Member States the status has to be renewed after a specific period of time.

It should be noted that inclusion in the register on the basis of the information available as to the organisation's nature and purpose at the time of the comparability test cannot guarantee absolute legal certainty, since only the statutes of the organisation and details of its management and activities up to the moment of entry in the register will have been checked, not the actual management and activities after the comparability test and entry

[747] Ibid., p. 35

into the register has taken place[748]. Table 13 shows that the compatibility assessment based on a general decision is not popular in the Member States, especially with regard to the taxation of NPOs (the Stauffer scenario).

A case by case decision entails the responsible tax authority performing the test only for this specific case/request for a tax incentive of the NPO or its donor. This individual decision is not binding. This means it is not kept in any register/list and may be judged differently for the same NPO by another donor's responsible local tax authority.

In the case of a case by case decision, the following procedural rules are common:

Typically the case by case decision will be made by the local tax authorities as an ex post assessment. An ex post assessment means that the NPO's status is only verified and the decision as to whether it meets the requirements to receive the sought tax incentive only taken after the activities in relation to which the tax incentive is sought have been carried out. Some Member States may allow the NPO or its donor to apply for an ex ante assessment. An ex ante assessment entails that the NPO is assessed before it carries out its activities. An ex ante assessment clearly has the advantage of establishing greater legal certainty. It should however be kept in mind that public benefit status, as noted above, is not static and requires continuous assessment: it is not enough that an organisation according to its statutes serves a public benefit purpose; the organisation must in its ongoing practice follow its statutes and internal regulations and in addition comply with the relevant statutory and regulatory provisions, something that can only happen through ongoing fiscal supervision. An ex ante assessment can only ever be a check of the organisation's statutes – the actual management and activities of the organisation during a given period can only be checked ex post. Absolute legal certainty for national or foreign-based NPOs is therefore not possible[749].

As an intermediate conclusion it can be noted that because of commitment of Member States to the comparability test on the base of case by case decision, at least in the near future within the EU no formal or uniform approach to the comparability test is foreseen[750].

3) Horizontal comparability vs. vertical comparability

As a rule, countries carry out the so-called "vertical comparability" assessment. In this case the comparator of choice for a taxpayer involved in a cross-border scenario shall be that of a taxpayer realising his relevant affairs within the borders of a Member Slate. But the ECJ, at times and without any stringent underlying concept, compares the cross-border situation under scrutiny to another cross-border situation (rather than to a purely domestic situation) and hence bases its comparability analysis on "horizontal comparability"[751].

4) The criteria of the comparability test

It should first be noted that the provisions can differ in terms of scope: on the one hand, there are uniform standards that apply to all tax breaks and on the other hand there are differentiated provisions that have different requirements for incentives related to different types of tax[752].

Comparative legal analysis of the requirements for the tax-privileged status is a very challenging area. From a comparative legal perspective, it is necessary to note that the wording of the relevant laws often employs vague legal terms the interpretation of which leaves scope for a lack of clarity. Hence a comparative examination of the relevant provisions throughout the EU is even more complicated. A comprehensive and exhaustive account of all existing rules in all Member States is not a target of this research but the basic structure of the various national provisions can be classified as follows:

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[748] Ibid., p. 36
[749] Ibid., p. 36
[750] Ibid., p. 44
[751] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p.188
[752] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 38

- It is often the case that only certain specific types of organisations and legal forms are recognised as being eligible for public benefit status (relevant for being an eligible as a recipient for tax deductible donations and own tax exemptions for the NPO).

- It is necessary that a NPO promotes a particular public benefit purpose with specific requirements in place as to how this purpose is to be pursued.

- Sometimes there are requirements regarding the means by which the organisation may acquire its resources as well as formal requirements for the internal organisation of the NPO and the content of its statutes[753].

As we noted above when assessing comparability of foreign (EU-based) NPOs a special procedural regime is the exception. Much more often the Member States use the general national provisions that also apply to domestic NPOs. We've discussed them in detail in paragraph 2.1, so we will not focus on them here.

Problems of performance of the comparability test. Whatever methodological approaches are used in the country, in any case the comparability test will begin with a check by the competent authority that the statutes of the NPO meet the requirements for the tax incentive in question. The burden of proof lies in general with the person or entity that will directly benefit from the tax privilege, namely the NPO itself or the donor. The authorities appear to have wide discretion as to what evidence of the status of a foreign-based NPO they require for the purposes of the comparability test. On the one hand, the comparability test may be straightforward, simply requiring that the foreign NPO is already recognised as eligible for and holds public benefit status for tax purposes in its Member State of origin. Such an approach assumes sufficient comparability of the national laws of the Member States concerned. One example for such a practice can be found in Luxemburg in the "Persche" scenario (a donor from Luxembourg gives across border). The procedure for the comparability test here foresees that the donor submits a model certificate list of the NPOs including the following information: (a) Date of establishment according to which laws of which state, address, (b) NPO pursues exclusively one of the following purposes: Art, Education, Philanthropy, Religion, Science, Social, Sports, Tourism, Development cooperation, (c) These purposes are recognised as eligible for tax incentives in the state of establishment, (d) NPO is exempt from income and wealth tax and the donation would be fiscally deductible in the country of establishment of the NPO. The certificate as well as the NPOs tax status in its country of establishment does not bind the Luxembourgian tax authority – the authority may in the end disregard the certificate/ask for additional information such as statutes of the NPO/financial reports etc. However there is at least an opportunity to perform the comparability test in a foreseeable and relatively unbureaucratic manner.

On the other hand however (and this is the most common scenario), the authorities may require the submission of all relevant documents (statutes, annual report, balance sheet, evidence of the actual use of resources in the form of receipts, statements/ certificates etc., and potentialy specific questionnaires) in official translation, which can lead to considerable costs. The question as to how intensively the checks will be applied is therefore an important one in practical terms, but equally cannot be answered in a general way. There is anecdotal evidence to suggest that even within one tax authority, individual officials may apply varying benchmarks. Furthermore it can be observed that large, well-recognised national or international NPOs have an advantage based on their reputation, which can result in less stringent checks being carried out.

A special situation exists in those Member States where the civil law establishment of the NPO leads automatically to the recognition of public benefit status for some or all relevant tax purposes, namely where the relevant requirements of civil and tax law are identi-

[753] Ibid.

cal . In such cases the ongoing supervision of the actual management and activities of the NPO is nonetheless necessary and is carried out by the tax authorities[754].

Providing sufficient evidence of the comparability of foreign and domestic NPOs is not a problem in itself. This is rather a task and necessary condition for obtaining tax benefits in the host country. But in proving their comparability, NPOs can face the following potencial problems:

1) A requirement the foreign NPOs to meet material requirements instead of formal requirements (actual requirements instead of legal ones).

The material requirements in relation to NPOs generally include: nature of activities, effectiveness, size or absence of business activities, remuneration of activities, etc[755]. Such material requirements are complex for tax authorities to assess, especially when they concern the verification of effective business activity. For example, the subsidiary nature of a business activity sometimes can be used just to obtain tax benefits for normal business activities. This is abuse of law that is not acceptable. But opposite scenario is also possible: an incorrect assessment of material conditions - for example, of volume of entrepreneurial activity - can lead to a misplaced refusal to grant tax benefits and cause tax discrimination of foreign NPO.

Often a correct assessment of material conditions cannot be carried out in absentia, that is frequently the case of cross-border activity. In such cases it is too complex to assess the effective nature of activities and the real purpose without reference to the articles of association of the non-profit entity. The absence of common characteristics of business activities in different Member States also does not add clarity – the material conditions are based on concepts that are still too divergent in national legislations[756].

Thus, it seems difficult to grant non-profit tax status to NPOs on the basis of material conditions. These requirements should be applied on a case by case basis using formal criteria. Moreover, in the opinion of F.Amatucci and G.Zizzo requirements for tax exemption status of non-profit entities and non-profit activities in EU Member States should remain predominantly formal ones. Exceptionally, and in the absence of formal conditions, material requirements should be admitted as evidence of the existence of non-profit activities[757].

Concerning the Court's jurisprudence, factual and legal comparability seem to play inconsistent roles in direct tax case law. For the specific field of charity and donor taxation, however, the direction purported by the ECJ is rather clear. In order to meet the condition of comparability, the foreign charity has to satisfy "the requirements imposed [in respect of charitable status] by the law of another Member State". The Advocate General was equally explicit: "The abovementioned difference in treatment is discriminatory if a domestic foundation and a foundation which has its seat in another Member State are in a comparable situation in respect of the German tax rules".[758] The benchmark is, therefore, of a legal, formal nature.[759]

2) Extension of formal requirements to non-resident non-profit entities

One of the main problems in granting tax exemption status concerns the extension of formal and material requirements for resident non-profit entities to non-resident bodies established in another Member State, in comparison with domestic NPOs.

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[754] Ibid., p. 37

[755] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

[756] Ibid.

[757] Ibid.

[758] AG Stix-Hackl Opinion, 15 Dec. 2005, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECLI:EU:C:2005:785, point 89

[759] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 190

A fundamental principle that has to be respected by national legislators when creating and applying formal requirements is the principle of proportionality. Formal requirements should not exceed what is strictly necessary for the recognition of non-profit tax status, taking into consideration national interests and the fight against tax fraud. Conditions for the granting of tax advantages should always be appropriate[760]. This means that to avoid discrimination, additional conditions should not be required for non-resident-entities[761].[762]

In this respect an interesting remark was made by S.Heidenbauer: it must be remembered that a number of Member States refrain from distinguishing between resident and non-resident charities but, instead, impose a number of rather creative requirements tying charitable activity to their home territory. If these requirements turn out to be of (unjustified) discriminatory character they do not have to be fulfilled - neither by domestic nor by foreign charities[763].

3) Excessive scrupulousness in assessment process

Member States cannot indeed require the "full identity" between foreign and domestic charities[764]. There should be no presumption to exclude non-profit activities and special tax treatment automatically merely on account of the failure to fulfil a specific formal condition (i.e. no a priori exclusion). In a similar way, excessive insistence on documentary requirements can be inconsistent with the proportionality principle, particularly when the documentation serves no useful purpose such as, for example, when it is not necessary for the prevention of tax fraud, evasion and avoidance[765].

As the German Bundesfinanzhof observed, this is of particular relevance as regards a foreign entity's articles of association, statutes, or other legal basis: Undue rigour must be avoided.[766] But also the fine details in other areas are only required to pass the lest of comparability, not that of identity.[767]

I.Koele rightly notes that, obviously, it does not make sense for a foreign NPO to have to meet all detailed requirements that are imposed on domestic NPOs because, in the case of rather detailed laws, this may lead to a virtually insurmountable administrative and legal burden[768] that by definition of S.Heidenbauer is "anathema to the fundamental freedoms"[769].

Indeed, under such an expansive approach, the landlock would effectively be maintained, as the more detailed a national tax law is, the more likely is that foreign NPOs may never comply with these detailed rules. Moreover, such expansive approach would literally over-kill the interests of international philanthropy, as in practice it is scarcely possible for

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[760] ECJ, C-318/07 Persche [2009] ECR I-00359, para. 52.

[761] The EU Commission considers that the additional requirement for foreign charities to register in The Netherland is discriminatory, disproportionate and incompatible with the EU rules on the free movement of capital guaranteed by Article 63 TFEU and Article 40 EEA. The European Commission announced on 6 April 2011 that it had decided to refer the Netherlands to the EU's Court of Justice

[762] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

[763] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 191

[764] Ibid., p. 191

[765] Amatucci, F., Zizzo, G. *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 45-60

[766] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p .191, qtd. in Federal Finance Court, Germany: Bundesfinanzhof, 14 July 2004, I R 94/02, section II.2.b of the judgment

[767] Ibid., p .191

[768] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 381

[769] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 236, and case law cited therein

a philanthropic organization to meet simultaneously all the requirements of legislation in all Member States[770].

Thus, the registration procedure for foreign philanthropic organizations should focus on an essential equivalency test with domestic philanthropic organizations[771], in other words, should be aimed at "sensible equivalency".

In order to be able to apply a sensible equivalency test to any foreign philanthropic organization (vis-a-vis a domestic qualifying philanthropic organization), countries should first determine which requirements are regarded as crucial in an international context and how compliance with those requirements should be verified in a practical way. As an important element of a resolution of the landlock, therefore, states should develop normative equivalency tests for international philanthropic purposes. In this process of developing normative equivalency tests, it is vital to consider what requirements under foreign legal systems have a similar function to domestic requirements, even where the wording of those requirements may be very different. The functionality of requirements should therefore be compared to each other[772].

Streamlining does not automatically mean that the effect is less burdensome for foreign philanthropic organizations; what it does mean, however, is that the rules are less detailed but nevertheless reflect the essence of the requirement. This has as an advantage in that the specific circumstances of the individual case may be taken into account and that new developments may easily be incorporated into test[773].

In practice, the essential equivalency test is likely to be purported by cooperation between domestic and foreign counsel in which the application of various national laws bearing on a specified philanthropic organization may be compared in a sensible way. In addition this practice would require legislatures and lawyers to be able to take some distance of their own domestic legal system on international philanthropy in order to be able to direct an analytical eye back onto it[774].

4) High costs for NPOs and (or) for their donors

As we noted above, the burden of proof of the right to tax benefits lies with the NPO itself or the donor. In the Stauffer and Persche cases[775] the ECJ held that[776]:

> "Any administrative disadvantages arising from the fact that such bodies may be established in another Member State are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such bodies the same tax exemptions as are granted to national bodies of the same kind"[777]

The Court pointed to the right of the Member States to require proof of comparability from foreign NPOs and their donors. It can be assumed that obtaining of evidence of the comparability of foreign NPOs gives rise to some financial costs for the NPOs themselves and for their donors. For example, in cross-border case, without a central authority in place which is competent to receive the documentary evidence from the foreign entities, foreign NPOs will require the assistance of a lawyer in the other country in order to make a valid claim and provide an appropriate comparability analysis to support the claim. NPOs are

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[770] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p.363

[771] Ibid., p.382

[772] Ibid., p.364

[773] Ibid., p.366

[774] Ibid., p.367

[775] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 48 and ECJ, C-318/07 Persche [2009] ECR I-00359, para. 55.

[776] In Stauffer (para. 48), the ECJ stated that, "before granting a tax exemption to a body established and recognised as having charitable status in another Member State, a Member State is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report".

[777] ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, para. 48, ECJ, C-318/07 Persche [2009] ECR I-00359, para. 55

also confronted with the necessity to supply their documents multiple times, i.e. once in respect of each individual donor. In the purely internal situation, the obligation would be a one-off.[778] The same goes for donors. While the national tax authorities have complete information about the internal NPOs and do not require from them and their donors any documents confirming their right for a privileged tax regime, national tax authorities don't have any information about foreign NPOs and consequently can't assess their comparability with domestic NPOs. Such information should be provided by donors who are forced to bear the costs of obtaining it.

Remember that the Court did not adopt the wording proposed by AG Mengozzi in Persche that would have obligated tax authorities to take into account "the difficulties encountered by that taxpayer in collecting the evidence requested in spite of all the efforts he has already made" and to analyse whether the evidence can be obtained with the assistance of foreign tax authorities under the Mutual Assistance Directive or a relevant bilateral tax convention.[779] [780] Moreover, he also pointed to the right of Member States to refuse the tax benefit if sufficient evidence has not been supplied. In our opinion, the peremptory nature of this position of the ECJ to some extent is contrary to its statement, that "any administrative disadvantages arising from the fact that such bodies may be established in another Member State are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant the tax advantage". In fairness it should be noted that apparently, the burden of proof indeed seems heavier for Member States to establish that foreign charities do not meet domestic criteria that are acceptable with EU law, than for a foreign charitable body to show that they are in a comparable situation with domestic charities.[781] [782]

In any case, there is no doubt that in proving of its equivalent status the NPO does incur some costs. In some cases the costs of gaining comparable status can be prohibitive to the cross-border recognition of NPOs; where the benefits of recognition are small in value, the costs are likely to deter NPOs from exercising their rights under EU law unless a streamlined procedure can be adopted[783].

The procedure and criteria of the comparability test remain at the discretion of the Member States' governments. But as stated by S.Heidenbauer, the discretion of the Member States to determine if non-resident charities meet the charitable criteria established by domestic law is subject to review by the ECJ, in the assessment of the compatibility with the EU principles of non-discrimination[784]. Particularly, in respect of the criterion of legal form (which in a number of Member States is kind of the first hurdle to overcome in order to be eligible for the tax benefits attached to charitable status), the Court's case law already leads the way:

> "The circumstance that in Finnish [the source State's] law there is no type of company with a legal form identical to that of a SICAV governed by Luxembourg [the residence State's] law cannot in itself justify a difference in treatment, since, as the company law of the Member States has not been fully harmonised at Community [now: Union] level, that would deprive the freedom of establishment of all effectiveness"[785]. The re-

[778] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 236
[779] AG Mengozzi Opinion, C-318/07 Persche [2009] ECLI:EU:C:2008:561, para. 110.
[780] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[781] See in particular ECJ, C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-08203, paras. 40-42.
[782] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142
[783] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., c. 37
[784] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p 191.
[785] ECJ, C-303/07 Aberdeen [2009] ECR I-5145, para. 50

maining criteria of charitableness (which are neither harmonised throughout the European Union) must be appreciated in the same way[786].

To summarize, the study showed that the jurisprudence of the European Court of Justice requiring a non-discrimination of NPOs of other Member States proposed to the Member States the host-country control solution and has generated a comparability (equivalency) test, being the method used by Member States to determine whether or not a foreign-based NPO is eligible for tax-privileged status[787].

Our research also showed that the key problems of equivalency determination can be found in procedural law. Consequently, that is where it is possible to find opportunities to solve these problems. For example, a significant easing of the process of equivalency determination could be achieved through the simplification of the way in which the comparability tests are carried out, for example, through limiting the checks carried out for the comparability test to some agreed core elements[788]. Comparability should be verified within the clear, simple and easy to understand procedures.

Another approach could be to encourage Member States fiscal authorities to focus their checks on a set of common principles rather than detailed rules. This need not prevent a state from imposing a detailed rule in a domestic context but it would require the state to make a broader based assessment for comparability purposes[789]. The benchmark for the comparability test is generally the national tax law of the Member State from which the tax incentives are sought and the crucial question is always in what level of detail this benchmark has to be fulfilled. As T. von Hippel rightly pointed out "comparable" in the context of cross-border philanthropy should not mean "identical" and imply fulfilment of all precise details of respective national tax laws but rather that the organisations have to be in essence comparable[790]. I.Koele supposed that "countries should first determine which requirements are regarded as crucial in an international context and which requirements are regarded as 'couleur locale' that has not to be maintained in an international context".[791]

From a policy point of view, the main hurdle to solving existing barriers is a need among Member States to build more trust in each other's systems by being assured that a certain level of control is guaranteed. Examples of attempts to develop simpler practice can be found in some Member States (e.g. model certificate in Luxembourg) and it should be in the interests of all Member States as well as the sector (and society as a whole) to continue to try to simplify and ease the process of the comparability test[792].

Some scientists are looking at the issue on a global scale and are looking for more effective alternatives to the comparability test itself. For example, the authors of study "Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?" assumed that an alternative to the comparability test would be to limit the check that the specific donations received by the foreign NPO will be used in accordance with the national law of the Member State from which the tax incentive is sought. Obviously, this would ease the burden of proof for organisations receiving punctual donations from foreign donors[793].

Obviously, the host-country control solution is not the most efficient from the point of view of charities because in accordance with this approach they have to meet the specific

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[786] Heidenbauer, S. *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* / Eucotax Series on European Taxation. / Kluwer Law International, BV. – 2011. – 291 p., p. 192

[787] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 44

[788] Ibid.

[789] Ibid., p.43

[790] Ibid., p.44

[791] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 415

[792] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.9

[793] Ibid., p.43

requirements of each Member State where they want to raise funds. Moreover, leaving the actual assessment thereof to national authorities, the Court, roughly speaking, created a legal fiction of comparability. The enforcement of CJEU rulings may vary: by requiring "relevant supporting evidence", some national authorities unavoidably impose a higher administrative burden than others. This also concerns the exercise of discretion to refuse the tax benefit if sufficient evidence has not been supplied[794]. In combination with the shortcomings of the method examined in this paragraph this creates a loophole for circumventing the Court's clear requirement for an equal tax regime for domestic and comparable foreign NPOs.

Nevertheless, it can be concluded that although the way in which the non-discrimination principle is currently implemented is not an entirely satisfactory solution, the comparability test is, when compared with the legal situation that preceded it, a significant step forward: where as in the past, foreign EU-based NPOs were simply excluded from the eligibility to have their public benefit status recognised for tax purposes by other Member States, now the possibility is open[795].

4.2 Alternative solutions to the problem of landlocked tax incentives

The approach of the European Court based on the principle of host-country control and prohibiting discrimination on the basis of the residency allowed NPOs to effectively carry out cross-border activities without violating rights of the Member States to determine which types of NPO activities they want to stimulate.

Moved to the practice, this approach was fixed by actions of the European Commission within the framework of infringement proceedings against some Member States, whose legislation contains signs of discrimination.

As we noted in the previous paragraph, these solutions, implemented in the framework of negative integration, nevertheless, today are very effective solutions for the landlocked tax incentives problem. However, they are not the only solutions to this problem: at the moment, scientists and practitioners offer other solutions to this problem. They are within the framework of positive integration and allow solving the problem in the longer term.

This paragraph provides a comprehensive overview of the current solutions that have been initiated by States and private initiatives that allow for tax incentives on cross-border gifts. We will also try to give critical evaluation of shortcomings of each of these solutions, as well as the crucial factors that influence the effectiveness of these solutions.

The application of tax incentives in cross-border situations can be regulated at different legal levels: at the national, international and supranational levels[796].

Solutions at the national level.

Solutions at the national level represent the unilateral solutions. A country can decide to provide national tax incentives to foreign NPOs or to open up its tax incentives on charitable gifts made to foreign charities. This presupposes that the resolution of the landlock is realized through amendments to national laws[797], for example, by removing geographical restrictions from the specific tax provision.

Let's remined that such amendments are initiated by the European Commission in the framework of its infringement proceedings. Based on the ECJ's judgements in the Stauf-

[794] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[795] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 44.
[796] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104
[797] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 389

fer-Persche line of cases, the European Commission forces countries to change the discriminatory provisions of national legislations.

However, in the case of a voluntary decision at the national level the initiative to change legislation does not come from the European Commission, but from the Member State itself. In this case the Member State changes the provisions of its legislation, facilitating cross-border activities of NPOs and their donors. Moreover the country may remove not only the discriminatory legislation provisions but also restrictions that are not considered as discrimination. This applies, for example, to the requirement of close link with the community of the State providing tax benefits. It should be recalled that this requirement, while not discriminating from the point of view of the European Court, can hamper cross-border activities of European NPOs. Thus, the Member States may voluntarily remove additional restrictions that are allowed by the European Court that will be a much more effective mean of resolving landlocked problem.

At the same time the Member State is ready to resolve the landlocked tax relief if certain requirements are met which are considered essential and normative for granting tax benefits in this State[798]. It is perfectly possible for national tax legislatures to require foreign NPOs not only to qualify for tax relief in their State of residence, but also to qualify for tax relief in the host State[799]. By adding specific requirements to the provision, the government can target the tax incentives to a specific cause[800]. The Member States can also demand registration of both domestic and foreign NPOs in special registers of non-profit organizations for obtaining information by donors about which of their donations can be deductible from taxable income.

An example of a unilateral solution to the landlocked tax benefits problem is the Netherlands. This country is generally known for its liberal nature regarding the taxation of the cross-border activity of NPOs. According to R. Buijze "the Netherlands is one of the few jurisdictions that allows for the application of all of the current existing solutions". Returning to our example we can note that the Netherlands does not place geographical restrictions on tax benefits for gifts. Dutch taxpayers can deduct their gift, whether it is a domestic gift or a cross-border gift, from personal income tax if the gift is made to an organization that is recognized as a "Public Benefit Pursuing Entity" by the Dutch tax authorities. This holds for both domestic and foreign charities. Resident charities of the Kingdom of the Netherlands, another EU Member State or a state designated by the Ministry of Finance have to meet the same requirements to qualify as a PBE in the Netherlands. States designated by the Ministry of Finance are states with which the Netherlands has an information-exchange agreement on personal income tax, corporate income tax, and gift- and inheritance tax. If a charity resides in a country that does not have such an agreement with the Netherlands, it can still meet the requirements of a PBE by accepting the obligation to provide additional information to the Dutch tax authorities[801].

By consulting the PBE register at the Dutch tax authorities, donors can check which organizations can receive gifts that qualify for a deduction from taxable income. Several NPOs located outside the Netherlands have registered as a PBE[802].

It is likely that this is the most realistic solution because it respects the sovereignty of states and does not require states to agree on mutual formulations[803].

However, the obvious disadvantage of relying on amendments to national law is that states will not have the same pace and priority in amending their laws. On the one hand, in

[798] Ibid., p. 389
[799] Ibid., p. 389
[800] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104
[801] Ibid.
[802] Ibid.
[803] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p. 389

some countries no urgent need for change may be perceived sufficiently, on the other hand, the reluctance of governments to initiate the voluntary providing domestic tax benefits to foreign NPOs may be caused by excessive pressure from the European Commission[804]. It might be likely that the stricter government policies around the world aimed at preventing the diversion of charitable assets to terrorists also may work to discourage cross-border activity of NPOs and that consequently, tax legislatures will increasingly wish to rely on domestic NPOs[805].

From the point of view of NPOs this approach has another significant drawback. By imposing its own requirements on foreign charities to be eligible to receive tax deductible gifts the countries apply host country control – the principle developed by the European Court of Justice. In accordance with this principle in order to obtain privileged tax regime in multiple Member States the NPO should simultaneously meet the requirements of the tax authorities of all the Member States involved. This, as we noted in the previous paragraph, is a serious barrier in the cross-border activities of NPOs.

Solutions at the international level

1) Bilateral tax agreements.

Another way in which countries can overcome the tax barriers to cross-border charitable giving is to mutually agree on granting tax incentives to cross-border gifts. This can be done in bilateral tax treaties.

Most bilateral tax treaties are based on the model tax treaties by either the UN[806] or the OECD.[807] The model treaties both include a non-discrimination provision that prevents nationals of a contracting state to be subject to taxation in the other contracting state other, or more burdensome, than the taxation of nationals in the other contracting state under the same circumstances.[808] Under the model tax treaties, however, the NPOs cannot turn to the tax authorities of the contracting state, since it does not recognize the NPO in the other contracting state as a NPO, nor is it obliged to do so under the model tax treaties. In the official commentary[809] of both the OECD Income and Capital Model Convention and the UN Model Double Taxation Convention it states that:

> Neither are they [the contracting states] to be construed as obliging a State which accords special taxation privileges to private institutions not for profit whose activities are performed for purposes of public benefit, which are specific to that State, to extend the same privileges to similar institutions whose activities are not for its benefit[810].

NPOs are thus excluded from the mutual recognition.

Furthermore, the cross-border application of personal allowances — which tax incentives on gifts to charities are classed as — is not taken into account in the OECD Income and Capital Convention and the UN Model Double Taxation Convention. It is assumed that the home state of the taxpayer takes this into account.

Because many tax treaties are based on these model tax treaties, countries explicitly have to agree on the inclusion of a provision on the mutual application of tax incentives for gifts to charitable organizations in the other contracting state. Although rare, this does happen. Again, as with the unilateral solution, countries have to decide whether they base control over recipient charities on host country control, home country control, or both. Be-

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[804] Ibid., p. 389

[805] Ibid., p. 389

[806] UN (2013), *United Nations Model Double Taxation Convention between Developed and Developing Countries*, UN, New York

[807] OECD (2015), *Model Convention on Income and on Capital*, 2014 (Full version), OECD Publishing

[808] Article 24 of UN Model Double Taxation Convention between Developed and Developing Countries and article 24 of OECD Model Convention on Income and on Capital.

[809] Commentary on article 24, paragraph 1, point 11 of UN Model Double Taxation Convention between Developed and Developing Countries and commentary on article 24, paragraph 1, point 11 of OECD Model Convention on Income and on Capital.

[810] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

cause tax treaties decide which law is applicable, but do not shape laws, the requirements imposed on charitable gifts of either the home state, host state, or both apply. No additional requirements can be incorporated in the tax treaties[811].

I.Koele distinguishes four different categories of tax treaties in which the different types of control are reflected. First, there are conventions that regard charitable organizations explicitly as "resident" under a treaty, allowing these "resident" organizations to benefit from the same beneficial tax regulations as domestic organizations. Second, there are conventions that regard charities explicitly as a safe haven under the "limitation on benefits" concept included in the treaty. For these organizations to enjoy the tax benefits, they are seen as resident entities under the treaty. Third, there are conventions that regard exempt organizations as being exempt from taxes on income sourced in another state with respect to specific income items. Last, some conventions resolve the issues with regard to gifts or bequests to foreign charities[812].

Let's consider some examples.

R.Buijze cited the example of a tax treaty that includes a provision on charitable contributions is the income tax treaty between the Netherlands and Barbados. The treaty states:[813]

Contributions by a resident of a Contracting State to an organization constituting a charitable organization under the income tax laws of the other Contracting State shall be deductible for the purposes of computing the tax liability of that resident under the tax laws of the firstmentioned Contracting State under the same terms and conditions as are applicable to contributions to charitable organizations of the firstmentioned State where the competent authority of the first-mentioned State agrees that the organization qualifies as a charitable organization for the purposes of granting a deduction under its income tax laws[814].

The treaty requires both home- and host country control, as the charity has to be recognized as such by the tax laws in its place of residence and it also has to meet the requirements put upon charities in the country of the donor. Other examples of tax treaties that overcome the tax barrier to cross-border charitable giving are the tax treaties the United States has concluded with Canada, Israel, and Mexico.[815]

Another example of bilateral tax agreements is, for example, double tax conventions on inheritances (the 4th type in I. Koele's classification). Such agreements are designed to relieve double or multiple taxation of inheritances[816]. This is relevant not only for NPOs but also for taxation of other successors. However "Commission Recommendation regarding relief for double taxation on inheritance taxes"[817] [818] stated that the Member States have few bilateral conventions to relieve double or multiple taxation of inheritances. This

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[811] Ibid.

[812] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., pp. 20-37

[813] Article 22 of Barbados – The Netherlands Income Tax Treaty (2006, as amended through 2009). https://www.investbarbados.org/docs/DTA%20-%20The%20Netherlands.PDF

[814] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

[815] Canada – United States Income and Capital Tax Treaty (1980 as amended through 2007) https://www.irs.gov/pub/irs-trty/canada.pdf Israel – United States Income Tax Treaty (1975) https://www.irs.gov/pub/irs-trty/israel.pdf Mexico – United States Income Tax Treaty (1992 as amended through 2002). https://www.irs.gov/pub/irs-trty/mexico.pdf

[816] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

[817] Commission Recommendation regarding relief for double taxation on inheritance taxes, 2011/856/EU of 15 December 2011 // O.J. L336/81 of 20 December 2011

[818] Commission Recommendation is a part of a package launched by the European Commission which deals with issues of double taxation and discriminatory tax treatment in the area of inheritance and estate tax.

is indeed the case. As the table 14 below shows, there are only 33 bilateral inheritance tax treaties in place between EU Member States out of a possible 351[819].

Table 14 – The EU Member States' double tax conventions on inheritances

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
BE										+																+	
BG																			+*								
CZ																											
DK					+						+														+	+	
DE				+			+			+*																+	
EE																											
IE																											+
EL					+				+		+														+		
ES								+		+																	
FR	+				+*				+		+								+		+				+	+	+
IT				+				+		+																+	+
CY																											
LV																											
LT																											
LU																											
HU																			+							+	
MT																											
NL																			+*						+	+	+
AT			+*							+						+		+*								+	
PL																											
PT										+																	
RO																											
SI																											
SK																											
FI				+				+		+								+								+	
SE	+			+	+					+	+					+		+	+						+		+
UK							+			+	+							+								+	

Source: Tax Treaties database[820]

Note: 1) + means in force since before 1 January 2000; +* means new since 1 January 2000; 2) The treaties between the Nordic countries are part of a multilateral agreement signed by the Nordic countries in 1983: (Nordic convention dated March 22, 1983); later it was considerably supplemented and in 1989 transformed into the Convention between Denmark, Finland, Iceland, Norway, and Sweden for the avoidance of double taxation with respect to taxes on inheritances and gifts (dated September 12, 1989[821]). 3) In the matrix each treaty is shown twice, e.g. a treaty between UK and SE is marked for both SE-UK and UK-SE.

In this regard it is worth mentioning that in the Commentary of the 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts[822], hardly any reference is made to charitable foundations or trusts. Although the Commentary touches upon foundations and trusts in general as special features of the domestic law of certain member countries, charitable foundations and trusts are not mentioned at all in this respect. In the Commentary on article 4 of the OECD Model Convention (concerning fiscal domicile) and article 10 (concerning non-discrimination) hardly any attention is given to charitable insti-

[819] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

[820] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Tackling cross-border inheritance tax obstacles within the EU. Brussels, 15.12.2011, COM(2011) 864, Annex II

[821] On 25 June 2007, Sweden withdrew from the convention. On 22 August 2014, Norway also withdrew, so the convention no longer applies to either of these two countries.

[822] OECD (1983) Model Double Taxation Convention on Estates and Inheritances and on Gifts (1982). OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264177277-en

tutions and non-profit-making institutions whose activities are performed for purposes of public benefit[823].

This fact as well as the low prevalence of bilateral tax agreements on estates and inheritances in Europe allows us to agree with R.Deblauwe, A.Biesmans, B.de Kroon and S.Frans, that "uniform tax treatment of gifts and inheritances is not to be expected in the near future. A uniform tax treatment of charities may be even further away"[824].

However, in general solving the landlock problem through the use of bilateral agreements could be assessed as quite effective. I.Koele also notes that bilateral treaties are very suitable vehicles for provisions to resolve the landlock, and in a bilateral treaty, it may be specified at the outset whether the law of the other country is essentially equivalent to the national law on philanthropic organizations. In such case, the requirements for philanthropic organizations in that specific state could be loosened in this regard[825].

Currently the solution through bilateral agreements seems even more attractive as security risks in an international context are increasing. Such agreements force the States to encourage each other, and serve to simplify international tax law. Nevertheless, for the effective implementation of this method countries should in the first place uniformly adopt the principle that NPOs are resident for purposes of any bilateral tax treaty and therefore may benefit from the treaty[826].

At the same time, where limitations on benefits (LOB)[827] clauses are concerned, states should not exclude NPOs entirely from the LOB clauses. In the development of LOB provisions over the years, philanthropic organizations have been excluded from such provisions, whereas other exempt organizations (such as pension funds) must meet the requirement that the majority of its beneficiaries, member or participants, if any, are individuals resident in either Contracting state. In other words, philanthropic organizations are not considered to be suitable or likely to be used for treaty shopping purposes, which is, however, not a reasonable conclusion. Especially in civil law countries where it is possible for donors to stipulate third party obligations from philanthropic organizations, those philanthropic organizations may be excellent tools for treaty shopping purposes[828].

2) Multilateral tax arrangements

Apart from amending national laws and bilateral treaties, a third possibility for resolving the landlock would be through the mechanism of a multilateral treaty concluded under the auspices of, for example, the EC. If the goal of resolving the issue of the landlock is recognized by many states and the procedure for negotiating the multilateral treaty is handled with care, this might be a perfect solution for a uniform way to resolve the landlock internationally. This has the advantage that states would undertake a coordinated effort to establish a procedure for the release of the landlock and accordingly, the perception of this procedure could be enhanced. In order to be a feasible undertaking, the following would be essential for a multilateral resolution of the landlock:

- the formulation of the treaty provisions must be negotiated in a flexible manner with sufficient reference to national laws on domestically sensitive issues;

- the key elements such as normative equivalency must be formulated in a functional and uniform manner, eventually referring to norms and criteria that are established under

[823] Commentary on article 4 and article 10 of the OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts (1982)

[824] Deblauwe, R., Biesmans, A., de Kroon, B., Sonneveldt, F. *Gift and Inheritance Tax with Regard to Charities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 87-105

[825] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p.390

[826] Ibid., p.389

[827] The LoB is tailored to check a well-known misutilization by foreign investors called, treaty shopping. The purpose of an LOB provision is to limit the ability of third country residents to obtain benefits under the certain tax treaty.

[828] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p.390

national law. It is likely that it would still be too ambitious to establish all the criteria of normative equivalency on a supranational level, as this does not respect the diverse and varied nature of philanthropy under various laws; and

- the various procedures must be formulated as a principled means of dealing with these issues, also leaving room for national legislatures to adapt the principles to their national systems where appropriate.

Once states begin to work without a landlocked tax relief for cross-border philanthropy and develop experience in the criteria that are sensible and effective, and withdraw from other criteria that appear to be less sensible or ineffective, internationally recognized practical standards may be developed as to detailed normative equivalency tests and safeguards against the diversion of philanthropic transfers. That moment is probably the right moment for conclusion of a multilateral treaty on the subject, thereby motivating other countries to recognize the conceptual procedures for releasing the landlocked tax treatment of cross-border philanthropic transfers[829].

However, currently such an approach shows no real prospect of getting the unanimous approval of Member States that would be necessary for such an undertaking[830].

Supranational Solutions

A supranational legal authority can take measures to overcome the tax barriers to cross-border charitable giving amongst multiple countries. The EU is based on such supranational agreements that have the potential to overcome tax barriers to cross-border charitable giving. Supranational solutions can take multiple forms:

1) EU Law.

Although it is extremely difficult to unify taxes within the EU due to member countries refusing to give up their sovereignty over their tax systems, EU law does have the potential to overcome tax barriers to cross-border charitable giving. This potential lies in the four fundamental freedoms as stipulated in the TFEU and its enforcement by the ECJ.

This method in the form of the host-country control approch supported by the ECJ, was already discussed in the framework of this dissertation. We recall only that in four landmark cases, the ECJ ruled that if a country provides fiscal facilities for charities and charitable giving, these facilities should also apply in comparable situations within the EU. In this case the ECJ focuses on the requirements imposed by the country that has to grant the tax benefit, which leads to a host country control[831].

As we noted in the previous paragraph, this method has some shortcomings. As A.Yevgenyeva stated, the requirement of "host-state control" rather than "home-state control", combined with the burden of proof carried primarily by the taxpayer, does not represent a completely satisfactory policy solution for the non-profit sector. It creates a considerable administrative burden for organizations, which increases with geographical expansion of activities[832].

2) The Proposal for a Council Regulation on the Statute for a European Foundation

The shortcoming of the host-country control approach could be completely corrected by the use of another supranational solution, namely, the introduction the Statute for a European Foundation.

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[829] Ibid., p.391

[830] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.42

[831] Hemels, S. *Are we in need of a European Charity? How to remove fiscal barriers to cross-border charitable giving in Europe* // Intertax. – 2009. Vol. 8-9, pp. 424-434

[832] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

The Proposal for a Council Regulation on the Statute for a European Foundation[833] (hereinafter: the Proposal) was an initiative of the EC to overcome this inefficiency and make it easier for charitable organizations to conduct cross-border activities within the EU.

The European Foundation or *Fundatio Europaea* was proposed as a separately constituted entity in private law for a public benefit purpose. Member States would have to regard the FE in the same way as domestic public benefit entities. This implied that its donors and beneficiaries would have received the same tax benefits as those of domestic charities. This provision thus had the potential to removing the tax barrier from cross-border charitable giving within the EU[834].

According to the majority of scientists studying the problem of taxation of NPOs in their cross-border activities[835], introduction the Statute for a European Foundation is the most effective, albeit radical solution of the landlocked problem. This decision aimed at deep harmonization civil and subsequently tax law, considerably restrains sovereignty of Member States in the field of the direct taxation. At the initial stage "the biggest problem with the FE, however, was its feasibility, due to the fact that it required Member States to trust each other's supervising authorities"[836].

Most likely this problem prevented the introduction of the Statute for a European Foundation. The Proposal has been withdrawn. Nevertheless, the sound ideas and potential of this solution for removing the tax barriers from cross-border charitable giving within the EU, prompt us to consider in a separate paragraph the features, strengths and weaknesses, the causes of failure of the Proposal for a Council Regulation on the Statute for a European Foundation.

3) The introduction of a model statute

The idea of this solution, in our opinion, was born from host-country control principle and the requirement to determine the comparability of a foreign (EU-based) and domestic NPOs. The arguments of the European Court on the issues of comparability of domestic and foreign organizations made it clear that theoretically a foreign EU-based NPO would be automatically tax-privileged in all Member States, if it statutes/ bylaws were to combine all requirements of the tax laws of the Member States (de facto strictest common denominator), i.e., permitting only such public benefit purposes as are allowed and would confer tax-privileged status in all Member States, prohibiting remuneration for the board of directors (like the Spanish tax law), requiring a duty of timely disbursement and several formal statements in the foundation's statute (like the German tax law)[837] and other mandatory requirements for the NPO status in different countries.

In this context researchers propose the creation of "drafting model statutes, which would include the strictest common denominator of tax laws". NPOs could use the "model statutes" in order to be able to get the additional advantage of almost certainly being accepted as holding tax-privileged public benefit status in all Member States[838].

There are two main objections against such an approach:

Firstly, such a tax-privileged status via model statutes may seem unrealistic, because it would be over-regulated and too "bureaucratic". We may disagree with this: according to the current information, the fundamental tax law requirements seem to be comparatively similar in most Member States. Model statutes may therefore be a viable means to facili-

[833] European Commission (2012) *Proposal for a Council Regulation on the Statute for a European Foundation (FE)* (including an Explanatory Memorandum), COM (2012) 35 final, 2012/0022 (APP)
[834] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104
[835] For example Sigrid Hemels, Oonagh B.Breen, Hanna Surmatz, Renate Buijze, K.J. Hopt , Bohdan Pretkiel, Renzo Rossi and others
[836] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104
[837] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.42
[838] Ibid., p. 43

tate the possibility for an organisation to hold tax-privileged public benefit status in all Member States.

Secondly, it is a big challenge to develop model statutes due to the legal uncertainty of the current tax legislation of the Member States. The guidance or least the assistance of the tax authorities would be needed in order to assure that the model statutes would really be accepted by the tax authorities of the relevant Member State. In case of amendments to the relevant law or its interpretation, model statutes would also need to be amended[839].

Obviously, this approach is a facilitated version of the Statute for a European Foundation, so it means that there is a risk that this decision will be difficult to implement. As we noted above, and as we will note in the next section of dissertation, the Member States had in the past (2007-2009) already tried to work towards better coordination via soft law approaches. However, at the time no agreement was found at the Council level. Times may however have changed and on the future there may be more appetite and trust among Member States to further review the matter now. The idea could be to agree on core principles that tax authorities would check in cross-border cases[840].

Private Initiatives

The NPOs can also undertake some initiatives to overcome tax barriers to cross-border charitable giving. They can do so by circumventing the cross-border situations, or through use the intermediary charitable organizations. Let's consider these methods in more detail.

One of the forced decisions NPOs can resort to is the circumventing the cross-border situations. The tax barriers created by cross-border situations can be overcome by setting up a legal entity in the donor's country. This can be done either by establishing an entity in the donor's country with charitable activities or by establishing an entity in the donor's country solely for fundraising activities. The latter is also known as a "friends of" organization[841].

1) Establishing a Legal Entity Abroad with Charitable Activities

When a NPO establishes a legal entity abroad that conducts charitable activities that qualify as such under a foreign jurisdiction, it can receive a charitable status in that country, allowing the donors in that specific foreign jurisdiction to use the applicable tax incentive on their gifts to that organization. By doing so, the cross-border situation is circumvented.

Guggenheim Museums, for example, can be visited in New York, Venice, and Bilbao. Although affiliated with the USA-based Solomon R. Guggenheim Foundation, they are not all run by the same legal entity. The Solomon R. Guggenheim Museum in New York and the Peggy Guggenheim Collection in Venice are owned and operated by the Solomon R. Guggenheim Foundation[842]. The Museum in Bilbao, however, merely follows the guidelines and ethics code set by the Solomon R. Guggenheim Foundation, but remains a separate legal entity (the Guggenheim Museum Bilbao Foundation), with charity status in Spain.[843] Spanish donors can thus donate to the Guggenheim Museum Bilbao in their own country and benefit from the applicable tax incentive[844].

However, as one can imagine, this solution comes at a significant cost and it would be irrational to pursue this avenue solely for donors to receive a tax benefit on their gift. Besides, not all NPOs are geographically mobile, like for example, fine arts and performing

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[839] Ibid., p. 43

[840] Ibid., p. 43

[841] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

[842] According to the website of the Peggy Guggenheim Collection http://www.guggenheim-bilbao-corp.es/en/guggenheim-network/ the Solomon R. Guggenheim Foundation is recognized by the Italian tax authorities as a charitable organization that can receive tax deductible gifts. This is an example of a unilateral solution, where a foreign charity is recognized by the local tax authorities.

[843] The website of the Peggy Guggenheim Collection http://www.guggenheim-bilbao-corp.es/en/guggenheim-network/

[844] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

arts institutions. For example this is not the case for Italian museum in Pompeii and for other heritage sites, exhibition or performance spaces.

Establishing a legal entity abroad with charitable activities can avoid a cross-border situation and thus are not encountered with the involved tax barriers, but for the majority of NPOs this is nothing more than a theoretical solution to overcoming the tax barriers to cross-border charitable giving. For other charitable causes, such as disaster relief and development aid, this solution might well be practically feasible, since their activities consist of providing services, which are less attached to a physical location[845].

2) Establishing a "Friends of" Organization

The cross-border situation that creates tax barriers is circumvented by setting up a legal entity for fundraising purposes in the donor's country, also called a "friends of" organization. For this solution to be effective, the "friends of" organization has to qualify as an organization that can receive gifts with a tax benefit. In this case, the donor can contribute to the "friends of" organization and benefit from the applicable tax incentive in his own country. The "friends of" organization can transfer the gift to the foreign organization which it raises funds for.

Whether the "friends of" organization qualifies to receive gifts with a tax benefit depends on the requirements it has to meet. If there are high requirements regarding the capital the organization needs to have, this might make it difficult to establish a "friends of" organization. Requirements applicable on qualifying gifts also influence the effectiveness of the solution. If the "friends of" organization is not allowed to transfer the funds to an NPO abroad, for example, this solution is not effective[846].

It should be noted that such a solution is of limited nature allowing NPOs to carry out in a cross-border context only fundraising activities. In addition, as in the previous solution, this method is aimed at avoiding the emergence of a cross-border situation as such, rather than eliminating related tax barriers.

3) Intermediary Charity Organizations.

This method unlike the previous two methods aims to overcome the inapplicability of tax incentives for cross-border gifts. This is achieved by creating networks of organizations with charity status.

Through this collaboration and the use of available fiscal facilities, donors can acquire the same tax benefit on cross-border gifts as on domestic gifts. In these networks, the donor gives to an intermediary organization with charity status in their country and can therefore benefit from the tax incentive. The intermediary organization transfers this gift to the charity abroad. The intermediary organization usually charges a percentage fee of the gift for this service. The prerequisites for this structure to work are that the country where the donor pays its taxes (host country) must allow organizations with charity status to spend their gifts on activities abroad and that the mission of the final recipient organization is consistent with that of the intermediary charity organization. This is where the requirements imposed by the donor's tax jurisdiction are of importance.

The intermediary charity organizations regularly have multiple purposes and their core business is often to contribute to the public benefit by conducting charitable activities or to raise funds for these activities[847]. In United States an example of such organisations is the King Baudouin Foundation. In Europe, the Transnational Giving Network Europe (TGE) is an illustration of this concept[848].

TGE is a network of European charities that help each other channel gifts between donors and charities resident in certain EU Member States and Switzerland. The NPOs of the

[845] Ibid.
[846] Ibid.
[847] Ibid.
[848] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p.374

Network collaborate to enable donors to give gifts internationally while still receiving the tax benefits they would get for giving locally in their country of residence[849].

Consider an example of how the network works. Let us assume that donor that a resident for tax purposes in Austria, wants to donate his donation to an NPO located, say, in Italy. In principle, Austrian law allows individual and corporate donors who donate to comparable EU-based NPOs to receive the same tax benefits that donors of domestic NPO receive.[850] However, a foreign NPO-recipient must be in the Austrian list of organizations eligible to receive tax deductible donations. Suppose also that the Italian NPO in question is not included for some reasons in this list (for example, it had no donors from Austria before and did not apply for confirmation of its status in Austria). Nevertheless, the fact that both Austria and Italy are members of the Network allows the donor to receive his tax benefits. The Italian partner of TGE (Fondanzione Vita Giving Europe Onlus)[851] validates whether the NPO is eligible for tax-deductible gifts under Italian tax law. If the NPO turns out to be eligible, the Italian TGE partner informs the Austrian TGE partner (Stiftung Philanthropie Österreich).

The Austrian TGE partner checks whether the gift is in line with its statutes, as well as whether it meets the legal criteria under Austrian law. If this is the case and the Austrian TGE partner is willing to receive the gift, the donor can make the gift to the Austrian TGE partner. Because the Austrian TGE partner holds PBE status under Austrian tax law and is included in the above-mentioned list of organizations the donor can deduct the gift from his taxable income[852]. The Austrian PBE partner then transfers the gift to the Italian NPO. For this service, TGE charges a fee of 5% for gifts up to €100,000 and a 1% fee if the amount exceeds this number. The fee will, however, never be more than €15,000.[853]

By using TGE's services the donor knows beforehand that his gift is tax deductible. This would not be the case if the NPO relied on EU jurisprudence. In this case, no one can guarantee that the country of residence of the donor as a result of the comparability test will make a positive decision on comparability and will provide the requested tax benefits to NPOs and their donors. If a request for tax benefits was rejected the appeal to the European Court can also not bring results. Furthermore, the expenses of the NPO for confirming its tax privilleged status through EU jurisprudence are unlimited and indefinite, while its expenses for the TGE service are transparent.

It is therefore not surprising that, despite the judgments of the ECJ, as discussed in chapter 3 and paragraph 4.1, there is an increasing demand for TGE, as their figures show. TGE covers nineteen countries and serves more than 5.000 donors and about 400 organizations.[854] The amount of funding that TGE deals with has increased year on year since the network was established: in 2009, at the start of TGE €2.946.708 was channeled through them[855], by 2016 this has almost doubled[856]. In 2016 the network was approached by a record number of new European non-profit organisations wanting to use its services: TGE made it possible for 5 084 gifts and a total amount of 6.380.054 € to be transferred to 334 non-profit organizations across 19 European countries. And this trend is continuing in 2017 (Annex C). The number of beneficiaries has increased significantly. The Network has

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[849] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p. 10

[850] See 2.3 paragraph of the dissertation

[851] A list of the non-profit organizations that are members of the network for each member state can be found on the official website of the TGE http://www.transnationalgiving.eu/en/partner/

[852] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

[853] The website of Transnational Giving Europe network http://www.transnationalgiving.eu/en/procedure/

[854] *TGE Annual Report 2016* / Transnational Giving Europe. – 2017. – 16 p., p.9

[855] *TGE Annual Report 2015* / Transnational Giving Europe. – 2016. – 15 p., p. 7

[856] The 2014 year was record, when the TGE channeled € 12,0 million since the few big amount donations represented 5 million, 60% of the global amount of that year. As the numbers of 2014 were exceptionally high, we can notice that the network is stabilising around € 8 million per year.

been approached by a record number of new European non-profit organizations wanting to use the services of TGE[857]. This demonstrates again that the supranational solution as currently applied in EU Member States is not sufficient yet to overcome the tax barrier[858].

On the one hand, the use of the network of intermediaries is an effective means to overcome the existing landlocked tax provisions in practice, but these practical facilitators are not a true solution to the problems attendant to international philanthropy. According to I.Koele, the problem with facilitators is that it is impossible to determine the quality and nature of their work. Theoretically in this scheme facilitators undertake to exercise due diligence with regard to the cross-border philanthropic transfers for the benefit of a donor. But in fact facilitators are merely service providers to others that do not wish to undertake due diligence responsibility[859]. The use of several intermediary entities in a chain of grantmaking increases the risk that the funds will be diverted to non-charitable purposes. In other words, in the chain of actors, the effective oversight of expenditure responsibility is easily lost[860]. In a legal environment where no specific due diligence requirements exist, such as in the Netherlands, this is manageable. However, where the due diligence requirements become increasingly complex, it is likely to become more apparent that facilitators will no longer be the best solution[861].

If one focuses on the practice of the Transnational Giving Network, currently no concrete due diligence procedure is foreseen; the foreign facilitator will verify the status of the ultimate recipient organization, but will not as a rule verify the ultimate destination of the funds. Nevertheless, the cost of the facilitating process is an administrative fee of 5% of the cross-border gift, to be split between the domestic facilitator and the foreign facilitator organization. If the due diligence procedure that should be exercised is extended to include site visits and effective control on the specific purpose for which the gift was given, and the risks of penalties becomes more apparent, then, once again, facilitators will not longer be an efficient mechanism[862].

I.Koele fairly points out that grant risk management is a function that essentially should be exercised by philanthropic organizations that are responsible for the proper pursuance of their objectives, and this simply cannot be delegated to a service provider, at least not such that the service provider takes title to the funds[863]. This argument is supported by the German law that focuses on the direct responsibility of a philanthropic organization for the pursuance of its objectives. The German partner of the Transnational Giving Network is not allowed to feed other foreign facilitators but must directly transfer its contributions to the ultimate intended recipient organization. When a German philanthropic organization feeds a foreign organization, it must exercise due diligence over these funds and remains responsible for the proper expenditure by the foreign organization[864].

The use of NPOs-intermediaries does not seem to be the best solution. However if in time the EU Member States adjust their legislation in line with the ECJ rulings, the situation might improve and TGE might become less essential. Paradoxically, TGE representatives are hoping for this. As noted by T.von Hippel, "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

[857] *TGE Annual Report 2016* / Transnational Giving Europe. – 2017. – 16 p., p.7
[858] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104
[859] Koele, I.A. *International Taxation of Philanthropy. Removing Tax Obstacles for International Charities* / IBFD. – 2007. – 414 p., p.374
[860] Ibid., p. 375
[861] Ibid., p.374
[862] Ibid., p. 374
[863] Ibid., p.375
[864] Ibid., p.375

philanthropy have been collected and assembled"[865]. Currently though, there is still a large demand for the services that TGE provides.

Thus, our review has shown that there are several state solutions available and also the charity sector and other private parties can make an effort to get access to solutions that allow donors to receive a tax incentive on their gift to an NPO abroad. In Table 15, we systematized methods of solving the landlocked tax benefits problem.

Table 15 – Possible solutions of the problem of landlocked tax benefits

	States solutions and EU's solutions	Private initiative of NPOs and their donors	
		Circumventing the cross-border situations	Resolving the cross-border tax barriers
National level	The opening up the national tax incentives for foreign NPOs and their donors	Establishing abroad a legal entity with charitable activities	-
International level	1) Bilateral tax treaties 2) Multilateral tax treaties	Establishing a "friends of" organization	Intermediary charity organizations*
Supranational level	1) EU Law (ECJ judgments) 2) The Proposal for a Council Regulation on the Statute for a European Foundation 3) Introduction of a Model Statute	-	-
Note:* Intermediary NPOs can exist both internationally at regional level (like TGE network) Source: Compiled by the author			

Depending on the legal context of the countries where the cross-border transaction takes place, one solution might be effective in solving the tax barrier where another fails. Requirements imposed on qualifying gifts and the conditions imposed on charities as well as access to bilateral tax treaties and supranational agreements are important[866].

Each type of solution sets its own terms. For the private initiatives to work, for example, it is necessary that charity organizations in the donor's tax jurisdiction are allowed to spend their funds abroad. For state solutions to work, the type of control required is of importance. From the perspective of charities, home country control would be most efficient, since meeting one set of requirements is sufficient in that case. Host country control would entail that if the charity wants to raise funds both in its residence country and abroad, it must meet multiple sets of requirements, which can put severe restrictions on the charity. This also holds true when a country requires both home country control and host country control. In theory, it could even be impossible to meet the requirements of both the home and host country if they use conflicting requirements. Therefore, the success of a solution largely depends on the kind of control that the legislator chooses. In any case, it is a prerequisite that a tax incentive is available in the donor's tax jurisdiction in the first place in order for a tax incentive to apply in a cross-border situation[867].

It would be valuable to know which solution is most successful in overcoming the tax barriers to cross-border charitable fundraising for NPOs. This would provide NPOs and their donors with the necessary information to lobby for a certain state solution, or to choose to invest in creating their own networks, to be able to benefit from the potential donors located abroad.

[865] *Taxation of cross-border philanthropy in Europe after Persche and Stauffer: From landlock to free movement?* / Von Hippel, T. / European Foundation Centre (EFC). – 2014. – 47 p., p.7
[866] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104
[867] Ibid.

As noted by R.Buijze, more factors have to be taken into account when evaluating the different solutions. For example the private initiatives initially seem to be more costly for the NPOs in comparison to the state solutions, whereas the state solutions might require a large time investment to gain knowledge of a foreign tax system. Furthermore, the level of legal certainty provided by a solution beforehand is of importance. Some solutions do allow for tax incentives on cross-border charitable gifts, but one might first have to go to court for the tax incentive to be enforced, as is witnessed in the EU. This is costly and time consuming. Another factor is the level to which a solution prevents a crowd-out effect. If every single country were to remove geographical restrictions from their tax incentives on gifts to creative industries, all countries could benefit. However, if not all countries do so, the risk exists that a crowding-out effect will arise: countries can benefit from others granting tax incentives on gifts, but refrain from granting these tax incentives in cross-border situations themselves. The more countries to which a solution is applicable, the smaller the chance of crowding out, and the more successful the solution is in removing tax barriers.

In our opinion, general propensity of a State or group of States to integrate and harmonize the taxation of NPOs and their donors is also the factor influencing the choice of the solution. Many conditions influence the readiness of the country for integration. This is not the subject of this dissertation, but it can be assumed that such factors can be the following:

- balance of incoming and outgoing capital of NPOs - whether the country is internationally a donor or beneficiary of charitable funds;
- the general nature of the existing tax traditions of a State or group of States in question, in particular, the rigidity or liberal nature of the fiscal function.

Obviously, solutions also differ in the degree of integration needed. In particular this concerns of course decisions at the governmental level. In the table 16 below we classify government decisions on this criterion.

Table 16 – The degree of necessary harmonization for different government decisions (low to high)

Government decisions	Specifications	Degree of harmonization
National landlock tax regime. Domestic tax benefits are available only for domestic NPOs, and only donations to domestic NPOs are deductible from taxable income of donors	The model of complete closeness. Foreign NPOs do not have access to domestic tax benefits which leads to violation of EU law	-
The opening of borders as a result of negative integration. The elimination of discrimination restrictions on the basis of residency of NPOs	It is mandatory in accordance with EU Law and ECJ judgments	low
The opening of borders as a result of positive integration. The elimination of the non-discriminatory requirement of close link with the community of host country	Voluntary (additional) removal of restrictions that are permitted by EU law, but make it more difficult to obtain tax benefits by foreign NPOs and their donors	low
Bilateral tax treaties	They allow the parties to mutually apply their tax incentives for cross-border gifts, perhaps by making some compromises	middle
Multilateral tax treaties	They unite more parties, affect more differentiated interests and require participants to make more concessions	middle

Table 16 (cont.)

Introduction of a Model Statute	It presupposes the harmonization of the majority of the most important requirements for the activities of NPOs, facilitating comparability tests	high
The Proposal for a Council Regulation on the Statute for a European Foundation	Introduction of a common pan-European form of NPO, with a single set of requirements for this status throughout the EU. Getting benefits is automatic. Test of comparability is not required	high
Mutual recognition: NPOs meeting the requirements of one Member State are automatically recognized as NPOs in other Member States according to principle of home-country control	The tax authorities and/or courts of the home countryof the NPO determine whether the NPO meets the charity requirements, thus determining whether the foreign tax incentives apply. The maximum, and, unfortunately, the hard-to-implement level of availability of tax incentives for foreign (EU-based) NPOs	high
Source: Compiled by the author		

It can be concluded that, despite some obvious advantages and disadvantages of each solution, further research is necessary to gain thorough insight in the solutions that allow for tax incentives on cross-border gifts, in order for NPOs to benefit from the fundraising opportunities abroad which globalization offers.

4.3 Proposal for the Council Regulation on the Statute of the European Foundation: historical background, effectiveness, failures

There are a variety of options for dealing the problem of landlocked privileged tax regimes. As we noted in previous paragraph, a choice of any one solution depends on many factors. In any case, as Sigrid J.C. Hemels notes, "in order to be successful, a solution should not only remove the tax barriers for charitable giving (be effective), but should require a minimum of extra investments of charities and governments (be efficient) and it should be acceptable for all Member States (be feasible)"[868]. One of such solutions, according to many experts on NPOs taxation is the Proposal for a Council Regulation on the Statute for a European Foundation (FE) (hereinafter the Proposal), developed by the European Commission. In previous paragraph we have already briefly described this solution and its features in comparison with other solutions. Although the Proposal has been withdrawn, nevertheless, the caliber of the expectations of researchers and practitioners from its implementation urge us to consider it in more detail.

On 8 February 2012 the European Commission presented the Proposal for a Council Regulation on the Statute for a European Foundation (FE) (hereinafter the Proposal).[869] According to the press release, the purpose of this proposal is to make it easier for foundations to support public benefit causes across the European Union.[870] The European Foun-

[868] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[869] European Commission (2012) *Proposal for a Council Regulation on the Statute for a European Foundation (FE)* (including an Explanatory Memorandum), COM (2012) 35 final, 2012/0022 (APP)

[870] European Commission Press release *Promoting projects that benefit society at large: the European Foundation Statute* / 8 February 2012, IP/12/112

dation or Fundatio Europaea was proposed as a separately constituted entity in private law for a public benefit purpose. This entity had to serve the public interest at large as defined by the Council Regulation via uniform and agreed-upon joint material and formal standards[871].

The Explanatory Memorandum to the Proposal describes as the object of the Proposal that the new legal form facilitates foundations' establishment and operation in the single market, thus allowing foundations to more efficiently channel private funds to public benefit purposes on a cross-border basis in the European Union.[872] According to the Explanatory Memorandum, this should result in more funding being available for public benefit purposes, e.g. due to lower costs, and should have a positive impact on European citizens' public good and the EU economy as a whole. Even though the Proposal uses the generic term "foundation", it is only aimed at specific foundations: entities with a public benefit purpose[873].

The European Foundation or *Fundatio Europaea* (hereinafter FE) would be a further expansion of the European legal forms. This new form was supposed to be another one European legal form along with previously introduced European legal forms - the European Company (SE)[874] (that was introduced on 8 October 2004) and the European Cooperative Society (SCE) (that was introduced on 18 August 2006[875]). In fact, the main purpose of these statutes, including the Statute for a European Foundation is to make it easier for companies to operate across European borders by enabling them to operate under the same corporate regime. But the SE and SCE Regulations only concern company law. The SE and SCE Regulations explicitly state that these do not cover other areas of law such as taxation.[876] This is an important difference with the FE Proposal, which includes a chapter on the tax treatment of the FE (Ch. VIII of the Proposal).[877] As A. Yevgenyeva notes, the Statute did not intent to create any new tax rules but instead allowed existing provisions on tax benefits that were granted to domestic public benefit purpose entities to be automatically applicable to a European Foundation (and its donors). In other words, the Proposal required Member States to recognize these entities as being equivalent to domestic public benefit purpose foundations, also for tax purposes[878].

A detailed retrospective analysis of the development and implementation of this new form of NPO in the EU was conducted by Sigrid J.C. Hemels. According to the researcher, the idea of a European framework for charities is not of recent date. In 1971, the International Standing Conference on Philanthropy (INTERPHIL) presented a Draft European Convention on the Tax Treatment in respect of certain Non-Profit Organizations to the Council of Europe. The draft provided for harmonization of requirements and supervision. The Secretary General of the Council of Europe was given the power to register charities and supervise them. However, the contracting states were not willing to transfer part of their sovereignty in relation to charities and the convention was not adopted.

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[871] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

[872] Explanatory Memorandum of the FE Proposal, p. 3.

[873] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[874] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R2157

[875] Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R1435

[876] Preamble 20 SE Regulation and preamble 16 SCE Regulation.

[877] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[878] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

In September 2001, the High Level Group of Company Law Experts was set up by the European Commission to make recommendations on a modern regulatory framework within the European Union for company law. In its report of November 2002, the group observed that some form of harmonization would be necessary to bring about a European Foundation. This group did not regard the European Foundation as a priority in the short or medium term.[879] The group, however, stated that tax problems for foundations and their donors should be abolished to promote cross-border donations[880].

In 2004, the European Foundation Centre proposed a draft Regulation on a European Statute for Foundations.[881] It provided for the harmonization of both requirements for charities and of their supervision. A European Registration Authority would become responsible for the supervision. The European Foundation Centre was of the opinion that a European supervisory structure would level the field and provide for better assurance that supervision would take place in a comprehensive and comparable way across the European Union. Where the establishment of a European Registration Authority would not be feasible, it was suggested that the supervision could be exercised at the national level as well. The European Foundation Centre warned that this would lead to (then) 25 different ways of setting up European foundations.

The Regulation included three additional articles on the treatment of the European Foundation, its donors and beneficiaries. It was proposed that the European Foundation would be subject to the tax regime applicable to charities in the Member State where it has its registered office. Donors to a European Foundation would enjoy the same tax incentives as donors to a local charity. Gifts from a European Foundation would be treated as if they were given by a charity registered in the Member State in which they were received[882].

On 21 November 2006, Internal Market Commissioner McGreevy told the European Parliament's legal affairs committee that he was not yet convinced about the ability of a European Foundation Statute to respond to the specific needs of foundations, but that the European Commission would reflect on the matter. Earlier that year, in March, the Commission had withdrawn its 1991 proposal for a Regulation on the statute for a European association[883] together with various other proposals which were found to be inconsistent with the Lisbon and Better Regulation criteria, unlikely to make further progress in the legislative process or to be no longer relevant for objective reasons.[884]

In 2007, the European Commission initiated a feasibility study on a European Foundation Statute.[885] This study, which was finalized in 2008, suggested a Statute for a European Foundation with or without addressing tax issues. Subsequently, in February 2009, the European Commission launched a public consultation on a possible Statute for a European Foundation. The objective of the consultation was to get feedback on the feasibility study and on the need for a European Foundation Statute, and to get more in-depth information

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[879] *Report of the High Level Group of Company Law Experts for a Modern Regulatory Framework for Company Law in Europe* / European Commission. – Brussels. –4.11.2002 / URL: http://www.ecgi.org/publications/documents/report_en.pdf

[880] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[881] European Foundation Centre (2005/2010), *Proposal for a regulation on a European statute for foundations* (version 19), Brussels, January 2005, last update: November 2010

[882] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[883] COM (1991)273: *Proposal for a Council Regulation (EEC) on the Statute for a European association* [No longer in force] // OJ C 99 of 21 April 1992, Procedure 1991/0386/COD

[884] *Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects* (2006/C 64/03) // Official Journal C 064, 17.03.2006. p. 0003-0010

[885] *Feasibility Study on a European Foundation Statute* / Max Planck Institute for Comparative and International Private Law & University of Heidelberg, Centre of Social Investment and Investigation (K. Hopt, T. von Hippel, H. Anheier.) – 2008 / URL: http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf

on the operational problems that foundations face when operating cross-border. In the press release on this consultation the Commission emphasized that it had not yet taken a decision as to the need for a European Foundation Statute or its content.[886]

In November 2009, the European Commission published the results of the public consultation.[887] Unsurprisingly, the non-profit sector strongly supported the idea of a European Foundation. Tire few respondent public authorities and business associations were sceptical or negative towards the idea of such a statute. The non-profit sector preferred supervision at a European level or, alternatively, delegation to the national level. The respondent public authorities preferred national supervision.

On 28 April 2010, the European Economic and Social Committee (EESC) approved with a vast majority the opinion of its member Mall Hellam (herself a director of an Estonian charity) that urged the European Commission to present a proposal for a Regulation on a European Foundation Statute.[888] The strong interest of the non-profit sector in a European Foundation Statute was confirmed by the more general consultation on the Communication, Towards the Single Market Act, in 2010-2011. On the other hand, in the Company Law Expert Group many Member States expressed reservations in the years 2009-2011 as to the need for new European legal forms, including for foundations.[889]

On 10 March 2011, the European Parliament adopted a declaration calling on the European Commission to take the necessary steps to introduce proposals for European statutes for associations, mutual societies and foundations, to propose a feasibility study and an impact assessment for the statutes for associations and mutual societies, and to complete the impact assessment for the statute for foundations in due course.[890] The picture is therefore that of a very strong lobby of non-profit organizations for an FE Regulation, which is supported by the European Parliament and the EESC on one hand and reservations of Member States on the other hand[891].

The problem the European Commission wanted to deal was the variety of national civil and tax rules that makes cross-border operations costly and cumbersome.[892] This results in less cross-border channelling of funds to public benefit purposes. Specific problems included uncertainty about recognition as a public benefit purpose foundation in other Member States, the costs of pooling and distributing funds on a cross-border basis and limited cross-border donations. The Commission opted for solutions on which, given the diversity of national laws, a compromise might be more easily reached. The European Commission considered the following solutions:

1. No new policy action at EU level or an information campaign and a voluntary quality charter. Given the current state of ECJ case law these solutions would be a choice for the status quo from a tax point of view: host-country control.

2. A Statute for a European Foundation with or without addressing tax issues. The alternative addressing tax issues would require Member States to regard a European Founda-

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[886] *Commission consults on a possible European Foundation Statute.* Press release IP/09/270, 16 February 2009 / URL: http://europa.eu/rapid/press-release_IP-09-270_en.htm

[887] European Commission (2009) *Synthesis of the comments on the consultation document of the internal market and services directorate-general on a possible statute for a European Foundation*

[888] *European Economic and Social Committee, Opinion of the European Economic and Social Committee on the European Foundation Statute (own-initiative opinion).* INT/498 European Foundation Statute, Brussels, 28 April 2010 / URL: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010IE0634

[889] European Commission (2012) *Proposal for a Council Regulation on the Statute for a European Foundation (FE)* (including an Explanatory Memorandum), COM (2012) 35 final, 2012/0022 (APP)

[890] European Parliament, Declaration of the European Parliament of 10 March 2011 *On establishing European statutes for mutual societies, associations and foundations* / URL: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0101+0+DOC+XML+V0//EN

[891] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[892] European Commission (2012) *Proposal for a Council Regulation on the Statute for a European Foundation (FE)* (including an Explanatory Memorandum), COM (2012) 35 final, 2012/0022 (APP), p. 2.

tion as equivalent to domestic public benefit purpose foundations, and therefore grant it, its donors an beneficiaries the same tax benefits This option entails, in fact, a limited form of mutual recognition. Mutual recognition is applied only to the charities with the specific legal form of a European Foundation.

3. Limited harmonisation of laws on foundations. This would mean harmonising those requirements that foundations need to meet to be able to register and operate abroad, such as public benefit purposes, minimum assets, registration requirements and some aspects of internal governance. The options of more extensive harmonisation of national laws on foundations and harmonisation of the tax treatment of foundations and their donors were also considered. It seems that this option only considered a harmonization of requirements, but not of supervision, as the Commission does not refer to supervision in the explanation of this option.

Based on an impact analysis, the European Commission came to the conclusion that a Statute for a European Foundation with automatically applied non-discriminatory tax treatment would be the most appropriate option, removing cross-border obstacles for foundations and donors and facilitating the efficient channelling of funds for public benefit purposes[893].

The Commission has chosen the legal instrument of a Regulation to introduce the Statute for a European Foundation. The Commission deems a Regulation to be the most appropriate means to ensure the uniformity of the Statute in all the Member States as a European legal form requires the uniform and direct application of rules across the European Union. In opinion of S.Hemels, a Regulation would not be necessary to solve the tax issues; a Directive might have been sufficient. However, she adds that for the introduction of a new legal form, a Regulation is the most appropriate instrument and it makes sense to cover the tax treatment in the same Regulation, even though the inclusion of the tax treatment might mean that it will be more difficult to obtain the consent of all Member States[894].

The legal basis for the European Commission to propose this Regulation is article 352 of the TFEU. Based on this article, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament can adopt measures if action by the Union is necessary to improve the conditions for the establishment and the functioning of the internal market and the Treaties have not provided the necessary powers. This article is therefore a kind of last resort if no other provision in the TFEU gives the institutions of the EU the necessary power to adopt the measure. This article cannot be used for the harmonization of Member States' laws. The predecessors of article 352 of the TFEU served as the legal basis for the other European legal forms (the European Company (SE), the European Cooperative Society (SCE) and the European Economic Interest Grouping) as well.

As we noted above, an FE is a separately constituted entity for a public benefit purpose that must serve the public interest at large.[895] It must have its registered office and its central administration or principal place of activities in the European Union.[896] It may transfer its registered office from one Member State to another while maintaining its legal personality and not having to wind up. The Proposal contains specific provisions for such transfer.[897] The FE has legal personality and full legal capacity in all Member States and has the right of establishment in any Member State.[898] Furthermore, at the time of registra-

[893] Explanatory Memorandum of the FE Proposal, p. 2
[894] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174
[895] Art. 5 FE Proposal
[896] Art. 36-37 FE Proposal
[897] Art. 34 FE Proposal
[898] Art. 10 FE Proposal

tion it must have activities or a statutory objective of carrying out activities in at least two Member States.[899] It may carry out activities in any third country.[900] The FE must be registered in one Member State[901] and its name must include the abbreviation FE.[902] No other legal entity may use this abbreviation unless these were registered in a Member State before the Regulation entered into force.[903]

The FE must have assets equivalent to at least EUR 25.000[904] and its liability is limited to its assets.[905] It is remarkable that the Proposal only includes a provision on the minimum assets, but does not include provisions to prevent that an FE only hoards funds using tax incentives. It seems that this part of the Proposal was drawn up from a legal point of view only (protection of creditors and donors) and not from a tax point of view as well (prevention of abuse of tax incentives). According to S. Hemels, this part of the Proposal should be amended. Similarly, it is an omission that the Proposal does not include a provision on the remuneration of the governing board. 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[906].

The FE may engage in trading or economic activities provided that any profit is exclusively used in pursuance of its public benefit purpose(s).[907] 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.[908]

An FE may be formed from scratch by a testamentary disposition of a natural person, a notarial deed or written declaration of a natural and/or legal person in accordance with the national law. Furthermore, it may be formed by a merger or conversion of public benefit purpose entities legally established in a Member State.[909] From the definitions in article 2 of the Proposal, it becomes clear that such entity is not necessarily a foundation itself, but may also be a public benefit purpose corporate body without membership. The FE must be set up for an indefinite period of time or a specific period of time of not less than 2 years.[910] The testamentary disposition, notarial deed or written declaration must at least express the intention to establish and to donate to the FE, determine the FE's initial assets and determine the public benefit purpose of the FE.[911] [912]

The Proposal provides regulations for the composition of the governing board, the nomination of managing directors, the optional creation of a supervisory board, conflicts of interest and representation towards third parties.[913] Within 6 months from the end of the financial year, the FE must draw- up and forward annual accounts and an annual activity

[899] Art. 6 FE Proposal
[900] Art. 10 FE Proposal
[901] Art. 21 FE Proposal
[902] Art. 25 FE Proposal
[903] Art. 25 FE Proposal
[904] Art. 7 FE Proposal
[905] Art. 8 FE Proposal
[906] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174
[907] Art. 11 FE Proposal
[908] Ibid.
[909] Art. 12 FE Proposal.
[910] Ibid.
[911] Art. 13 FE Proposal.
[912] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174
[913] Arts. 27-33 FE Proposal

report to the national registry and the supervisory authority.[914] Six months is a short term as compared to, for example, the term in England, which is currently 10 months.[915] Furthermore, unlike, for example, the English Charity Commission,[916] the Regulation does not make any difference as regards the disclosure requirements for large and small charities: the requirements are the same for every FE. The reason might be that the European Commission expects that only large charities will apply for the FE status. The documents must be disclosed in accordance with the applicable national law in such a way that it is easily accessible to the public.[917] The annual activity report must contain a least information on the activities of the FE, a description of the way the public benefit purposes have been promoted during the financial year and a list of the grants distributed, taking into account the right of privacy of the beneficiaries. The European Commission does not give any guidance on how and to what extent the right of privacy of beneficiaries should be taken into account. This creates legal uncertainty[918].

Furthermore, the proposal includes provisions for the involvement of employees and volunteers,[919].

The proposal requires that the statutes of the FE are in writing, are subject to the formal requirements of the applicable national law and include at least:[920]

(a) the names of the founders;

(b) the name of the FE;

(c) the address of the registered office;

(d) a description of its public benefit purposes;

(e) the assets at the time of formation;

(f) the financial year of the FE;

(g) the number of members of the governing board;

(h) rules on the appointment and dismissal of the governing board;

(i) the bodies of the FE other than the governing board and their functions, where applicable;

(j) the procedure for amending the statutes;

(k) the specified period of time the FE shall exist for if it is not established for an indefinite period of time;

(l) the distribution of net assets after winding up; and

(m) the date when the statutes were adopted.

The purpose of the FE may only be changed if the current purpose has been achieved or where this has clearly ceased to provide a suitable and effective method of using the FE's assets. A change in purpose must be consistent with the will of the founder and adopted by unanimity by the governing board and must be submitted to the supervisory authority for approval.[921]

An FE may only be created for the purposes mentioned in the exhaustive list included in article 5(2):

(a) arts, culture or historical preservation;

(b) environmental protection;

(c) civil or human rights;

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[914] Art. 34 FE Proposal

[915] *Public benefit: reporting (PB3)* / Guidance /Charity Commission for England and Wales. / URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/588307/PB3_Reporting.pdf

[916] Ibid.

[917] Arts. 4 and 34(5) FE Proposal

[918] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[919] Arts. 38-39 FE Proposal

[920] Art. 19 FE Proposal

[921] Art. 20 FE Proposal

(d) elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination;

(e) social welfare, including prevention or relief of poverty;

(f) humanitarian or disaster relief;

(g) development aid and development cooperation;

(h) assistance to refugees or immigrants;

(i) protection of, and support for, children, youth or elderly;

(j) assistance to, or protection of, people with disabilities;

(k) protection of animals;

(l) science, research and innovation;

(m) education and training;

(n) European and international understanding;

(o) health, well-being and medical care;

(p) consumer protection;

(q)assistance to, or protection of vulnerable and disadvantaged persons;

(r) amateur sports; and

(s) infrastructure support for public benefit purpose organizations.

With regard to the list of purposes, some interesting details can be noted[922]:

Firstly, it is interestingly that the European Commission proposes an exhaustive list of public benefit activities. Member States differ in this respect. For example, Poland and Spain[923] have an open list with examples of public benefit activities. In other countries, such as Hungary[924] and the Netherlands,[925] public benefit activities are included in an exhaustive list. The European Foundation Centre proposed an open list by allowing for other purposes deemed to be of public benefit in order to allow the list to be amended in the light of social and other changes. However, it was not clear who should have the power to qualify such activity to be for the public benefit: the Member States (unanimously?), the ECJ or national courts? If me Member States would have to decide on every charity with activities outside the list, this would be highly impractical. The ECJ might be a better option. However, the Court already has a work overload. Furthermore, die question whether an activity is for the public benefit is not so much a juridical question fit for the Court, but rather a political question that should be answered in the political arena. These problems might be the reason that the Commission decided to include an exhaustive list.

Secondly, as noted by S.Hemels, religion, philosophy and spirituality are not included in the exhaustive list. This is remarkable as religion is regarded a public benefit in all EU Member States. Furthermore, the draft regulation does recognise human rights, which usually include freedom of religion and elimination of discrimination based on religion as public benefit purposes, but does not regard religion itself as a public benefit. The explanatory memorandum does not say why religion was excluded. One wonders why this purpose that is acknowledged in all Member States as being for the public benefit is excluded, whereas purposes which are not regarded a public benefit in all Member States, such as amateur sports (this is not regarded a public benefit in the Netherlands), are included[926].

Finally, it seems strange that the European Commission does not give any guidance on

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[922] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[923] National reports of Poland and Spain / (Poland: Ch. 19, sec. 19.1.2., p.414) (Spain: Ch. 22, sec. 22.2.1.1.1, p.515) in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p.

[924] National report of Hungary / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.339

[925] National report of Netherlands / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.376

[926] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

the interpretation of these listed public benefit purposes. It merely states: "An exhaustive list of the public benefit purposes accepted under civil and tax laws in most Member States is provided for reasons of legal certainty". However, by not giving guidance on the interpretation of the categories, the Commission creates uncertainty, both for charities and their donors and for tax authorities and supervisory authorities. More in general, the explanation of the Commission is rather meagre. This is made even worse by the fact that the paragraph under the title "Detailed Explanation of the Proposal" is only two pages and therefore at its best a broad outline of the Proposal. Given the large impact of the Proposal on the tax incentives Member States will have to provide to foreign FEs, a more detailed explanation is required[927].

Each Member State must designate a registry for the purposes of the registration of FEs.[928] This registry is responsible for storing information about registered FEs.[929] Every year, before 31 March, it must notify the European Commission of the name, address of the registered office, and sector of activity of the FE registered in, and removed from, the registry in the preceding calendar year, as well as the total number of the registered FEs at 31 December of the preceding year.[930]

Applications for registration as an FE must be accompanied by several documents and statements. However, Member States may not require any other documents or particulars than those listed in the Proposal:[931]

a) the name of the FE and the address of its intended registered office in the EU;

b) the founding documents;

c) a signed statement of the assets to be set aside for the purposes of the FE or other proof of the payment of consideration in cash or of the provision of consideration in kind, and details thereof;

d) the statutes of the FE;

e) the names and addresses, and any other information necessary, in accordance with the applicable national law, to identify

(i) all members of the governing board, and their alternates, if any,

(ii) any other person who is authorised to represent the FE in dealings with third parties and in legal proceedings,

(iii) the auditor(s) of the FE;

f) whether the persons in points (i) and (ii) of point (e) represent the FE individually or jointly;

g) the names, purposes and addresses of founding organisations where these are legal entities, or similar relevant information as regards public bodies;

h) the names and addresses of offices of the FE, if any and the information necessary to identify the competent registry and the number of entry;

i and j) some extra requirements for FEs which were formed as a result of a merger or a conversion;

k) a certificate from the criminal records office and a declaration of the members of the governing board that they have not been disqualified from serving as a board member.

The application must be filed in the language required by the applicable national law.[932] The registry or, where applicable, other competent authority must check the conformity of the documents and particulars with the requirements of the Regulation and the applicable national law and whether the applicant complies with the requirements of the Regulation. The registry must register a compliant FE within 12 weeks from the date of

[927] Ibid.
[928] An. 22 FE Proposal
[929] Art. 22(2) FE Proposal
[930] Art. 22(3) FE Proposal
[931] Art. 23 FE Proposal
[932] Ibid.

application. No further authorization by Member States is required after registration. The decision of the registry together with the information referred to in points (a) and (d) to (h) above must be disclosed. The Regulation does not seem to provide for the possibility of an appeal against the decision of the registry or competent authority. This is an important drawback of the Regulation.

The FE must notify the registry of changes in the documents mentioned above. After every amendment to the statutes, the FE must submit the complete text of the statutes to the registry.[933] [934]

Each Member State must designate a supervisory authority to supervise FEs registered in that Member State.[935] The supervisory authority must ensure that the governing board acts in accordance with the statutes of the FE, the Regulation and the applicable national law. It has the power to approve a change in purpose and the winding up of FEs. Furthermore, it must have at least the following powers:[936]

a) Where the supervisory authority has reasonable grounds to believe that the governing board is not acting in accordance with the statutes of the FE, the Regulation or the applicable national law, it may inquire into the affairs of that FE and, for that purpose, require the directors and employees of the FE as well as its auditor(s) to make available all necessary information and evidence.

b) Where there is evidence of financial impropriety, serious mismanagement or abuse, the supervisory authority may appoint an independent expert to inquire into the affairs of the FE at the expense of the FE.

c) 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, the supervisory board may issue warnings to the governing board and may order the governing board to comply with the statutes of the FE, the Regulation and the applicable national law.

d) 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.

e) 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.

However, the supervisory authority does not have the power to act in the administration of the FE. The supervisory' bodies must cooperate with each other and provide each other with all relevant information in the event of infringements or suspected infringements by the FE of its statutes, the Regulation or the applicable national law.[937] Furthermore, on request of the supervisory authority of a Member State where the FE carries out its activities, the supervisory authority of the Member State where it has its registered office must investigate infringements by that FE and inform the other supervisory authority of its conclusions and actions taken.[938] It is important to note that the Member State where the FE carries out its activities does not have the right to investigate the FE itself. The Regulation has made a clear choice for supervision on a home state basis.

The supervisory authority of the Member State where the FE has its registered office must inform the tax authorities of that Member State as soon as it starts an inquiry into suspected irregularities regarding the acting of the FE in accordance with the statutes of the FE, the Regulation or the applicable national law or when it appoints an independent expert.[939] Furthermore, it must inform the authorities of the progress and outcome of such

[933] Art. 24 FE Proposal
[934] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174
[935] Art. 45 FE Proposal
[936] Art. 46 FE Proposal
[937] Art. 47 FE Proposal
[938] Ibid.
[939] Art. 48 FE Proposal

inquiries as well as about any warnings issued or sanctions imposed. The supervisory authority of the Member State where the FE has its registered office, must, upon request of the tax authority of any other Member State, make available any documents or information concerning the FE.

It seems, however, that a tax authority of a Member State where the FE does not perform any activity does not have a right to request an investigation, not even through the supervisory authority of the Member State of that tax authority. This would mean that if a Austria resident would spontaneously donate to an FE registered in Malta with activities in Cyprus, Austria would not have any means to make sure that the gift is justly tax deductible. In S.Hemels' view, this would be very undesirable and should be amended as it would open up numerous ways for abuse of the gift deduction in Member States.

For Member States where supervisory body already has similar powers it will be easy to comply with these requirements. For other Member States these conditions require the setting up of a new supervisory body with new powers. Furthermore, it is not clear from the Proposal whether the tax authorities are allowed to be the supervisory body. From the explanatory Memorandum, it seems to follow that the European Commission presupposes a supervision body that is separate from the tax authorities. If this is correct, the Proposal may lead to additional costs for some Member States to set up and maintain this new supervisory body. For such Member States therefore the Proposal might be less efficient[940].

Member States must provide for rules on effective, proportionate and dissuasive penalties applicable to infringements of the provisions of the Regulation.[941] However, the Proposal does not specify what these penalties must imply. This means that Member States are free to decide what kind of penalties they will introduce and how these will be enforced. Member States must notify these penalties and changes therein to the European Commission, but this does not guarantee that all Member States will impose similar penalties in the same way. For example, if 30,000 wealthy Belgian residents all form a FE in Lithuania to claim Belgium tax relief for gifts to those FEs, Lithuania will probably not have the means to supervise and penalize those FEs. Belgium might have the means to supervise these FEs, but Belgium is not allowed to supervise or penalize these Latvian FEs, even though these are primarily used to reduce the Belgium income tax burden. It is difficult to understand why the Proposal does not address these rather obvious risks of abuse.

Provisions on tax treatment

Unlike the SE and the SCE Regulation, the Proposal for the FE Regulation includes a chapter on the tax treatment of the FE, its donors and beneficiaries.[942] The Regulation requires the Member States to regard an FE as equivalent to resident charities. This applies both to the Member State of registration and the Member State where the FE performs its activities: both must give the FE the same tax treatment as resident charities. However, the equivalency principle does not apply to all taxes. As regards the tax treatment of the FE itself, it applies to income and capital gains taxes, gift and inheritance taxes, property and land taxes, transfer taxes, registration taxes, stamp duties and similar taxes.[943] Therefore, not all taxes are covered. For example, the Dutch energy tax provides for a partial refund of energy tax for charities registered in the Netherlands.[944] It seems that the Regulation does not oblige the Netherlands to grant this refund to the FE.

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[940] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[941] Art. 53 FE Proposal

[942] Arts. 49-51 FE Proposal

[943] Art. 49 FE Proposal

[944] National report of Netherlands / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., p.376

The equivalency principle applies to natural and legal persons donating to an FE within or across borders as well.[945] With respect to income taxes, gift taxes, transfer taxes, registration taxes, stamp duties and similar taxes, the donors of an FE must be subject to the same tax treatment that is applicable to donations made to charities established in the Member State where the donor is resident for tax purposes. The FE receiving the donation must be regarded as equivalent to charities established pursuant to the law of the Member State where the donor is resident for tax purposes.

Lastly, the beneficiaries of an FE must be treated as if the grants or other benefits received were given by a charity established in the Member State in which they are resident for tax purposes.

Effectiveness of resolving the landlock problem by creating of unified European legal form should be evaluated from the NPOs' perspective and from the perspective of the Member States. From the point of view of the NPOs, the Proposal for the FE Regulation is quite effective solution. In contrast to the host country control approach with its weaknesses, the Proposal provides for application of the home country control, which is extremely beneficial for NPOs operating at cross-border level. The requirements for FEs are harmonized in the Regulation, but supervision of the FE is the responsibility of the home country. The Member States must give an FE and donations and legacies to the FE the same tax treatment as resident charities and donations and legacies to such resident charities which is a home-country solution as well. Member States must, in fact, mutually recognize each other's supervisory authorities.

From this perspective the solution is effective in solving the tax issues for cross-border charitable giving to and fundraising of charities taking the legal form of an FE. The charities of FE form will only have to meet the single set of requirements for the FE instead of the different requirements of the 28 Member States. Furthermore, they will only have to deal with one supervisory authority instead of with 28 supervisory authorities. The FE and their donors will only have to deal with the tax authority of their home country and the donors will be granted the same tax incentives irrespective of whether they donate to a resident charity or an FE resident in another Member State.

Meanwhile for such charities that receive subsidies of governments and private bodies it is also important that governments and private bodies are willing to grant those subsidies and grants to charities with the legal form of the FE. Furthermore, this legal form has to be trusted and accepted by the general public in order to make the fundraising of the FE successful. The Proposal does not address these issues. A solution for those charities might be a dual structure with an FE for donations from other Member States and a legal entity of the home country for subsidy purposes. However, according to S. Hemels, this is only a next best solution from an efficiency point of view[946].

Furthermore, the Regulation doesn't give a solution the problems related to cross-border fundraising for charities with another legal status, other than the FE. Those charities will have to use the host-country control solution of the ECJ, which means that they will have to meet the requirements and obligations of the supervisory authority of every Member State in which they want to attract funds. This is especially the case for charities with a religious purpose, as these cannot qualify for the FE status. For smaller charities that, for example, are located close to a border and only operate in the two Member States sharing that border or that only receive cross-border donations on an incidental basis, the FE might be too much hassle compared with the local charity regulations. For charities, full mutual recognition (full home-country control) would be the most efficient solution. However, this solution does not seem feasible, at least not in the foreseeable future.

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[945] Art. 50 FE Proposal.

[946] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

From the point of view of the Member States, the Proposal is deficient in several respects. First of all, the Member States will have to come to an agreement on the requirements for the FE, which might differ from their own requirements. As the Proposal does not include provisions on the maximum amount of assets or the minimum amount of expenditures, the maximum remuneration of board members and the proportion of operation costs to charitable spending, the Proposal leaves ample room for abuse of tax incentives. The transparency requirements of the Proposal are not a solution for this problem. Transparency might help to discourage boards of charities that depend of donations of the broader public to abuse the European Foundation, but the biggest threat of abuse are not such charities. Instead, charities that are used by private persons and which do not depend on the broader public might be tempted to make abuse of the lenient requirements of the Proposal. For such charities transparency is insufficient to prevent abuse, for which reason clear requirements are needed. Second, the proposal would further limit the discretion of EU Member States in defining (and especially narrowing down the definition of) "public benefit purpose" (Article 5), as any organization would have two options available to it: either the definition developed by national laws, or its EU alternative[947].

But the Proposal has an even greater disadvantage, which further weakens the possibilities for control exercised by tax authorities over bodies established elsewhere in the EU[948]. According to the Proposal, the bodies with the status of a European Foundation would rely upon the principle of "mutual recognition" rather than "equal treatment" alone[949]. In other words, the Proposal means that compared to the current host-country control solution of the ECJ, the Member States have to give up their supervisory authority over charities in other Member States. The Member States will have to trust each other's supervisory authorities, a kind of limited mutual recognition. They will have to allow' tax incentives for charities that are not under their own control. 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.

Furthermore, the Proposal might lead to differences between FEs in Member States that take the supervision very serious and FEs resident in a Member State for which supervision of FEs is not a priority.

So, one can understand the objections of EU Member States to having to grant tax relief for donations to foreign FEs without having the power to supervise these FEs.

As for the unified tax regime, the inclusion of the tax treatment in the Proposal makes the FE Regulation very different from the SE and SCE Regulation and less realizable. On the one hand it is necessary to provide for a solution for cross-border charitable fundraising. An FE Regulation that does 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 encroaching on the Member States' tax sovereignty will make it even more difficult to obtain agreement of all Member States on the Proposal and therefore has a negative

[947] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.
[948] Ibid.
[949] Ibid.

effect on the feasibility of this solution[950]. This is what happened in reality. Although the initial Proposal could have provided a partial solution to the inapplicability of tax incentives for cross-border gifts, agreement between Member States proved difficult to obtain[951]. By November 2013, the tax provision was excluded in the discussion of the Proposal.[952] On 16 December 2014 the new European Commission put the EFS on the list of 80 proposals that the Juncker European Commission proposes to withdraw from the EU legislative agenda. The reason to include the FE regulation in this list was that no progress was made in the European Council. Since unanimity is required, the new European Commission concluded that there are no prospects that an agreement can be reached.[953] [954] In March 2015 it was withdrawn[955].

Thus, the analysis showed that the use of the Court's case law, which amounts to establishing a general host country control for pan-European charities, currently remains as the most proven and the often used solution. According to host country control principle, foreign charities that meet the requirements of the other Member States can benefit from the tax incentives of those Member States. From the point of view of charities operating on a pan-European scale, this is not a very efficient way to remove barriers to cross-border fundraising. Charities have to register in every Member State in which they want to raise funds and have to meet all the different (and sometimes conflicting) requirements of 28 different tax systems.[956]

In this respect, the Commission's Proposal on the statute of the European Foundation, which appears to favor a system of home-country control, could constitute a big step forward towards a unified European area of charitable giving and spending[957].

The FE provides for a charity that will be mutually recognized in all Member States and will be supervised by the home country, but which has to meet the requirements of the Regulation that are the same in every Member State. This combination of home-country control with harmonized requirements provides for a full and effective solution for all tax issues related to cross-border charitable giving and fundraising for charities that take the form of the FE.

If Member States adopt the FE Regulation and are willing to trust each ether's supervision authorities for supervision of the FE, this might be a fast step towards trusting each other on supervision of and requirements for charities in general. Furthermore, the FE Regulation might also inspire Member States to converge their charity requirements. The FE might then get the important function of opening the way towards full mutual recogni-

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[950] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[951] Buijze, R. *Tax incentives crossing borders* / in Hemels S., Kazuko G. (eds.) Tax Incentives for the Creative Industries / Springer Science + Business Media Singapore. – 2017. – 245 p., p.85-104

[952] Press release 6653/14 *Competitiveness (Internal Market, Industry, Research and Space)* Brussels, 20 and 21 February 2014 / URL: http://www.parliament.bg/pub/ECD/147582ST06653.EN14.PDF

[953] European Commission 16 December 2014 COM(2014) 910 final, Annex 2, *Annex to the Commission communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 A New Start,* p. 12

[954] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[955] *Withdrawal of Commission Proposals* (2015/C80/08) // Official Journal of the European Union, C 80/17, 07.03.2015

[956] Hemels, S. *Are we in need of a European Charity? How to remove fiscal barriers to cross-border charitable giving in Europe* // Intertax. – 2009. Vol. 8-9, pp. 424-434, p. 428.

[957] Traversa, E. *Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp.107-142

tion of charities within the European Union, which would be the most efficient solution to remove all ox barriers to cross-border charitable giving and fundraising[958].

Certainly, the FE is just a partial solution for this efficiency problem. For charities that do not take the form of an FE, for example, because they are too small or only occasionally receive gifts or investment income from other Member States or because they do not meet the public benefit requirements of the Regulation, the FE does not remove the tax barriers to cross-border giving and fundraising. Those charities will still have to rely on the costly and cumbersome host country control solution of the ECJ.

That's not the only inherent defect of the Proposal. By introducing the home country control principle, the Proposal also limits the supervisory functions of national tax authorities over bodies established in the other EU countries and forces Member States to rely on each other's supervisory authorities on the "mutual recognition" principle[959]. Giving tax benefits without being able to supervise the charity is a big step for Member States. It might be too big, given the fear of abuse. Especially Member States with wealthy citizens and strict supervision of resident charities will be worried that their citizens will try to reduce their taxable income by claiming tax deductions for gifts to FEs established in countries with a week supervisory system[960].

It is obvious that the European Community for a variety of objective reasons is not yet ready for such "mutual recognition", especially in matters of taxation. But we agree with S. Hemels, that observed that "the tax provisions are crucial for the FE to have any success. An FE without a paragraph on tax treatment would not have an added value"[961].

Whether the FE will be a step forward in solving the tax issues for cross-border charitable giving and fundraising is therefore now mainly a question of trust within the European Union[962]. Therefore one can agree with the opinion of some researchers [963], that several contentious features of this Proposal made the prospects of its adoption highly uncertain.[964] The Member States' mistrust in each other's supervisory authorities, the current economic situation, the reports on the inability, or unwillingness, of the tax authorities of some Member States to collect taxes, and the debate on abuse of tax incentives in relation to cross-border charitable giving in some Member States imply that expectations on the adoption of the Proposal must not be set too high[965].

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[958] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[959] Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[960] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

[961] Ibid.

[962] Ibid.

[963] See, for example, Yevgenyeva, A. *The Taxation of Non-profit Organizations after Stauffer*. / WP 14/29 (Working paper series). – Oxford University Centre for Business Taxation. – 2014. – 50 p.

[964] Note that the proposal was based on Art. 352 TFEU, which requires unanimous approval by the Council and the consent of the European Parliament.

[965] Hemels, S. *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross-Border Charitable Giving and Fundraising?* / in Frans Vanistendael (ed.) Taxation of Charities / EATLP International Tax Series / IBFD. – 2015. – Vol. 11. – 638 p., pp. 143-174

CHAPTER 5. TAX REGIMES FOR NONPROFIT ORGANIZATIONS IN EAEU COUNTRIES: COMPARATIVE ANALYSIS[966]

5.1 Public benefit status of NPOs in legislations of the EAEU countries: the features and tax consequences

5.1.1 Armenia

The status of non-profit organizations in the Republic of Armenia is regulated by the Civil Code and a number of specialized laws.

The legislation of the Republic of Armenia[967] defines two basic legal forms of NPOs: public organizations and funds. The special laws governing the activities of the above-mentioned NPOs are the Law "On Public Organizations" and the Law "On Foundations".

According to the Civil Code of the Republic of Armenia, the category of non-profit organizations includes:

- public associations;
- funds;
- groups of legal entities[968].

In addition to the forms of NPOs listed in the Civil Code, the legislation of the Republic of Armenia[969] provides for the existence of so-called "state non-profit organizations". Due to their specific nature, the state non-profit organizations, like cooperatives, are excluded from the scope of this study.

In addition to the organizational and legal forms of NPOs, Armenian legislation through separate legal acts regulates some types of NPOs. Thus, the Law "On the Basics of Cultural Legislation" gives definition of "non-profit cultural organizations". A non-profit cultural organization is an organization the main goal of which is the implementation of cultural activities[970]. A non-profit cultural organization can also carry out entrepreneurial activities that are consistent with the purposes of its creation[971].

And, finally, the RA Law "On Charity"[972] establishes the category of "charitable organizations", defined as "non-profit organizations conducting charitable activities". Charitable activity is the provision of a voluntary, unselfish, not prohibited by law (gratuitous or on preferential terms) material and spiritual assistance to individuals and non-profit organizations for charitable purposes (Article 3). According to article 11 of the Law, "charitable organizations are created in the form of public associations, foundations and in other forms provided by the Law". The law also establishes that the government bodies and local self-government bodies can not be founders of a charitable organization.

Armenia takes a unique among the EAEU countries approach to define "public benefit" or "charitable" status[973]. The Law "On Charity" only defines a term "charitable organizations", not providing any procedures of registration, certification, or any other official procedures of recognition of the charity status of the organization. Therefore, charitable organizations do not obtain tax benefits automatically.

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[966] All legislation mentioned in chapter 5, was analyzed during 2017 and earlier, therefore an analysis does not cover recent changes in the legislations of EAEU countries. In particular, this concerns the new Tax Codes of Armenia and Kazakhstan, which entered into force on January 1, 2018.

[967] The Law of the Republic of Armenia AL-268 dated December 4, 2001 "On Public Organization" and the Law of the Republic of Armenia AL-516 dated December 26, 2002 "On Foundations"

[968] The Civil Code of the Republic of Armenia dated July 28, 1998 AL-239 (Art. 122-127)

[969] The Law of the Republic of Armenia AL-248 dated October 23, 2001 "On non-commercial state organizations"

[970] Art. 6 of the Law of the Republic of Armenia AL-465 dated December 18, 2002 "On the Basics of Cultural Legislation"

[971] Ibid., Art. 26

[972] The Law of the Republic of Armenia AL-424 dated November 8, 2002, "On Charity"

[973] Stepanyan, T. *Armenian Governmental Commission Regulating Charitable Programs* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 8. – Issue 2

Although charitable organizations in Armenia have more benefits than other NPOs, these benefits are non-tax. The main incentives to seek charitable qualification of programs include (1) prestige (that is, the award of honorable titles); (2) benefits on taxes, duties, and obligatory payments; and (3) the receipt of material and technical assistance from the government. In addition, charitable organizations can be provided with material, technical and financial assistance (for example, full or partial exemption from payment for services rendered by state and municipal organizations, rent for use of state and municipal property)[974].

According to Armenian legislation, preferences for taxes, duties, binding payments (mainly VAT exemption) are submitted not to charitable organizations as such, but to projects and programs qualified as charitable[975]. The receipt of tax benefits is the main stimulus for an organization to seek charitable status, but even having received such a status, the organization can obtain tax benefits only within the framework of the qualified project[976]. Organizations can qualify as charitable one, several or all of their programs.

The "charitable" status, in accordance with the procedure established by law, is awarded by a special authorized body - the Armenian Governmental Commission Regulating Charitable Programs. The main objective of the Armenian Governmental Commission is to coordinate charity programs as well as to monitor the activities of charitable organizations in Armenia[977].

The Commission dates back 25 years[978]. Its existence in Armenia is due to historical reasons. In 1991 Armenia suffered from harsh socioeconomic conditions during the slow transition from a planned Soviet-style economy to a market-based economy. The situation was especially severe due to the tragic earthquake in 1988, which, according to official statistics, claimed the lives of 25,000 people (more than 100,000, according to unofficial sources) and devastated a number of cities, towns, and villages. Following the earthquake, significant streams of humanitarian aid flowed into Armenia, and numerous charitable and humanitarian international organizations began to operate actively in the country. At the same time, many local humanitarian organizations started their activities to cooperate with international organizations in distributing foreign assistance[979]. With the increased volume of humanitarian assistance, the Armenian government became concerned over the perceived duplication of projects, the concentration of humanitarian aid programs in the same locations, and fraud and abuse. To help ensure that humanitarian aid was effectively managed, the Armenian government created the RA Governmental Central Commission on Humanitarian Aid. The Commission was established to monitor the receipt and distribution of all humanitarian assistance entering Armenia.

The activities of the Commission are regulated by a number of RA legal acts, including the Law "On Charity", the Law "On State Duties", customs and tax legislation, as well as Governmental Decree N 66 of 2003 "On Charitable Programs"[980]. As indicated by its official name, the Commission is attached to the RA Government and receives its financing from the state budget.

The primary function of the Commission is qualification of programs as charitable. Only non-profit organizations and non-profit groups of legal entities alone can qualify their

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[974] Article 16 of the Law of the Republic of Armenia AL-424 dated November 8, 2002 "On Charity"
[975] Ibid.
[976] Stepanyan, T. *Armenian Governmental Commission Regulating Charitable Programs* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 8. – Issue 2
[977] Article 18-19 of the Law of the Republic of Armenia AL-424 dated November 8, 2002 "On Charity"
[978] The Commission was created on December 31, 1991, by a decree of the Government of the Republic of Armenia.
[979] Stepanyan, T. *Armenian Governmental Commission Regulating Charitable Programs* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 8. – Issue 2
[980] It is remarkable that decisions similar to RA Governmental Decree N66 of 2003 "On Charitable Programs" have been adopted on numerous occasions, all of them temporary. This leaves the impression that the Government is struggling to establish a system and creates uncertainty in the minds of those implementing charitable programs in Armenia.

programs as charitable and receive corresponding tax benefits[981].

However, charitable status is not available to, among others, any program that includes the provision of monetary or other support to political parties or commercial organizations (with the exception of public health organizations)[982]. Commercial organizations are free to carry out charitable activities, but they cannot have tax benefits. In order for a program to be qualified as charitable, an eligible organization must submit to the Commission an application with corresponding materials attached.

The law gives the Prime Minister authority to determine the composition of the Commission. Both the qualitative and quantitative composition of the Commission fully depends on the subjective opinion of the Prime Minister.

There are no qualifying requirements for the Commission members. In practice in recent years the Commission is composed of representatives of state bodies (the majority of the members), non-profit organizations (public organizations and foundations), and religious organizations. Decisions are made by a simple majority of votes of the members present in the session.

The law does not provide any safeguards against conflicts of interest. Indeed, Commission members are often appointed from organizations that implement charitable programs and enjoy corresponding tax and customs benefits, making them interested parties. As a rule, however, non-profit organizations constitute less than a third of the composition of the Commission, and therefore do not play a decisive role.

The Commission oversees the activities of organizations undertaking qualified charitable activities basing on their reports. In addition, the Commission may receive information on the implementation of a charitable program through other means, including a survey of the program's beneficiaries.

The Commission has no authority to directly influence an organization and to inspect it directly. The authority of the Comission is limited to petitioning authorized bodies – for example, tax authorities – to conduct an inspection.

The Commission may suspend or revoke the qualification of the project if the organization receives more than one written warning within a year or commits serious violations of law in implementing the charitable program. Suspension or revocation terminates the organization's tax benefits. Where the organization provided false information about its activities, the state benefits it has received (that is, taxes and other obligatory dues that have not been paid) can be subject to confiscation under RA legislation[983]. The charitable organization can appeal all of these actions in court.

Article 6 of the RA Law "On Charity" expressly provides as follows: "It is prohibited to put restrictions on the choice of goals and means of implementation of charity". Thus an organization is free to choose the goals and methods of implementation of its charitable programs. Furthermore, an organization can appeal any adverse decision of the Commission to the courts[984].

In general, the functioning of the Commission is quite effective - as noted above, the Commission has no right to directly influence NPOs or directly monitor its activities; the Commission includes representatives of NPOs; the actions of the Commission may be appealed by the NPO in court.

Nevertheless, it is indisputable that there are serious problems in the work of the Government Commission in Armenia:

- Being a governmental body, the Commission lacks independence from the govern-

[981] There are approximately 3,000 noncommercial organizations currently registered in Armenia. There is no official information, however, regarding the number of qualified charitable programs.
[982] RA Governmental Decree N66 of 2003 "On Charitable Programs"
[983] Article 19 of the Law of the Republic of Armenia AL-424 dated November 8, 2002 "On Charity"
[984] Stepanyan, T. *Armenian Governmental Commission Regulating Charitable Programs* // The International Journal of Not-for-Profit Law. – 2005. – Vol. 8. – Issue 2

ment. Its members are chosen without specifying any objective criteria of selection;

- The Armenian legislation does not provide for clear and objective criteria for qualifying the programs as a charitable. As a result, the Commission considers applications for charitable status on the basis of subjective judgments;

- Since the application process can be lengthy (despite strict limitations set in the law) and unpredictable (given the absence of clear criteria of selection), applicants are usuasly organizations that implement large-scale programs.

- The law does not provide for any guarantees against conflicts of interest. In conditions of unflagging competition for grants and tax benefits, participation in the Commission of interested NPOs can cause biased judgments and conflicts of interest.

5.1.2 Belarus

According to the Civil Code of the Republic of Belarus non-profit organizations shall be deemed organizations, not having the main purpose to receive the profit and not distributing profit received among the participants.

The non-profit organizations can be formed for achievement of social, nature protective, charitable, cultural, educational, scientific and managing purposes, for health care, development of physical culture and sport, satisfaction of spiritual and other non-material needs of the citizens, protection of the rights and legal interests of the citizens and legal entities, solving of disputes and conflicts, rendering legal assistance in accordance with the legislation, and for other purposes, aimed on achievement of the public well-being.

The non-profit organizations can be formed to meet the material needs of the citizens and legal persons, in cases provided by the Civil Code and other legislative acts.

Non-profit organizations may be created in the form of:

- consumer cooperatives,
- public or religious organizations (associations),
- institutions financed by the owners,
- charitable and other funds,
- Republic's State-social Associations,
- State Associations[985].

Public and other non-profit organizations, including institutions, may voluntarily create their groups of associations [986].

In the national legislation there is no single normative legal act regulating the establishment and operation of NPOs. Legal procedures of establishment and operation of NPOs depend on their forms are regulated by the following legislative acts:

- The Decree of the President of the Republic of Belarus of January 16, 2009 No. 1 “On State registration and liquidation (termination) of business entities”;

- The Decree of the President of the Republic of Belarus of July 1, 2005 No. 302 “On some measures to harmonize the activities of the funds”;

- The Law of the Republic of Belarus of October 4, 1992 “On public associations”;

- The Law of the Republic of Belarus of December 17, 1992 “On freedom of conscience and religious organizations”[987].

To determine funds and institutions the Civil Code establishes an open list of public benefit goals. A *fund* shall be deemed to be a non-profit organization not having membership, founded by citizens (a citizen) and(or) legal entity (a legal entity) on the basis of voluntary property contributions, and pursuing social, charitable, cultural, educational, sport-

[985] Art. 46 The Civil Code of the Republic of Belarus N 218-Z dated December 7, 1998 (as amended on January 5, 2016) http://etalonline.by/?type=text&regnum=HK9800218#load_text_none_1_

[986] Ibid., Art. 121

[987] Zhurakovskiy, V. *Legal regulation of charitable activities in the Republic of Belarus and abroad* (in Russian) / The international educational public association “ACT”. – 2014. – 80 p.

promoting, scientific and other public benefit purposes specified in the its charter[988]. An *institution* shall be deemed to be an organization created by the owner in order to perform management, social and cultural, or other functions of a non-profit character, and financed by the owner wholly or partially[989].

It should be noted that fulfillment of these goals by the organization (along with the fulfillment of other requirements) allows organisation to be considered as a non-profit organization, in particular, as a fund or an institution, but it does not automatically provide tax benefits. Running forward, we note that there are no other requirements for NPOs in relation to public benefit goals, as well as there are not other mentions of the public benefit (charitable) status of NPOs in the Belarusian legislation.

A peculiarity of the legislation of Belarus is the existence of *Republic's state-social associations* (non-profit organizations based on the membership which aim at the accomplishment of state-wide missions) and *State associations* (industrial, scientific and industrial or other association with participation of state legal entities, created on the decision of the President of the Republic of Belarus, Government of the Republic of Belarus, and, under their instruction (authorization) by other Republic state governance bodies, local government bodies and self-government bodies).[990].

Although, according to the Civil Code, these types of associations are non-profit, they cannot be called NPOs in the traditional sense, and therefore they do not fall within the scope of our research. Consumer cooperatives as well as public and religious organizations (associations) are also not of interest to our research, since they are mutual benefit organizations.

Despite existence of sufficient set of organizational and legal forms of NPOs, the legislation of Belarus as distinct from, for example, the Armenian legislation, does not provide definition of so-called "public benefit status" of NPOs. It also does not define "charitable" organizations, unlike the Armenian legislation. Accordingly, the government does not make the granting tax benefits dependable on the availability of this status.

Some restrictions on NPOs (like on other organizations) are imposed by certain legislative acts concerning the various types of financial assistance. One of them is the Decree of the President of the Republic of Belarus of 01.07.2005 No. 300 "On Granting and Using Gratuitous (Sponsorship) Assistance". The decree is a fundamental document in matters of providing charitable (sponsor) assistance to legal entities and individual entrepreneurs of the Belarus[991] [992]. The decree establishes a closed list of purposes to which assistance can be directed. It also requires mandatory identification of the types of goods, works and (or) services that can be purchased by the recipients of these funds[993].

Decree of the President of Belarus No. 460 dated October 22, 2003, "On international technical assistance provided to the Republic of Belarus" it also defines the purposes for which NPOs can use international technical assistance[994]. Permitted purposes include: supporting social and economic transformations; protecting the environment; overcoming the consequences of the catastrophe at the Chernobyl nuclear power plant; developing infrastructure by carrying out research, training and exchange of experts, graduate and under-

[988] Art. 118 of the Civil Code of the Republic of Belarus N 218-Z dated December 7, 1998 (as amended on January 5, 2016) http://etalonline.by/?type=text&regnum=HK9800218#load_text_none_1_

[989] Ibid., Art. 120

[990] Ibid., Art. 123

[991] The decree stipulates that only legal entities and individual entrepreneurs have the right to render free (sponsor) assistance. Individuals are not entitled to provide free (sponsored) assistance, their charitable activities are limited to donations regulated by a gift contract.

[992] Funk, Y. *Possibility of gratuitous transfer of property from one unitary enterprise to another unitary enterprise (as of March 27, 2009)* (in Russian) / Consultant Plus: Belarus [Electronic source]. – Minsk. – 2014

[993] Gurshtyn, D. *Is the society of Belarus ready for charity?* (in Russian) / URL: http://actngo.info/article/gotovo-li-obshchestvo-belarusi-k-blagotvoritelnosti

[994] International technical assistance is one of the types of assistance provided free of charge to the Republic of Belarus by international donors and channeled for purposes determined by law.

graduate students; transferring expertise and technology; providing financial resources, equipment and other goods (property) within the framework of approved projects of international technical assistance; and, organizing and/or carrying out seminars, conferences and other public forums.

Finally, *Decree of the President of Belarus No. 5 of August 31, 2015, "On foreign grants"*[995] also establishes a list of purposes for which foreign gratuitous aid can be used. These include:

- liquidation of consequences of emergency situations of natural and man-made character;
- promotion of historical and cultural legacy conservation,
- the development of a different kind of arts, the holding of cultural events, as well as the development and support of folk art, folk handicrafts (crafts);
- ensuring the enforcement of punishments, preventing offenses and promoting a law-abiding way of life;
- upgrading of facilities of state institutions, construction, repair (reconstruction) of social facilities;
- physical culture and sport promotion, children's and youth sports;
- conducting research, development, training, as well as implementing research programs;
- delivery of health and social care;
- environmental protection and resource conservation[996].

The implementation of the public benefit purposes contained in the above legislative acts does not in itself give the NPO anypublic benefit status and does not provide tax benefit. It only gives NPOs and other organizations the right to use these types of assistance in their activities. At the same time, in the tax legislation of Belarus, the listed types of assistance (gratuitous (sponsored) aid, international technical assistance, foreign gratuitous assistance) are exempt from some taxes.

Thus, it can be stated that while in some countries the carrying out public benefit activities gives NPOs a direct right to use some tax benefits, in Belarus the performance of certain public benefit activities entitles NPOs to use non-taxable financial resources.

5.1.3 Kyrgyzstan

The term "non-profit organization" is widely defined in the legislation of the Kyrgyz Republic. Civil, tax and non-profit legislation simultaneously determine this type of organization.

The basis of civil law regulation of the activities of non-profit organizations is the Civil Code of the Kyrgyz Republic of May 8, 1996 No. 15. In accordance with clause 1 of Article 85 of the Civil Code, non-profit organizations are "legal entities that do not have the making profit as the main purpose of their activities and do not distribute the profits among the participants".

The Law of the Kyrgyz Republic "On Non-Profit Organizations defines a "non-profit organization" as a voluntary, self-governing organization created by individuals and (or) legal entities on the basis of the commonality of their interests for the realization of spiritual or other non-material needs in the interests of their members and (or) the entire society, for which the making profit is not the main goal of activities, and which do not distribute profits among members, founders and officials[997].

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[995] The Decree regulates the procedure for the receipt and use by organizations and individuals of the Republic of Belarus of gratuitous assistance provided by foreign states, international organizations, foreign organizations and citizens, citizens of the Republic of Belarus permanently residing outside the Republic of Belarus, as well as stateless persons and anonymous donors.

[996] Para. 3 of the Decree of the President of Belarus N 5 dated August 31, 2015 "On foreign grants"

[997] The Law of the Kyrgyz Republic N111 dated October 15, 1999 "On Non-Commercial Organizations"

The Tax Code of the Republic of Kyrgyzstan for the tax purposes defines NPO as follows[998]: An "NPO" is an organization (1) registered in one of organizational and legal forms provided under the legislation on non-profit organizations and other legislation of the Kyrgyz Republic; and (2) that does not put the making profit as the primary purpose of its activities and does not distribute profits among its members, founders, or officers.

Thus, the Tax Code, firstly, repeats the economic characteristics of the NPOs given by civil legislation, and secondly, directly refers to it with regard to the possible organizational and legal forms of NPOs.

At the present time there are the 16 organizational and legal forms of NPO in the legislation of the Kyrgyzstan. In particular, public benefit non-profit organizations can be created in the form of public association; foundations; institution; union (association) of legal entities; jamaat (community organization); religious organization[999].

The organizational and legal form of an NPO is not in itself a basis for applying any specific tax regime or obtaining significant tax benefits. The legislation of Kyrgyzstan provides to NPO a possibility to receive the charitable status.

Charitable status is determined by the Law of the Kyrgyz Republic "On philanthropy and charitable activity". In accordance with article 5 of this Law, a charitable organization is a non-profit organization set up to implement the purposes provided by the Law by carrying out charitable activities in the interests of the society as a whole or of certain categories of persons.

The Tax Code also contains the definition of a charitable organization. In part 2 of article 153 of the Tax Code "charitable organization" is defined as follows: "charitable organization" is nonprofit organization that: а) is created and carrying out charitable activity in compliance with the legislation of the Kyrgyz Republic on non-profit organizations and charitable activity; б) does not participate neither in the activity on production and/or sale of excise goods, nor in gambling business ; в) does not participate in the support of political parties and election campaigns"[1000].

A "charitable organization" is not an independent organizational and legal form of non-profit organizations. It is just a status of non-governmental non-profit organizations, created in various forms and carrying out charitable activities.

NPO can acquire the charitable status immediately in the moment of its registration as well as in the course of its activities[1001]. In both of cases the procedure for registration of non-profit organizations is determined by the Law of the Kyrgyzstan "On the State Registration of Legal Entities, Branches (Representative Offices)" dated February 20, 2009 No. 57[1002]. It should be noted that this Law does not contain special rules for the registration of a charitable non-profit organizations. Charitable organizations and other NPOs are covered by the general regime of registration of legal entities. We can only assume that the organization that decided to receive charitable status in the course of its activities should make the necessary changes to its charter, which is subject to reregistration.

It is not coincidentally that the Tax Code for the tax purposes defines a "charitable organization". The presence of a charitable status directly affects the tax regime of NPOs. According to the Tax Code there are two regimes of NPO taxation: (1) regime set for all NPOs and (2) regime set for NPOs having a charitable status. For both types of NPOs, a favorable tax regime is established, but charitable NPOs additionally enjoy special tax breaks.

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[998] Article 153 (11) of the Tax Code of the Republic of Kyrgyzstan as of October 17, 2008 (with subsequent amendments as of August 12, 2016)

[999] Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.

[1000] Ibid.

[1001] Zhunusova, A. *Entrepreneurial activity of a non-profit organization in the Kyrgyz Republic* (in Russian) / – Bishkek, International Center of Not-for-profit Law. – 2012. – 18 p.

[1002] The Law of the Kyrgyz Republic N 57 dated February 20, 2009 "On the State Registration of Legal Entities, Branches (Representative Offices)"

In the case of ordinary NPOs, the provision of tax benefits is effected by the tax exemption of some types of income, turnover, deliveries that are of public benefit character. If an ordinary NPO makes a profit in the course of its activities, it is a taxpayer of the profit tax in the same regime as all other legal entities. The meaning of this approach is to not allow any organization established in the form of an NPO to be exempt from taxes. As long as its earnings, turnovers and deliveries are preferential it does not pay taxes. But when it is starting having objects of taxation, the taxes are paid on general grounds. This can happen at any stage of the activity, since any NPO has the right to conduct economic acrivities not prohibited by law and to receive income or make deliveries that are subject of taxation[1003].

Charitable organizations enjoy a much wider range of benefits. The tax regime for both ordinary NPOs and NPOs having a charitable status is discussed in more detail in paragraph 5.2.3 of our research. Briefly note that charitable organizations are exempt from (1) profit tax (for all kinds of incomes), (2) VAT, if the supplies are for charitable purposes, (3) sales tax. In addition, the tax legislation stimulates citizens and legal entities to make charitable donations in favor of charitable organizations[1004].

In compliance with the Tax Code, for obtaining the status of charitable organization NPO shall not be obliged to preliminarily refer to tax authorities and ask them reaffirmation of its right for tax benefits set for charitable organizations[1005].

At the same time, the charitable status obliges NPOs to meet more stringent requirements in comparison with the rest NPOs[1006]. These requirements are established by the Law of the Kyrgyz Republic "On philanthropy and charitable activity" from November 6 of 1999 N 119):

1) Non-state character. Firstly, only a non-governmental organization can become a charitable organization. The state, represented by its authorized bodies and officials, can not be a founder, participant or member of a charitable organization[1007].

2) Legal form of NPO. Secondly, only a non-profit organization can be a charitable organization (all forms of NPOs set by civil law, with exception of cooperatives).

3) Carrying out charitable activities. Thirdly, all charitable organizations should achieve their goals through the implementation of charitable activities. In Kyrgyzstan, the list of charitable activities includes[1008]:

- Social welfare and protection of citizens, including the improvement of economic conditions of indigent persons, social rehabilitation of unemployed, disabled and other persons, who due to their physical and (or) intellectual peculiarities, other circumstances are not independently able to enjoy their rights and lawful interests;
- Providing assistance to victims of natural disasters, ecological, production or other catastrophes, social, national, religious conflicts and forces displaced persons;
- Assistance in strengthening peace, friendship and harmony among nations, prevention of social, national, religious conflicts;
- Assistance in the activity in the sphere of education, science, culture, arts, enlightenment, spiritual development of personality;
- Assistance in protection of maternity, childhood;

[1003] *Non-profit law* (in Russian) / N. Idrisov (ed.) – B.:T. Kirland. – 2012. –243 p.
[1004] Ibid.
[1005] Previously, the existing Tax Code provided for the procedure for the preliminary recognition of an NPO by a charitable organization (certification procedure) by the tax authorities. Introduced from 2009, the Tax Code, in addition to introducing significant tax benefits for charitable organizations, also abolished the procedure for the preliminary recognition of an NPO by a charitable organization (certification procedure) by the tax authorities. Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.
[1006] Zhunusova, A. *Entrepreneurial activity of a non-profit organization in the Kyrgyz Republic* (in Russian) / – Bishkek, International Center of Not-for-profit Law. – 2012. – 18 p.
[1007] Article 11 of The Law of the Kyrgyz Republic N 119 dated November 6, 1999 "On philanthropy and charitable activity"
[1008] Ibid., Art. 1

- Assistance in the activity in the sphere of prevention and protection of health of citizens, as well as propaganda of healthy life style, improvement of moral and psychological condition of citizens;
- Assistance in the activity in the sphere of physical culture and mass sports;
- Environmental protection and protection of animals;
- Protection and proper maintenance of buildings, objects and territories, which have historical, religious or environmental meaning, and places of burial grounds.

The list of activities is exhaustive and can only be specified in by-law and local legal acts. Transfer of cash and other material means, providing assistance in other forms to commercial organizations, as well as support of political parties, movements, groups and campaigns are not considered as charitable activity.

4) A charitable organization must spend at least 98% of the funds received for charitable purposes (from all sources established by the legislator) in the period of a year from the moment of obtainment of the funds. This means that the cost of maintaining the employees of the NPO, renting its office, purchasing equipment and other necessary material resources should not exceed 2% of the funds received[1009].

By this requirement, the law sets stringent conditions for the functioning of NPOs having a charitable status. However, consequences of restrictions are mitigated by the spending funds with the framework of charitable programs[1010]. Using "charitable program" many NPO could overcome the barrier of "98% and 2%" and meet the requirements of the Law, as the Law does not set any conditions in relation to the content of charitable program. NPO has a right at its discretion to draw up charitable program and its budget. The Law also does not prescribe any conditions in relation to the number of charitable programs, which NPO can perform in the period of a year. A NPO also can edit the content of its charitable programs during the period of their implementation as many times as it is necessary[1011].

5.1.4 Kazakhstan

The Civil Code of the Republic of Kazakhstan (RK) defines a non-profit organization as "an organization that does not have profit making as its main objective and does not distribute the net income between participants". Since January 16, 2001 the Law of the Republic of Kazakhstan "On Non-profit Organizations" acts. It is a "framework" legal act that regulates the majority of organizational and legal forms and types of NPOs.

Additionally, special laws regulating specific legal organizational and forms and types of NPOs have been adopted in Kazakhstan[1012]. These laws grant to certain groups of NPOs special privilleges in the relevant spheres of activity or provide them with state support in various forms. In addition, several laws of Kazakhstan, regulating other spheres of civil-law relations, contain the special provisions on certain types of NPOs[1013].

[1009] *Non-profit law* (in Russian) / N. Idrisov (ed.) – B.:T. Kirland. – 2012. –243 p.

[1010] According to article 10 of the Law "Charitable program is a complex of activities, approved by the highest management body of charitable organization and directed at solving specific tasks, corresponding to charter goals of the given organization. Charitable program includes the budget of assumed inflows and planned expenses (including labor remuneration of persons, participating in implementation of charitable programs), establishes stages and terms of its realisation. So, the abovementioned limitation "98%-2%" does not apply for labor remuneration of persons, participating in the implementation of charitable programs. Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.

[1011] Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.

[1012] These include the Law dated October 11, 2011 "On religious activities and religious associations", the Law dated April 9, 1993 "On trade unions", the Law dated May 31, 1996 "On public associations", the Law dated July 15, 2002 "On Political parties", the Law dated April 16, 1997 "On Housing Relationships", the Law dated May 8, 2001 "On the Consumer Cooperative", the Law dated May 13, 2003 "On Joint Stock Companies", etc.

[1013] For example, the Law dated April 13, 2005 "On Social Protection of Persons with Disabilities in the Republic of Kazakhstan" regulates public associations of persons with disabilities, the Law dated July 7, 2004 "On State Youth Poli-

Under the civil legislation (in particular under the Law "On non-profit organizations"), an NPO may take many forms, including the form of institution, public association, public foundation, religious organization, association (group) of legal entities, consumer cooperative, non-profit joint-stock company, cooperative of the owners of apartments, notary chamber, auditing chamber, chamber of trade and commerce etc.[1014] All these forms of NPOs are non-state. Some types of NPOs, for example, public funds, can only be state-founded.

The Tax Code for tax purposes also defines NPOs. It states that the non-profit organizations are organizations registered in any form stipulated by civil legislation for NPOs, excepting joint stock companies, institutions and consumer cooperatives (apart from cooperatives of the owners of residential and business apartments). These forms *are not recognized as non-profit organizations for tax purposes* and a priori excluded from tax benefits.

However, it is not the only requerement the organizations must meet to obtain status of NPOs for tax purposes. The Tax Code sets additional and more stringent requirements. These requerements are similar but not equivalent to those set under civil legislation. They are as follows:

1) The organization must conduct activities of a public interest. This condition is not required under the civil legislation and not defined in more detail in the Tax Code;

2) The organization may not have as its purpose the pursuit of profit (whereas civil legislation requires that this only not to be the primary purpose);

3) NPO must not distribute any net income or property among its participants[1015].

Thus, not all NPOs which meet the civil law requerements pose simultaneously as NPOs for tax purposes. However, in current practice the tax authorities do not inquire as to compliance with these three conditions in deciding whether the organization qualifies as an NPO for tax purposes, and apply the non-profit tax regime formally, focusing instead solely on the legal form of the organization.

NPOs are granted limited tax benefits, including exemptions for (1) specific types of income obtained on a gratuitous basis; (2) specific types of passive (investment) income and (3) certain types of income from economic activities. These exemptions are discussed in more detail in section 5.2.4.

The concept of charitable organizations is also presented in Kazakh law. In 2015, the Law "On Charity" was adopted in Kazakhstan. The law regulates the legal and organizational basis of charity, the formation and use of endowments, the procedure for philanthropic, sponsorship and patronage activities in Kazakhstan.

In our opinion, the Law is rather general of nature and defines a charitable organization very broadly. In accordance to the Law, a charitable organization is a NPO created to carry out charitable activities in accordance with the legislation of the Republic of Kazakhstan and international treaties of the Republic of Kazakhstan[1016]. In determining the rights and obligations, the Law also refers to the Law "On Non-profit Organizations"[1017].

As for *tax regime for charitable organizations,* Article 10 directly refers to the Tax Code, stating "A philanthropist, who carries out charitable activities, may enjoy tax benefits provided by the tax legislation of the Republic of Kazakhstan. Article 14 of the Law lists the rights of a charitable organization to carry out entrepreneurial activities and repeats on many points the provisions of article 33 of the Law "On Non-proft Organizations". In particular, it also states that "income from entrepreneurial activities of a charita-

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cy" - youth organizations in the form of public associations, The Environmental Code of the Republic of Kazakhstan - public environmental associations.

[1014] Chapter 2 of the Law of the Republic of Kazakhstan N 142-II dated January 16, 2001 "On Non-profit Organizations" (as amended on 08.04.2016)

[1015] Art. 134 (1) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 26.07.2016)

[1016] Article 1 of the Law of the Republic of Kazakhstan N 402-V dated 16 November, 2015 "On Charity"

[1017] Ibid., Article 8

ble organization shall be taxed in accordance with the tax legislation of the Republic of Kazakhstan"[1018]. Article 17, directly regulating the status of a charitable organization, divides all organizations into international and national. The tax consequences of any status are not mentioned in the law.

Thus, it can be assumed that the status of a charitable organization in Kazakhstan is formal from the tax point of view, and its obtaining does not bring any tax benefits to NPOs.

The Tax Code provides for several special tax regimes to NPOs. These include, in particular, the tax regime of so-called "social-sphere organizations" and tax regime of "autonomous educational organizations".

Social-sphere organizations (SSOs). There are two categories of SSOs:

1 type: Organizations (regardless of legal form) deriving no less than 90 percent of their gross annual income from provision of services or conduct of activities in several fields, basically limited to healthcare, child care and education, science, sports, culture, preservation of objects of historical and cultural heritage, library services, social welfare of children, the elderly, and disabled persons[1019] (hereinafter, "exempt activities"); and

2 type: Organizations (also regardless of legal form) meeting the following criteria[1020]:

1) at least 51 percent of the employees of the organization must qualify as disabled; and

2) wages paid to the disabled employees must comprise no less than 51 percent of the organization's overall payroll (this number is further reduced to 35 percent for specialized organizations employing hearing-, speech-, or vision-impaired employees).

Both the organizations recognized non-profit as by the Tax Code as well as under only civil law (for example, institutions or joint-stock companies) there may be considered as SSOs of the 1st and 2nd types, if they carry out activities in the social sphere under the above mentioned requirements. There is no procedure for obtaining this status and appropriate tax regime. The application of this tax regime is declared in the CIT declaration submitted by NPO[1021]

A feature of the tax regime of SSOs is the complete exemption from corporate income tax for all kinds of incomes subject to certain conditions:

- 90 percent or more of the total annual income of the organization is received from exempt activities (listed in Article 135 of the Tax Code);
- not allowed manufacturing or sale of goods subject to excise tax or conducting activities subject to excise tax[1022];
- the SSO's entire income should be used solely for the performance of exempt activities and should not be distributed among the founders.

In case of breach of these conditions, a non-profit organization is not entitled to apply this tax regime[1023].

Autonomous educational organizations. One of the peculiarities of the taxation of NPOs in Kazakhstan is the presence of special type of non-profit organizations, defined in the law as "Autonomous educational organizations" (AEOs). AEOs are the non-profit or-

[1018] Ibid., Article 14
[1019] Ibid., Art. 135 (2)
[1020] Ibid., Art. 135 (3). The full rule reads as follows: "during the respective tax period, handicapped employees shall comprise no less than 51 percent of the overall number of workers, and the wages shall amount to no less than 51 percent of the overall wages. For specialized organizations employing hearing-, speech- or visionimpaired the latter figure is 35 percent".
[1021] *Legal status of non-commercial organizations in the Republic of Kazakhstan* (in Russian) / Sourcebook. – 6th edition, recreated and updated. / – Almaty, Publishing office "LEM". – 2014. – 432 p.
[1022] Art. 135 (4) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 26.07.2016)
[1023] Ibid., Article 135

ganizations having no membership, established by the Government of the Republic of Kazakhstan[1024].

AEOs are experimental "platforms", carrying out the developing, monitoring, research, analysis, testing, introduction and implementation of innovative programs in education and science[1025]. Due to their experimental nature, autonomous educational organizations have an almost unlimited credibility, which is reflected in a special favored legal and tax regime[1026].

Theoretically, any NPO may apply for the status of an AEO. However, the tax legislation (Article 135-1 of the Tax Code) restricts access to status of AEO, establishing requirements that are unfeasible for ordinary NPOs[1027]. Thus, in our opinion, it is impossible to consider this tax regime as one of those available for NPOs. Rather this regime is favourable for only several specific organizations. Nevertheless, in paragraph 4.2.4 we will briefly review the tax regime of autonomous education organizations in order to understand the general directions of the tax policy of the Kazakhstan with respect to the non-profit sector.

5.1.5 Russia

In accordance with the Civil Code of the Russian Federation a non-profit organization is an organization not having profit-making as the main objective of its activity and not distributing the received profit among the participants [1028].

Except the Civil Code, the legal nature of non-profit organizations in the Russian Federation is regulated by Federal Laws "On Non-profit Organisations"; "On Charitable Activities and charitable organizations", and by laws regulating certain legal forms of NPOs (for example, Federal law "On Public Associations").

Non-profit organizations may be created for achieving social, charitable, cultural, educational, scientific and managerial goals, for protecting the health of citizens, developing the physical culture and sports, satisfying the spiritual and other nonmaterial requirements of citizens, protecting the rights and legitimate interests of citizens and organizations, settling disputes and conflicts and also for any other purposes directed towards the achievement of public welfare[1029]. The activities of NPOs may be carried out in the interests of the whole society or of certain groups and categories of the population.

The Russian legislation contains a specification of 23 forms of non-profit organizations. The main organizational and legal forms are social and religious organizations, funds, non-profit partnerships, institutions, consumer cooperatives, associations (groups of associations) and autonomous non-profit organizations (that are non-profit organizations having no membership established for purpose of providing services in the field of education, health, culture, science, physical culture and sports, etc.)[1030].

[1024] Art. 1 of the Law of the Republic of Kazakhstan N 394-IV dated January 19, 2011 "On status of "Nazarbayev University", "Nazarbayev Intellectual Schools" and "Nazarbayev Fund"

[1025] Ibid., Article 4

[1026] For more information, see Stepanitskaya, O. *Taxation and the Educational Organization in the Republic of Kazakhstan* // in Proceedings of TIIM Joint international Conference 2015 "Management Knowledge and Learning". – 27-29 May 2015. – pp. 2193-2202

[1027] For example, 1) organization should be created at the initiative of the First President of the Republic of Kazakhstan - the Leader of the Nation (i.e. exclusively by the decision of the incumbent President of the country) – 1 type AEO; or 2) organization should be created by the Government of the Republic of Kazakhstan – 2, 3 and 6 types AEO or 3) 50 and more percent of voting shares of this joint stock company are owned by the Government of the Republic of Kazakhstan - 4 and 5 types AEO (Article 135-1 of the Tax Code).

[1028] Art.50(1) of the Civil Code of Russian Federation N 51-FZ dated November 30, 1994

[1029] Art. 2 of the Federal law of Russian Federation N 7-FZ dated January 12, 1996 "On non-profit organizations"

[1030] Sinelnikov-Murylev, S., Trunin, I., Goldin, M., Ilyasova, G., et al. *Problems of taxation of non-commercial organizations in Russia* (in Russian) / – Moscow: Transition economy institute. – 2007. – N 108. – 371 p.

According to Russian scientists[1031], the tax regime of NPOs in Russia is quite favorable (in more detail the tax regime of NPOs will be discussed in section 5.2.5). The question arises: is there any tax privileged status that allows some NPOs to receive tax benefits or tax benefits are applicable to all NPOs without exception?

Charitable organizations are defined in Russian law. The status of charitable organizations is regulated by the Federal Law "On Charitable Activities and Charitable Organizations". A charitable organization is not a legal form of organization. According to the law, the charitable organization shall be a non-government non-profit organization, set up to realize the charitable goals by way of performing the charitable activity in the interest of society as a whole or of the some categories of persons[1032].

Charitable activities shall be interpreted as voluntary activities of the citizens and of the legal entities involved in altruistic (unpaid or payable on privileged terms) transfers to citizens or to legal entities of property, including money, in altruistic works, services or other support[1033].

The purposes of charitable activity are defined in Article 2 of the Law. They consist of 20 items and, like in the EU countries, include the social support and protection of socially vulnerable groups of people; rendering assistance to the victims of ecological, industrial and other kinds of catastrophes and of social, national and religious conflicts; assistance in activities in the spheres of education, science and culture, of art; the prevention of diseases and in the health protection of citizens; protection of the environment and wildlife; protection and a proper maintenance of the historical objects etc.[1034]

A charitable organization should engage in only charitable activities. It also may to engage in business activities, but these activities should be aimed only to achieve the statutory goals of NPO and be corresponded to these goals.[1035].

A charitable organization is obliged to spend money exclusively for charitable programs. Legislation imposes rules regarding the use of funds by charitable organizations. During one fiscal year, charitable organizations may use for salaries of the administrative staff no more than 20 percent of financial (i.e., cash) assets "collected for charitable goals" (this limitation does not cover remuneration of the labor of persons who participate in implementation of charitable programs)[1036]. Moreover, no less than 80 percent of a charitable contribution in monetary form, or fully in case of charitable contribution in-kind, must be used for charitable goals within a year from the moment of its receipt, with a number of exceptions[1037]. Finally, no less than 80 percent of the revenues obtained during the financial year from "non-sale activities" (passive income), or from any commercial organization (whose charter capital is composed in its entirety of the contribution of this charitable organization), and from "entrepreneurial activity permitted by law" shall be spent on financing charitable programs[1038].

The analysis showed that, the Law "On charitable Activities and Organizations" does not provide tax benefits for charitable organizations[1039]. The only significant tax advantage for charitable organizations is provided by Article 251 of the Tax Code that states: "resources and other assets and property rights which have been received for the purpose of carrying out charitable activities, listed in the Law "On charitable activities and organizations", shall not be taken into account in determining the tax base".

[1031] Ibid.

[1032] Article 6 of the Federal Law of Russian Federation N 135-FZ dated August 11, 1995 "On charitable activities and organizations"

[1033] Ibid., Art. 1

[1034] Ibid., Art. 2

[1035] Ibid., Art. 12

[1036] Ibid., Article 16 (3)

[1037] Ibid., Article 16 (4)

[1038] Ibid., Article 17 (3). The law does not specify any period of time within which such funds must be spent.

[1039] At the same time, there are proposals in Russian literature to introduce a special exemption for organizations engaged in charity and not doing business (for example, exempting from VAT or even applying a zero VAT rate).

Taxation of socially-oriented non-profit organizations

A feature of Russian tax law in relation to non-profit organizations is the presence of so-called "socially-oriented non-profit organizations". According to the definition of Article 2 of the Law "On Non-profit Organizations" this status is applicable to non-profit organizations that carry out activities aimed at solving social problems, the development of civil society in the Russian Federation[1040]. Article 31.1 of the Law establishes a list of socially-oriented activities which allow the NPOs to request tax breaks[1041]. It includes 18 types of activities. The list of activities is "open". It means that along with the established types of activities, regional governments of Russian Federation can establish additional types of social activities. An analysis of the list of activities showed that they are almost identical to the activities set for charitable organizations.

With respect to the volume of tax privileges the status of a socially-oriented organization is similar to the status of a charitable organization. Like the status of a charitable organization, the status of a socially-oriented NPO does not provide tax breaks for organizations automatically. On the one hand, according to the Law "On Non-profit Organizations" the socially-oriented non-profit organizations can count on the support of federal and local governments, including some tax breaks for them and their donors. On the other hand, the Law provides support not only to socially-oriented NPOs, but also to non-profit organizations not having such status.

Providing a theoretical opportunity to receive tax benefits by charitable and socially-oriented NPOs, civil law, however, alludes to the Tax Code for determining the specific forms of these benefits. Tax Code establishes only one type of tax benefits in the field of income taxation of NPOs, namely the tax benefits for the revenues obtained on a gratuitous basis. The Tax Code establishes a wide range of income and special-purpose receipts, which are not taken into account in determining the tax base (and, accordingly, are not taxed). These include, for example, grants and special-purpose receipts for the maintenance of non-profit organizations and the conduct by them of their statutory activities, including: 1) donations; 2) income in the form of work (services) received free of charge by non-profit organizations which is (are) performed (rendered) on the basis of relevant contracts; 3) assets and property rights which are bequeathed to non-profit organizations; 4) resources and other assets and property rights which have been received for the purpose of carrying out charitable activities (Article 251 of Tax Code). A detailed list of such receipts will be considered in section 5.2.5. Tax legislation makes it clear that the having of such benefits does not depend on the type or status of the organization; it rather depends on the type of activity carried out by organization. Russian legislators have established a limited list of areas of activity of NPOs that can use tax-exempt financial support.

For example, this restriction applies to grants: in accordance with Article 251 (14) of the Tax Code, in order not to be included in the organization's non-operating income (and be exempt from income tax), "the grants should be provided … for the implementation of specific programmes in the sphere of education, art, culture, science, fitness and sports (with the exception of professional sports), health care, environmental conservation and the protection of human and civil rights and freedoms which are provided for in the legislation of the Russian Federation and the provision of social care to low-income and socially vulnerable categories of citizens".

In addition, as we noted above, according to Article 251 of the Tax Code, resources, other assets and property rights which have been received for the purpose of carrying out charitable activities, listed by the Law "On Charitable Activities and Organizations", shall also not be taken into account in determining the tax base.

[1040] Art. 2 of the Federal law of Russian Federation N 7-FZ dated January 12, 1996 "On non-profit organizations"
[1041] Ibid., Article 31.1

Thus, in order the funds received from the donor (philanthropist) to be exempt from the corporate income tax, it is necessary that the activities of the NPO either belong to the types established by law or be considered as charitable activity[1042].

Russian tax legislation does not directly define additional benefits for socially-oriented NPOs, it only empowers local state bodies to provide some additional regional tax benefits, taking into account socio-economic, ecological, cultural and other specifics of the regions. As for national level, providing additional benefits to charitable and socially-oriented NPOs still remains a matter of the future, although the Russian media regularly raises this issue.

5.1.6 Interim findings

In conclusion, let's formulate the main characteristics of the charitable status in each of the EAEU countries. The most uncommon procedure for obtaining the charitable status is characteristic for **Armenia**. First, in Armenia charitable status is awarded not to organizations, but to some of their projects. Termination of the charitable status of project entails the phase out of all tax breaks for NPO within the framework of this project. The consequences of this approach are contradictory. On the one hand, awarding a charitable status to each project, rather than to the organization increases supervision over the targeted use of tax breaks. On the other hand, it complicates the administration of the project and increases the amount of the Commission's work, as organizations must, in fact, submit for the qualification of several programs simultaneously and regularly.

Secondly, the work of Armenian body that reviews and awards charitable status to some projects of NPOs - Armenian Governmental Commission Regulating Charitable Programs is of interest. In this sense Armenia has a unique experience among the EAEU countries in creating of a special body regulating the activities of NPOs in the country and giving them tax privileges. This experience could be of interest to the rest of the EAEU countries. But the work of Armenian Governmental Commission also has a number of drawbacks that influences negatively on the nonprofit sector of Armenia. Dependence on the government, non-transparent approach to the selection of Commission members, absence of any guarantees from conflicts of interest, lack of clear and objective criteria for the qualification of the program as a charity, and, as a consequence, unpredictability of the selection results are just some of the shortcomings of the Commission's work. Nevertheless, even if these problems are solved, it can be assumed that the uncommon approach chosen by Armenia in granting a privileged tax regime will limit the possibility of harmonizing the taxation of NPOs within the EAEU.

In **Belarus**, there is no legal definition of a charitable or any public benefit status that allows NPOs to use tax benefits. In our opinion, it can be explained by the abundance of legislative acts regulating the activities of NPOs in this country. Complementing each other, legislative acts contain provisions on tax breaks for NPOs of specific industries and even for certain individual NPOs. Consequently, in these conditions there is no need to establish a common criterion for the selection of NPOs that deserve a fiscal support. The absence of a single criterion that is would be understandable for domestic and foreign (EAEU-based) NPOs can not be considered favorable from the point of perspective of potential harmonization.

In **Kyrgyzstan**, the special charitable status for individual NPOs is defined by law. Such status provides a privileged tax treatment for NPOs. However, the Kyrgyz legislation sets strict criterion for the recognition of NPOs as a “charitable organization”. In comparison with the CIS Model Charity Law and other legislative acts established after it, the Charity Law of Kyrgyzstan establishes a much lower ceiling for staff compensation (2 per-

[1042] In addition, it is necessary that the donor be a Russian resident or a specially registered foreign person (within the framework of a registered project and a program of foreign gratuitous assistance or as part of a registered grant).

cent of overall expenditures) and a much higher level of mandatory disbursement (98 percent as opposed to the usual 80 percent). The consequences of limitations are mitigated by the exceptions for spending with the framework of charitable programs or pursuant to arrangements with donors. This legislative loophole eases the activities of NPOs at the national level, but does not stimulate their cross-border activities within the framework of the EAEU. Foreign (EAEU-based) NPOs that are unawared of the nuances of the Kyrgyz tax legislation will have to call on tax advisers and lawyers to obtain tax breaks in Kyrgyzstan. With help of tax advisers foreign NPOs have to form so-called charity programs at least for those of their existing projects which suppose actvities in the territory of Kyrgyzstan. In our opinion, this feature of the tax legislation of Kyrgyzstan is a significant barrier for potential harmonization.

In **Kazakhstan**, the status of a charitable organization is defined, but from the tax point of view it is formal, since it does not bring any tax benefit to NPOs. Nevertheless, in Kazakhstan there are several types (but not organizational and legal forms) of NPOs which may enjoy a privileged tax treatment. These are the status of Autonomous educational organization and the status of Social-sphere organization. From the point of view of the requirements for NPOs the most accessible way to obtain tax breaks in Kazakhstan is qualification as a Social-sphere organization.

As in Kazakhstan, **in Russia** legislation establishes the status of charitable organisation and status of socially-oriented non-profit organizations. However, the analysis of the legislation allows us to conclude that such status doesn't bring any tax breaks to NPOs. From tax point of view it is more important for NPOs a type of activity they carry out in accordance with their charter, than a status they have. To receive benefits, the NPO should carry out activities promoted by the government and / or charitable activities. Taking into consideration that the list of activities subject to preferential taxation is very wide, it can also be concluded that most NPOs involved in public benefit activities fall under the definition of a socially-oriented and / or charitable NPO. It can therefore be concluded that from tax point of view the public benefit status in Russia is quite formal, and in the sense of the law all NPOs which carry out public benefit activities are eligible for tax benefits and non-tax support. Even more, in Russia there are no relevant procedures for determining charitable status of organizations. State bodies at the federal and local levels form registers of socially-oriented non-profit organizations receiving support. However, obtaining of tax and other breaks is not the result of incorporation into such register. Instead, the inclusion into register comes after receiving tax breaks, i.e. fact of receiving benefits is primary.

A feature of the taxation of NPOs in Russia is also the broad powers of local authorities in establishing tax breaks for socially-oriented non-profit organizations. Therefore, each NPO claiming such a status should have information about list of benefits established in the region where this NPO acts. It can be assumed that the lack of unity of tax benefits and the differencies in regional taxation inherent to Russia, can make it difficult the taxation NPOs performing cross-border activities within the EAEU. Theoretically, foreign (EAEU-based) NPOs working in Russia and willing to enjoy tax privileges on a par with Russian NPOs should have information on the diversity of benefits in the regions of the country, which will lead to an increase in their administrative costs.

Consequently, comparative legal analysis has shown that in all EAEU countries, except for Belarus, NPOs are subject to internal selection for tax purposes. The result of such selection is the awarding of a special status to some NPOs, which can be called charitable (like in Armenia and Kyrgyzstan) or have a different name (like in Russia and Kazakhstan). Countries differ in the degree of formalism in the selection process - both in terms of requirements imposed on NPOs, and in terms of the tax breaks that are provided to them. A more formal approach is inherent in Russia and Kazakhstan, less formal is in Armenia and Kyrgyzstan. As a rule, in all countries the type of activity the NPOs carry out is important.

In no countries, except for Armenia there is a clear established formal procedure for obtaining a special status.

It follows that the EAEU countries have chosen different concepts for the assignment of tax breaks for NPOs. In the next paragraph we compare the amount of tax benefits that NPOs enjoy in each of countries, dividing the general and additional tax breaks of NPOs.

5.2. Tax regimes for domestic non-profit organizations in the EAEU countries: a comparative legal analysis

Let's consider the tax regime of NPOs in the EAEU countries according to the following scheme: taxation of income from entrepreneurial activity, taxation of passive income and taxation of income received gratuitously.

5.2.1 Armenia

Taxation of Income from Entrepreneurial Activities

Public organizations "may engage in entrepreneurial activities only through creating a commercial organization or through participating in one". The ability of Armenian NPOs to carry out entrepreneurial activities depends on the legal form they have chosen. For example, charitable foundations are permitted under the Law on Foundations to carry out entrepreneurial activities without establishing a separate commercial entity only if such activities (i) further the statutory purposes of the organization, (ii) correspond to those purposes[1043].

As for the most popular form of NPOs in Armenia - public organizations - the opportunity for them to engage in economic activities is a matter of disagreement between various bodies of the Armenian government. The conflict consists in conflicting interpretations of the relevant provisions of the Civil Code and the Law on Public Organizations[1044]. Despite some vagueness of the wording, art. 52 of the Civil Code allows non-profit organizations to engage in economic activities, either directly or indirectly through the creation of commercial units or participation in for-profit entities[1045]. At the same time, Article 15(6) of the Law on Public Organizations allows non-profit organizations to create commercial organizations or become participants in such organizations, therefore allowing them to engage in economic activities only indirectly.

Obvious inconsistencies between the Law on Public Organizations and the Civil Code lead to conflicts between the Ministry of Justice and the tax authorities. While the tax authorities, relying on the wording of the Civil Code, assume that non-profit organizations can directly engage in economic activities, the Ministry of Justice believes that such organizations can engage in entrepreneurial activities only through the creation of commercial legal entities, which is assumed, although not explicitly stated, in the Law on Public Organizations. Since the Ministry of Justice is the supreme body responsible for registration and supervision of non-profit organizations, its interpretation of the possibility for non-profit organizations to be engaged in economic activities has priority over the interpretation of other government bodies.

Thus, at the moment, the Ministry of Justice does not allow non-profit organizations to engage in entrepreneurial activities directly, and entrepreneurial activity remains essential-

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[1043] Art. 29 of the Law of the Republic of Armenia AL-516 dated December 26, 2002 "On Foundations"

[1044] A review of the literature on this issue showed that this debate has continued since 2001, i.e. since the introduction of the Law of the Republic of Armenia "On Public Organizations" (see *ICNL Commentary to the Armenian Civil Code Provisions Regulating Non-Commercial Organisations* (in Russian) // International Center for Not-for-Profit Law. – 21.05.2001 / URL: http://www.icnl.org/research/library/files/Armenia/analy3.pdf
and *ICNL Commentary to the Armenian Draft Law "On Public Organizations"* (In Russian)/ ICNL. – 12.09.2001 / URL: http://www.icnl.org/research/library/files/Armenia/analy2.pdf

[1045] *ICNL Analysis of the Armenian Tax Legislation* (in Russian). – 2001. – September 2001 / URL: http://www.icnl.org/research/library/files/Armenia/analy.pdf

ly inaccessible to NPOs. The only alternative for NPOs is the creation of a business entity. However, the obvious disadvantage of this solution is that the business unit of an NPO is taxed like any other commercial entity. In addition, such an entity could be subject to the same stringent restrictions on donations to the founding NPO as any independent organization, i.e. the amount of the deducted donation cannot exceed 0.25% of the gross income of the donor organization. Thus, the current legislation permitting non-profit organizations to engage in entrepreneurial activities solely through the creation of commercial legal entities, significantly limits the ability of the NPOs to earn funds to support their activities[1046].

Some provisions of the legislation are specific to non-profit cultural organizations. According to the Law "On the Basics of Cultural Legislation", a non-profit cultural organization can carry out entrepreneurial activity insofar as this activity is consistent with the statutory goals of a cultural NPO and promotes them[1047]. However, the Law does not specify whether a non-profit cultural organization can engage in entrepreneurial activities directly or through the establishment of commercial organizations. It should be assumed that this depends on the chosen organizational and legal form of the organization.

Profits from entrepreneurial activities are fully taxed. Nevertheless, engagement of NPOs in entrepreneurial activities does not appear to jeopardize tax benefits applicable to income obtained on a gratuitous basis.

Taxation of Passive (Investment) Income

Resident organizations, regardless of their nature as profit or non-profit, are exempt from taxation on the following types of income[1048]:

- dividends;
- income from privatization certificates;
- residual property received from liquidation of a legal entity;
- income from investment in foreign currencies and securities.

Thus, NPOs in Armenia are taxed in the same way as other legal entities, except for their income in the form of donations and membership fees, which are tax exempt. The passive income of NPOs in Armenia is not tax exempt. In international practice, public benefit organizations are usually exempted from tax on all types of passive income, including interest income, rent payments and royalties[1049].

Taxation of Revenues Obtained Gratuitously

Non-profit organizations (NPOs) are exempt from taxation of funds received as donations. Under Article 8 of the Profits Tax Law, "assets" (including membership fees) and services received by NPOs gratuitously are not considered "income" for taxation purposes[1050].

At the same time, the Charity Law states that charitable organizations must use no less than 80 percent of monetary donations and contributions designated to a specific purpose within one year of receipt, unless the donor or the charitable program stipulates otherwise[1051]. In-kind donations and contributions designated to a specific purpose must be fully allocated for their charitable purposes no later than a year after receipt, unless the donor or the charitable program stipulates otherwise[1052]. Further, no less than 80 percent of income earned during the fiscal year may be used for financing charitable programs[1053].

Tax benefits for donors

[1046] *ICNL Analysis of tax laws affecting non-commercial organizations in the Republic of Armenia* / URL: http://www.icnl.org/research/library/files/Armenia/taxanalysis.pdf

[1047] The Law of the Republic of Armenia AL-465 dated December 18, 2002 "On the Basics of Cultural Legislation"

[1048] Art. 26, 28-29 of the Law of the Republic of Armenia N ZP-155 dated October 27, 1997 "On Profit Tax"

[1049] *ICNL Analysis of the Armenian Tax Legislation* (in Russian). – 2001. – September 2001 / URL: http://www.icnl.org/research/library/files/Armenia/analy.pdf

[1050] Art. 8 of the Law of the Republic of Armenia dated December 26, 2000 "On amendments and additions to the Law of the Republic of Armenia "On Profit tax" // http://www.parliament.am/legislation.php?sel=show&ID=3042&lang=rus»

[1051] Art. 12 of the Law of the Republic of Armenia AL-424 dated November 8, 2002 "On Charity"

[1052] Ibid., Art. 12(3)

[1053] Ibid., Art. 13(5). The law does not specify by what time the income should be realized.

Armenian legislation provides for various tax incentives for corporative donors. Under the Profits Tax Law, monetary and in-kind contributions and services rendered to NPOs, libraries, museums, public schools, asylums, residential homes, orphanages, and infirmaries and hospitals for psycho-neurological and tuberculosis treatment are deductible up to 0.25 percent of the donor's gross income[1054]. Amounts in excess of this annual limit may not be carried over to the next fiscal period. Thus, the maximum amount of donations exempt from tax is very small[1055]. In addition, Armenian legislation does not provide for the possibility of increasing the maximum amount of donations exempt from tax by the amount of donations not used in previous periods[1056].

Tax benefits for individual donors. Until 2013, Armenia's tax legislation provided privileges to donors of NPOs in the form of deduction of the amount of charitable donations from the tax base. Thus, monetary and in-kind contributions, as well as services rendered to the following organizations, could be deducted from an individual's taxable income for that year, up to a maximum of five percent of the taxable income:

- public and religious organizations, political parties of the Republic of Armenia;
- condominiums; and
- organizations which do not pursue a profit-making goal and operate exclusively for the following purposes: religious; charitable; scientific; conduct of tests for purposes of public security; protection of the environment; development and promotion of literature, culture and education; protection of consumers' rights; promotion and organization of amateur sports; protection of human rights, rights of women, children, and the elderly; libraries, museums, public schools, boarding schools, nursing homes, and orphanages; and infirmaries and hospitals for psychiatric and tuberculosis treatment[1057].

The new Law "On Income Tax" of December 30, 2010 N ZR-246, which came into force on January 1, 2013, completely abolished the provisions of Article 13, leaving no incentives for individual donors in the form of deductions from the taxable base. It should be noted that such stringent restrictions exist in international practice referring to donations to political parties or organizations of mutual benefit that may not provide public benefit services. However, in general international practice, tax benefits should be applied to donations to public benefit organizations, operating for the public benefit purposes and helping the state to provide social services[1058].

5.2.2. Belarus

Taxation of income from business (entrepreneurial) activities

Non-profit organizations can carry out entrepreneurial activities either directly or through the creation of other legal entities. The ability of a non-profit organization to conduct independent entrepreneurial activities depends on its organizational and legal form. Funds, religious organizations, consumer cooperatives, trade unions, institutions, state-public organizations have the right to carry out entrepreneurial activity independently[1059]. Public associations, groups of public associations can run business activities only through commercial organizations and (or) by participation in them[1060].

[1054] Art. 23 of the Law of the Republic of Armenia dated December 22, 2010 "On Income Tax"

[1055] In the early versions of the Law of the Republic of Armenia of December 22, 2010 "On Income Tax" the amount of deductions reached 5 percent of the donor's gross income

[1056] *ICNL Analysis of the Armenian Tax Legislation* (in Russian). – 2001. – September 2001 / URL: http://www.icnl.org/research/library/files/Armenia/analy.pdf

[1057] Article 13 of the Law of the Republic of Armenia of December 22, 2010 "On Income Tax"

[1058] *ICNL Analysis of the Armenian Tax Legislation* (in Russian). – 2001. – September 2001 / URL: http://www.icnl.org/research/library/files/Armenia/analy.pdf

[1059] Art. 279 of the Civil Code of the Republic of Belarus N 218-Z dated December 7, 1998 (as amended on January 5, 2016)

[1060] Ibid., Art. 121

At the same time, for the public associations, groups of public associations the legislation makes an exception. Thus, the Decree of the President of the Republic of Belarus of April 15, 2013 N 191 "On rendering support to organizations of physical culture and sports" says that sports organizations established in the form of public associations and groups of public associations have the right to run entrepreneurial activities directly[1061]. This permission extends to a wide range of activities, both related and unrelated to the statutory activities of the NPO. Moreover, the legislation obliges government bodies to provide assistance to sports organizations established in the form of public associations, groups of public associations, to implement entrepreneurial activities[1062]. The only condition for such a favorable regime for this type of NPO is that it is mandatory to use business income solely for the realization of its statutory goals (Art. 12).

This condition applies, however, to all Belarusian NPOs: all NPOs may carry out entrepreneurial activity only to the extent that the activity is necessary for the pursuit of their statutory goals, corresponds to the purposes of the organization, and is consistent with the organization's activities, or inasmuch as it is needed for implementing socially valuable tasks specified in their statutory documents, the activity corresponds to these tasks, and is consistent with the type of the organization's statutory activities[1063]. Non-profit organizations, as legal entities, may become founders or participants in commercial organizations whose entrepreneurial activities are not subject to the aforementioned restrictions. However, the legislation prescribes that they may become founders or participants in for-profit entities whose activities must also correspond to the statutory goals and purposes of the parent non-profit. Profits obtained as a result of such activities should serve the purposes stipulated in the charter of the public association and may not be distributed among its members.

In practical terms, taxation of profits of a non-profit organization obtained as a result of their entrepreneurial activities is no different from the taxation of commercial organizations except for the cases discussed below[1064].

According to Art. 140 of the Tax Code of the Republic of Belarus, the following are exempt from income taxation:

– the profit of cultural organizations received from the implementation of cultural activities, if the funds received in this way are used for the acquisition or repair of fixed assets, or the acquisition of property rights necessary for the implementation of cultural activities;

– the profit of educational institutions from income-generating activities[1065];

– the gross profit (excluding profit received from trade and intermediary activity) of organizations using the work of disabled people (if the number of disabled persons is at least 50 percent of the average number of employees).

According to the Decree of the President of the Republic of Belarus of April 15, 2013 N191 "On providing support to organizations of physical culture and sports", the profits of such organizations from advertising are also exempt from profit tax.

Availability of exemptions for passive (investment) income

Dividends and similar income are included in the amount of income from non-sale operations and are subject to taxation (with the exception of certain public associations listed by name in the law)[1066].

[1061] Art. 11 of the Decree of the President of Belarus N 191 dated April 15, 2013 "On rendering support to organizations of physical culture and sports"

[1062] Ibid., Art. 20

[1063] Art. 46 of the Civil Code of the Republic of Belarus N 218-Z dated December 7, 1998 (as amended on January 5, 2016)

[1064] *Survey of Tax Laws Affecting NGOs in the Newly Independent States* / ICNL. – 2009. –144 p. / URL: http://www.icnl.org/research/library/files/Transnational/TaxSurveyEng.pdf

[1065] Art. 140 of the Tax Code of the Republic of Belarus (Special Part) N 71-Z dated December 29, 2009

Income from non-sale operations does not include income (interest) from the deposits in bank accounts of funds received by NPOs gratuitously in the form of 1) entry fees, share contributions and membership fees; 2) funds received from participants (members) as the forthcoming financing and/or reimbursement of expenses for acquisition of goods and/or for works execution (service provision) for these participants; 3) the value of goods, work or services, property rights, the amount of donations received gratuitously, provided that funds from these goods, work or services, property rights, are used as intended[1067].

Taxation of revenues obtained gratuitously

Under Belarusian legislation, donations fall into four categories:

1) Donations received from Belarusian citizens. Under the legislation of Belarus, a donation is a gratuitous transfer by one party (donor) to the other party (donee) of a thing or right for general purposes.

2) Sponsorship. The granting of gratuitous (sponsored) aid by legal entities and individual entrepreneurs of the Republic of Belarus is regulated by the Decree of the President N 300 dated July 1, 2005 "On Granting and Using Gratuitous (Sponsorship) Assistance"[1068]. The decree establishes a closed list of purposes for which assistance can be used and requires mandatory identification of the types of goods, works and/or services that will be acquired by recipients of sponsorship[1069].

3) Foreign gratuitous aid. Cash, as well as goods (property), with the exception of immovable property located outside the Republic of Belarus and property rights, gratuitously granted to non-profit organizations by foreign states, international and foreign organizations, citizens of the Republic of Belarus permanently residing outside the Republic of Belarus, by foreign citizens, is a foreign grant aid. Such aid also includes funds granted by foreign founders to finance the institutions of the Republic of Belarus they created, contributions and interest-free loans of foreign founders (members) of non-profit organizations of the Republic of Belarus. Registration and use of this type of aid is regulated by Decree N 5.

4) International technical aid is a type of aid gratuitously granted to the Republic of Belarus by international donors for purposes specified in the legislation. Registration and use of this type of aid is regulated by Decree N 460[1070].

According to the legislation of the Republic of Belarus, the amount of gratuitously received cash, the value of gratuitously received goods, works or services, property rights and other assets are included in non-sale income, and are subject to income tax[1071]. The legislation also defines a number of provisions that, for tax purposes, are not included in the income of NPOs from non-sale operations[1072]:

- entry, share and membership fees in the amounts set by the statutes;
- funds received from members as forthcoming financing and/or as reimbursement of expenses for acquisition of goods and/or works execution (service provision) for these members;
- the value of gratuitously received goods, works or services, property rights, or monetary funds, provided they are used as intended;
- income (interest) from deposits in bank accounts of funds indicated in the previous

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[1066] *Survey of Tax Laws Affecting NGOs in the Newly Independent States* / ICNL. – 2009. –144 p. / URL: http://www.icnl.org/research/library/files/Transnational/TaxSurveyEng.pdf

[1067] Art. 128(4) of the Tax Code of the Republic of Belarus (Special Part) N 71-Z dated December 29, 2009

[1068] According to the Decree, only legal entities and individual entrepreneurs can provide free (sponsored) assistance. Charitable activities of individuals can be only in the form of donations.

[1069] Gurshtyn, D. *Is the society of Belarus ready for charity?* (in Russian) / URL: http://actngo.info/article/gotovo-li-obshchestvo-belarusi-k-blagotvoritelnosti

[1070] Decree of the President of Belarus N 460 dated October 22, 2003 "On international technical assistance provided to the Republic of Belarus" (with amendments as of January 28, 2008).

[1071] Art. 128(3) of the Tax Code of the Republic of Belarus (Special Part) N 71-Z dated December 29, 2009

[1072] Ibid., Art. 128(4)

three points.

Tax regime of the donors

For corporate donors the law provides the following tax benefits:

- Profit of organizations (in the amount of no more than 10 percent of gross profit) donated to the state organizations of public health services, education, culture, physical culture and sports, to religious organizations, social service institutions, …registered in the territory of the Republic of Belarus, as well as to some public associations, named by the law, is exempt from tax[1073];
- Donations to sports organizations in the form of monetary funds, property, including property rights, and/or gratuitous provision of services (work execution), for tax purposes may be included in non-sale expenses[1074];
- Profit in the amount of not more than 10 percent of gross profit, donated to some types of cultural and mass media organizations registered in the territory of the Republic of Belarus, is exempt from profit tax[1075].

There are no deductions relating to donations of individuals to non-profit organizations in Belarus.

There is no *inheritance and gift tax* in Belarus. The value of any property received by individuals from other individuals domestically or from abroad, is not subject to income tax. Exemption from income tax of property received by inheritance in the territory of the Republic of Belarus extends to both Belarusian citizens and foreign citizens[1076]. Nevertheless, when real estate received by inheritance is sold, non-resident individuals pay income tax at a rate of 12%. Resident individuals are exempt from income tax on the sale of any property received by inheritance.

As for legal entities, as already mentioned, the value of goods, works or services, monetary funds, property rights, or other assets received gratuitously, is included in non-sale income[1077] and therefore is subject to income tax (except for the tax benefits described above).

5.2.3 Kyrgyzstan

Exemptions in the Tax Code are linked to both the type of organization and the type of income. There are two categories of organizations that are eligible for certain exemptions: regular NPOs and NPOs having charitable status (known as charitable organizations). For ease of comparison, we will examine the tax incentives for each type of NPO in parallel.

Taxation of Income from Entrepreneurial Activities

The Tax Code does not define the term entrepreneurial activity, but instead refers to the Civil Code in defining the given term and also provides that "'economic activity' is an entrepreneurial activity and other activity"[1078]. The Civil Code defines entrepreneurial activity as "independent activity, conducted at a [person's] own risk, aimed at derivation of profits"[1079].

Under legislation of Kyrgyzstan, NPOs are generally allowed to engage in entrepreneurial activities directly but with some limitations. More specifically, the Civil Code of

[1073] Ibid., Art. 140(1)(1.2)

[1074] The Decree of the President of Belarus N 191 dated April 15, 2013 "On rendering support to organizations of physical culture and sports"

[1075] The Decree of the President of Belarus N 145 dated April 14, 2011 "On certain tax issues in the spheres of culture and information"

[1076] *Is it necessary to pay an inheritance tax?* (in Russian) / URL: http://www.bk-brest.by/2014/10/9795/

[1077] Art. 128(3)(3.8) of the Tax Code of the Republic of Belarus (Special Part) N 71-Z dated December 29, 2009

[1078] Art. 21 of the Tax Code of the Republic of Kyrgyzstan dated October 17, 2008, (with subsequent amendments as of August 12, 2016). Other activities include: (1) activity carried out in compliance with labor legislation of the Kyrgyz Republic; (2) investment of money in banks; (3) acquisition, transfer or sale of securities; and (4) other activity that is not considered entrepreneurial activity.

[1079] Art. 1(4) of the Civil Code of the Kyrgyz Republic N15 dated May 8, 1996 (Part 1) (with amendments as of August 2, 2017)

the Kyrgyz Republic allows NPOs to engage in entrepreneurial activities "to the extent it is necessary for implementation of their statutory goals"[1080]. The Law on NPOs, in substance, allows NPOs to conduct entrepreneurial activities: "Noncommercial organizations shall have a right to carry out economic, including production activity without distribution of received profit among founders, members, officials, other employees and members of management bodies. This activity could include in itself production and sale of goods, accomplishment of works, rendering of services with counter-compensation and other kinds of economic activity, *if they do not contradict the aims and purposes of the organization"*[1081].[1082] Thus, it follows from this norm, in Kyrgyzstan there are minor limitations for NPO in carrying out economic activity.

As opposed to this approach, which grants broad rights to regular NPOs to carry out economic activities, charitable organizations have fewer opportunities for this. In accordance with Art. 7 of the Law "On philanthropy and charitable activity" "a charitable organization is allowed to carry out entrepreneurial activities only for the achievement of the goals for which it was created and corresponding to these goals"[1083].

In other words, charitable organizations are allowed to carry out only those economic activities that correspond to *the goals of creation* of the organization. It is important to mention that this approach substantially limits charitable organizations in carrying out their economic activity[1084]. An additional problem of this restriction is that sometimes it is difficult to determine whether a particular business activity of a charitable organization corresponds to the goals of its creation[1085].

Entrepreneurial activities of regular NPOs can be carried out directly by the organization itself, or through the creation of subsidiary commercial organizations[1086].

Charitable organizations also have the right to establish subsidiary commercial organizations. So, in compliance with part 4 of article 7 of the Law "On philanthropy and charitable activity", "For creation of economic conditions for achievement of charitable purposes a charitable organization shall have a right to establish economic companies. The participation of the charitable organization in economic companies jointly with other persons is not admitted". Following from the content of the given norm, it is possible to conclude that charitable organizations can only be solely founder of affiliated companies[1087].

The tax legislation of Kyrgyzstan does not provide any profits tax exemptions on income from entrepreneurial or economic activities for NPOs. The profit of NPOs from entrepreneurial activities is taxed at a rate of 10%. However, engaging in entrepreneurial activities will not result in the loss of tax privileges applicable to revenue obtained gratuitously.

The situation with charities is somewhat different. The income from the business activities of charitable organizations is exempt from income tax. Article 212 of the Tax Code of the Kyrgyz Republic exempts from taxation the profit of:

1) charitable organizations;
2) communities of disabled persons of I and II group, as well as of enterprises of the Kyrgyz community of blind and deaf people, where disabled persons shall compose not less than 50 percent of the total number of employed and their salary shall

[1080] Ibid., Art. 85
[1081] Art. 12 of the Law of the Kyrgyz Republic N111 dated October 15, 1999 "On Non-Commercial Organizations". The Article further establishes that limitations on specific types of activities of NPOs may only be established by law.
[1082] Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.
[1083] Art. 7 of the Law of the Kyrgyz Republic N 119 dated November 6, 1999 "On philanthropy and charitable activity"
[1084] Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.
[1085] Zhunusova, A. *Entrepreneurial activity of a non-profit organization in the Kyrgyz Republic* (in Russian) / – Bishkek, International Center of Not-for-profit Law. – 2012. – 18 p.
[1086] Ibid.
[1087] Idrisov, N. *Taxation of non-profit organizations in accordance with the new Tax Code* / ICNL. – 2008. –17 p.

compose a sum, which is not less than 50 percent of the total fund of labor remuneration[1088].

Taxation of Revenues Obtained Gratuitously

Under the Tax Code, the following types of revenues of NPOs are exempt from profits tax:

- membership and entry fees;
- humanitarian aid and grants, so long as they are used for statutory purposes[1089];
- assets, received gratuitously so long as they are used for statutory purposes;
- income from the conducting of religious rites, rituals, ceremonies, services or the organization and conduct of pilgrimage, as well as voluntary donations.

The Tax Code defines all these terms of revenues obtained gratuitously (Article 153(4,6,7,29).

Not including the abovementioned incomes in the total annual income of a non-profit organization, it must be remembered that the costs associated with obtaining tax exempt incomes are not deductible for tax purposes. That is, it is necessary to keep separate records of income and expenses for statutory non-profit activities and income and expenses for commercial activities (if the NPO carries out such activities). In practice, such separate accounting is rather complicated and is not clearly regulated by the legislation[1090].

Availability of Exemptions for Passive (Investment) Income

Certain types of income traditionally recognized as "passive" are subject to exemptions or special treatment, regardless of whether the taxpayer organization is for profit or non-profit:

- Dividends received from participation in domestic organizations are not subject to profits tax[1091].
- Interest payable to taxpayers is taxed at its source, through a withholding of 10 percent, and is not included in taxable income upon submission of documentary evidence of withholding[1092].

Taxation of donors

The Tax Code provides incentives for charitable donations by corporate donors and individual entrepreneurs in the form of deductions. The Tax Code raised the limits on deductibility of donations from 5 to 10 percent of taxable income. The relevant provisions of the Tax Code are as follows: "Assets donated gratuitously, including monetary funds and property (at its balance sheet value) to charitable organizations, as well as to organizations of culture and sports, regardless of the form, in an amount not exceeding 10 percent of the taxable income of the taxpayer-donor, provided that those assets are not used to the benefit of the taxpayer-donor, shall be deducted from gross annual income"[1093].

However, the Tax Code does not provide any incentives for individuals[1094].

There is no *inheritance and gift tax* in Kyrgyzstan. Taxation of hereditary incomes is considered, depending on the category of the recipient, as income taxation or profit taxation.

[1088] Art. 212 of the Tax Code of the Republic of Kyrgyzstan dated October 17, 2008 (with subsequent amendments as of August 12, 2016)
[1089] Ibid., Art. 189(3)
[1090] *Non-profit law* (in Russian) / N. Idrisov (ed.) – B.:T. Kirland. – 2012. –243 p.
[1091] Art. 189(4) of the Tax Code of the Republic of Kyrgyzstan dated October 17, 2008 (with subsequent amendments as of August 12, 2016)
[1092] Ibid., Art. 221(1) and (3)
[1093] Ibid., Art. 208
[1094] *Survey of Tax Laws Affecting NGOs in the Newly Independent States* / ICNL. – 2009. –144 p. / URL: http://www.icnl.org/research/library/files/Transnational/TaxSurveyEng.pdf

5.2.4 Kazakhstan

As noted in paragraph 5.1.4, the Tax Code of Kazakhstan defines some categories of organizations that enjoy some tax exemptions: non-profit organizations (NPOs), two kinds of social sphere organizations (SSOs) and autonomous educational organizations. The latter enjoy the most favorable tax conditions. As the Tax Code says, "when determining for an autonomous education organization the amount of the corporate income tax, the amount of the calculated corporate income tax shall decrease by 100 percent"[1095]. Also, the remuneration for deposits paid to the autonomous educational organizations is not subject to taxation at the source of payment[1096].

Let us consider in more detail the exemption from income tax for NPOs and SSOs.

Taxation of Income from Entrepreneurial Activities

According to the civil legislation of the Republic of Kazakhstan, NPOs can be engaged in entrepreneurial activity only insofar as this is in accordance with their goals defined in the charter. The Tax Code does not define entrepreneurial activity, but as a matter of practice, it is understood to include any activity with the purpose of deriving incomes, no matter what the profit is spent on.

The Tax Code contains two specific exemptions for income earned by NPOs from economic or entrepreneurial activity. In accordance with Article 134 (2) of the Tax Code, "1) income of NPOs received under a state social contract [and] 2) fees of condominium owners" is tax exempt. The first exemption is applicable only to recipients of Government funds under state social contracts, which are regulated by the special Law on state social order of 2005[1097] and treated as commercial state procurement contracts. The remaining incomes of NPOs that are not privileged, in particular, income from entrepreneurial activities (except for interest on bank deposits), are subject to taxation in accordance with the generally established procedure.

As for SSOs, all their incomes (from all types of activities) are tax exempt.

However, such blanket exemption is applicable only as long as income from exempt activities accounts for 90 percent or more of the gross annual income of NPO. Thus, engaging in entrepreneurial activity that is not in an exempt field of activity could result in the loss of all tax privileges, if the income from exempt activities falls below 90 percent of the gross annual income. We recall that this proportion of NPO income sources is a mandatory requirement for benefiting from the SSO status (in accordance with Art.135 of Tax Code), which gives some tax privileges. According to local tax experts, a loss of this status and, consequently, of a tax exemption once will result in imposition of income tax for the whole tax period (whole financial year) in which the organization failed to qualify as a social sphere organization.

Non-profit organizations are obliged to keep separate accounting for income which is exempted from taxation and income which is taxable[1098]. Since January 1, 2013 this obligation does not apply to SSOs and autonomous educational organizations (AEOs)[1099].

Taxation of passive (investment) income

NPOs are exempt from taxation of "premium on bank deposits", which is the interest received on bank deposits[1100]. However, as in many other post-Soviet countries, NPOs in

[1095] Art. 135(1) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017)
[1096] Ibid., Art. 143(2)
[1097] The Law of the Republic of Kazakhstan N 36 dated April 12, 2005 "On the state social order, grants and bonuses for non-governmental organizations in the Republic of Kazakhstan" (with amendments and additions as of April 18, 2017).
[1098] Art. 134(4) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017). No sanctions for non-compliance are explicitly imposed by the Tax Code, though it is likely that the exemption would not be applied if the organization failed to keep separate accounting.
[1099] Amendment to Art. 134(4) of the Tax Code dated December 26, 2012

Kazakhstan are not able to obtain the benefit of this exemption because the Tax Code also provides that passive income (which includes dividends and interest on debt instruments, as well as interest on bank deposits) is subject to withholding at the source at the rate of 15 percent for all resident legal entities, including NPOs[1101].

Other forms of passive income, such as rental income, are taxed under the general rules.

SSOs as such are not specifically exempt from taxation on passive income. The blanket exemption from corporate income tax they enjoy, so long as they satisfy Article 135 of the Tax Code, covers all forms of their passive income. However, in reality, the passive income of SSOs is subject to withholding tax (at the rate of 15 percent), as for NPOs.

Taxation of Revenues Obtained Gratuitously

Article 134 (2) of the Tax Code provides that NPOs are exempt from taxation of income received "in the form of … grants, entry and membership fees, …charitable and sponsorship aid, gratuitously transferred property, subsidies, and donations"[1102]. As for SSOs, in accordance with Art.135 they are exempt from taxation on income received from engaging in social activities (specified in Art.135) and on income in the form of property received gratuitously (until the income is used for social, i.e., exempt activities), without specifying particular types of such income[1103].

It should be noted that tax exemption of grants has some features. A "grant", as defined by the Tax Code, is "property provided on a gratuitous basis for attainment of particular goals: by states and state governments, by international and governmental organizations, as well as by foreign non-governmental organizations or foundations…. to the Republic of Kazakhstan, the Government of the Republic of Kazakhstan, individuals, and legal entities"[1104].

The term of "grant" is defined in Kazakhstan solely for tax purposes, in order to exempt the recipients of such receipts from some taxes. This means that not every grant given by an international or foreign organization will be recognized in Kazakhstan as a grant for tax purposes. In order for the beneficiary to have tax benefits set for grants under the Tax Code, the organization that gave the "grant" must meet a number of requirements, namely:

1) A foreign or Kazakh organization should be public (but the legislation of Kazakh does not define the term "public");

2) A foreign or Kazakh organization should be non-governmental (and Kazakh legislation defines the term "non-governmental" solely for the purpose of legislation of state social contracts);

3) The activities of state, international, foreign and Kazakh organizations should be of a charitable and/or international nature (but the legislation of RK defines neither "charitable", nor "international nature");

4) The activities of state, international, foreign and Kazakh organizations should not contradict the Constitution of the Republic of Kazakhstan;

5) State, international, foreign and Kazakh organizations should be included in the List established by the Government of the Republic of Kazakhstan. The list of such organizations is defined by RK Government Resolution No. 376 of March 20, 2009 "On Approving the List of International and State Organizations, Foreign Non-Governmental Public Organizations and Funds Granting Grants" (hereinafter - List). If some organizations provide for grants in the territory of the Republic of Kazakhstan without being included in this list, such revenues are not recognized as grants for tax purposes but just the recipient's gratuitous income. This income is not subject to corporate income tax, since it is income in the form of gratuitously received property, but is not covered by other benefits provided by the

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[1100] Art. 134(2) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017).
[1101] Ibid., Art. 147(1)
[1102] Ibid., Art. 96
[1103] Ibid., Art. 135(2)
[1104] Ibid., Art. 12(1)(11)

Tax Code for grants (on social tax, personal income tax, value added tax, as well as customs payments).

Currently there are no official criteria and procedure for inclusion an organization on the List of entities entitled to provide grants. The list is established by a Resolution[1105] of the Government and annually updated on the basis of recommendations put forward by interested state bodies. That is, the opportunity of organization to be included in the List depend on the support of one of state bodies of the Republic of Kazakhstan.

Taxation of donors.

The Tax Code provides for a reduction of the taxable income of corporate taxpayers who have made donations in the form of monetary funds, property, works or services provided to NPOs. According to Article 133 of the Tax Code, a taxpayer can reduce taxable income for the following types of expenses in the amount not exceeding 3 percent of taxable income (for major taxpayers) and 4 percent (for other taxpayers):

– the value of property donated to NPOs and SSOs gratuitously;

– charitable donations on the basis of request of a person receiving donation. The largest benefit can be received by donors of autonomous educational organizations. So, according to Art. 133 of the Tax Code of the Republic of Kazakhstan, "the taxpayer may reduce the taxable income in the amount of the value of the property donated gratuitously, provided that the recipient is an autonomous educational organization" (Art.133). Note that the maximum amount of deduction for a donor AEO is not established, which, undoubtedly, can be considered a significant tax advantage of this type of organization.

All abovementioned benefits are available for corporate donors only. No deductions are available to individual taxpayers for such donations.

5.2.5 Russian Federation

The Tax Code does not grant a tax exemption to NPOs for profits tax liability. According to the Tax Code, registered non-profit organizations are recognized as taxpayers, regardless of the scope of their activities. The Tax Code does not provide for tax benefits for charitable organizations. Some legal forms of NPOs – namely, public organizations of disabled people and religious organizations – may obtain a special regime in relation to determining their taxable base for the profit tax.

Taxation of Income from Entrepreneurial Activities

An NPO is permitted to carry out entrepreneurial activities, provided that its charter-based activities remain the principal activities. Entrepreneurial activities of NPOs should comply with two requirements:

1) these activities must help NPOs to achieve their statutory goals and increase the ability to perform statutory tasks; and,
2) the field of such activities must correspond to the statutory goals of the NPOs.

According to the Civil Code of Russian Federation NPOs cannot carry out the following activities:

- under factoring agreements[1106];
- under franchising agreements[1107];
- under public contracts[1108].

The legislation of the Russian Federation may establish restrictions on entrepreneurial activities for some types of non-profit organizations. For example, a public association (group of public associations) is not entitled to engage in entrepreneurial activities.

[1105] Resolution N 376 of the Government of Kazakhstan of March 20, 2009
[1106] Art. 825 of the Civil Code of Russian Federation N 51-FZ dated November 30, 1994 (as amended on 29 July, 2017
[1107] Ibid., Art. 1027
[1108] Ibid., Art. 426

The Tax Code does not provide exemptions for revenues obtained by an NPO from entrepreneurial activities, including activities corresponding to its charter-based goals. Profit that remains after taxation must be used for financing the NPO's charter-based activities.

Taxation of passive (investment) income

Types of income traditionally considered passive or investment income (in the Tax Code referred to as "non-sale" /"extraordinary" revenues) are taxed as business income (in case they do not form an endowment (target-purpose capital) under general rules. There are no tax exemptions for passive revenues of NPOs in the Tax Code.

Taxation of Revenues Obtained Gratuitously

The Russian regime of taxation of funds received by NPOs gratuitously, in the form of financial (and/or charitable) aid, differs depending on the circumstances. For example, there are problems related to the necessary registration of foreign donors and philanthropists; the legislative restriction of the spheres of activity of non-profit organizations that can use tax exempt financial support; taxation arising from incomplete use of target-purposes funds during the tax period; and other circumstances.

Tax-exempt income is set out in Article 251 of the Tax Code, and the list is exhaustive. It is, in particular, funds or other assets received in the form of gratuitous aid (assistance), gratuitous (technical) assistance, grants, donations, special-purpose income and other income. The NPOs must account for such income separately from taxable income.

Let us examine in detail these types of receipts.

a) Gratuitous (technical) aid

In accordance with Article 251(1)6) of the Tax Code, funds or other assets received in the form of gratuitous aid (assistance) in the manner determined by the Gratuitous Aid Law[1109] are not taken into account when determining the tax base for corporate income tax.

This is the case of direct and final use of gratuitously obtained funds.

Revenues received by the NPO for works/ services provided in the framework and at the expense of the project of gratuitous assistance under contracts concluded with the beneficiary of this assistance are considered as business income of NPOs and are included in the income tax base[1110].

b) Special-purpose financing in the form of a grant

In accordance with Article 251(1)14) of the Tax Code, assets obtained by the taxpayer within the framework of special-purpose financing, including grants are not taken into account when determining the income tax base[1111]. For the purposes of the Tax Code, "grant" is defined as: "[F]inancial means or other assets in cases where their transfer (receipt) qualifies as the following:

- grants are provided on a gratuitous and non-repayable basis by Russian individual persons and NPOs; by foreign and international organizations that are in the list of such organizations approved by the Government of the Russian Federation;
- grants provided for implementation of specific programs in the spheres of education, art, culture, health care (some types), environmental protection, defense of human and citizen's rights and freedoms provided for by the legislation of the Russian Federation, social services for poor and socially disadvantaged categories of citizens, as well as for conducting specific scientific research;
- grants are provided under conditions determined by the grant-maker, with obliga-

[1109] Federal Law N 95-FZ dated May, 4, 1999 "On gratuitous aid (assistance) of the Russian Federation and amendments and additions to some legislative acts of the Russian Federation on taxes and on the establishment of benefits for payments to state non-budgetary funds in connection with the implementation of gratuitous aid (assistance) of the Russian Federation".

[1110] Sinelnikov-Murylev, S., Trunin, I., Goldin, M., Ilyasova, G., et al. *Problems of taxation of non-commercial organizations in Russia* (in Russian) / – Moscow: Transition economy institute. – 2007. – N 108. – 371 p.

[1111] According to the Tax Code, "assets received by the taxpayer and used in accordance with their designation as determined by the sources of the special purpose financing are considered to be funds of the special purpose financing". The Tax Code enumerates 13 types of such assets including grants.

tory provision of reports about proper use of grant funds to the grant-maker".

c) Special-purpose receipts in the form of donations.

Article 251(2)1) of the Tax Code relieves from taxation the special-purpose receipts for the maintenance of non-profit organizations and their statutory activities, received gratuitously from other organizations and (or) individuals and used by NPOs for their intended purpose.

As special-purpose financing funds, Article 251(2)(1) considers donations as they are defined by the Civil Code of the Russian Federation. Donations may be made to citizens, educational establishments, social protection institutions and other similar establishments, charitable, scientific and educational institutions, foundations, museums and other cultural institutions, public and religious organizations and other NPOs in compliance with the legislation.

Some legal forms of NPOs, in particular, consumer cooperatives and associations of homeowners, are not qualified to receive donations. Assets donated to such NPOs are recognized as property received gratuitously, and, according to Article 250(1)(8) of the Tax Code, are considered as taxable non-sale income when determining income tax base.

d) Special-purpose funds received for implementation of charitable activities

In accordance with Art. 251 of the Tax Code, funds and other property that were received for charitable activities are also not included in the income tax base (the definition of charitable activities and its sub-categories under Russian legislation were examined in paragraph 5.1.5).

e) Other special-purpose fund receipts

In addition, the following special-purpose receipts are also exempt from taxation:

- Entrance fees, membership fees, share contributions;
- Assets given to NPOs as inheritance;
- Amounts of state funding (at all levels), assigned for charter-based activities of NPO;
- Assets received gratuitously by the state and private educational institutions for promoting their statutory activities;
- Properly used receipts from owners to entities created by them[1112];
- Other types of income listed in Article 251(1-2) of the Tax Code of Russia[1113].

The list of revenues of NPOs excluded from income tax base seems to be extensive. In practice, however, a typical NPO has quite limited budget. Assets received by an NPO for its statutory activities are not always sufficient.

Taxation of donors

An individual taxpayer may make a social tax deduction, which is limited by the amount of incurred expenses, and cannot exceed more than 25 percent of income obtained in the current fiscal period[1114]. Social tax deductions are applicable to the amount of income donated by the taxpayer to charitable organizations; to socially oriented non-profit organizations for implementation of charter-based activities; to non-profit organizations operating in the scientific and cultural fields, as well as in the field of health care, education, and social protection, physical education and sports; protection of the environment and animal protection, etc.; to religious organizations for implementation of charter-based activities; to NPOs for formation or completion of their endowments.

In contrast to individual donors, corporate donors making donations to the NPO, since 2002, according to the Tax Code have no deductions or benefits[1115]. It applies to all forms

[1112] Art. 251 (2)(15) of the Tax Code of the Russian Federation (part 2) N117-FZ dated August, 5, 2000
[1113] Only the incomes more relevant for NPOs are listed here.
[1114] Art. 219 (1) (1) of the Tax Code of the Russian Federation (part 2) N117-FZ dated August, 5, 2000
[1115] *Survey of Tax Laws Affecting NGOs in the Newly Independent States* / ICNL. – 2009. –144 p. / URL: http://www.icnl.org/research/library/files/Transnational/TaxSurveyEng.pdf

of donations - to monetary donations and to donations made in the form of goods, works or services)[1116].

The current tax regime for donors in Russia does not seem rational from the standpoint of international experience. In particular, as in many countries, Russian legislation could either provide for the possibility to deduct funds donated to an NPO from the income tax base, or provide a credit for the profit tax for some portion of these funds. However, the absence of these norms in the Russian Tax Code can be explained: according to Russian scientists - S. Sinelnikov-Murylev, I. Trunin, M. Goldin and others, - the refusal of significant tax benefits for corporate donors since 2002 allowed the establishment of a relatively low tax rate on corporate income tax[1117].

5.2.6. Interim findings

Having reviewed the tax legislation of NPOs in all the EAEU Member-States, the following conclusions can be made.

1) In all EAEU countries (Armenia, Belarus, Kyrgyzstan, Kazakhstan and Russia), civil and or tax legislation suggests the definition of economic and/or entrepreneurial activities, defining these activities more or less broadly.

2) Without exception, all the EAEU countries allow NPOs to engage in entrepreneurial activities. However, in some cases, the law explicitly prohibits carrying out entrepreneurial activities. As a rule, this applies to some specific activities, or some forms of NPOs. For example, in Russia, NPOs cannot carry out activities under factoring and franchising agreements or under public contracts. In addition, NPOs in the form of public associations (groups of associations) can not engage in entrepreneurial activities in general.

The attitude of States to direct involvement of NPOs in business activities varies. Kyrgyzstan and Kazakhstan are more liberal in this respect: in these countries, both ordinary NPOs and NPOs having special status can directly engage in entrepreneurial activities. Other countries use a combined approach, allowing some NPOs to engage in entrepreneurial activity only indirectly, i.e., through the creation of subsidiary commercial organizations. In this case, the possibility of participating in economic activity depends on the form or status of the NPO. For example, public associations of Armenia and Belarus can participate in entrepreneurial activity only indirectly, while all other forms of NPOs can run their business directly.

3) It should be noted that, according to the legislation of all EAEU countries, NPOs are permitted to carry out entrepreneurial activities provided that their charter-based activities remain the principal activities. Entrepreneurial activities of NPOs should comply with two requirements:

a) These activities must help NPOs to achieve their statutory goals and increase the ability to perform statutory tasks; and,
b) The field of such activities must correspond to the statutory goals of the NPOs.

4) In all countries, profits from business activities are taxed. However, the legislation of each country establishes some exceptions. As a rule, they apply to NPOs that have a special public benefit status. In Kyrgyzstan, for example, the income of regular NPOs is subject to taxation, while charitable organizations enjoy tax exemption. A similar situation exists in Kazakhstan: regular NPOs are taxed (with the exception of activities under state procurement contracts), but organizations carrying out activities in the social sphere (SSOs - type of NPO with public benefit status) are completely exempted from income tax (with the exception of activities related to the production and sale of excisable goods). In Belarus, the business incomes of organizations of disabled people, educational institutions and

[1116] Art. 270(16) and (34) of the Tax Code of the Russian Federation (part 2) N117-FZ dated August, 5, 2000,
[1117] Sinelnikov-Murylev, S., Trunin, I., Goldin, M., Ilyasova, G., et al. *Problems of taxation of non-commercial organizations in Russia* (in Russian) / – Moscow: Transition economy institute. – 2007. – N 108. – 371 p.

cultural organizations are exempt from taxation. In Russia, tax legislation provides tax exemption for organizations of disabled people and for organizations entirely composed of religious organizations' contributions, while the incomes of all other NPOs are taxed.

Only in Armenia is profit from entrepreneurial activity subject to taxation without any exceptions.

5) As a rule, engaging in entrepreneurial activities does not lead to the loss of tax benefits for other types of income. Kazakhstan is an exception. For example, SSOs – "organizations carrying out activities in the social sphere", by virtue of their status, enjoy a wide range of tax benefits. To maintain this status, organizations must meet strict requirements, one of which is to receive at least 90% of their total income from tax-exempt activities (social activities). Thus, excessive engagement in entrepreneurial activities, other than tax-exempt activities, can lead to the loss of all tax benefits.

6) There is another important point concerning most countries: the costs associated with obtaining tax exempt income cannot be deductible for tax purposes. That is, NPOs should keep separate accounting for tax-exempt income and taxable income. The exception is Kazakhstan, where SSOs and autonomous educational organizations (AEOs) are exempted from this obligation.

7) When taxing passive income, countries use different approaches. In some countries, passive incomes of NPOs are exempt; in others, such incomes are considered as a type of entrepreneurial income and are taxed. Sometimes, the regime of taxation of passive income of NPOs does not differ from the tax regime of for-profit organizations. For example, in Armenia, regardless of the type of organization, its dividends are tax exempt, while interest income, rental income and royalties are taxed. The same situation is reproduced in Kyrgyzstan. In Belarus, only passive income of organizations of disabled people is completely exempted from tax; all other NPOs have partial tax exemption, in that their income (interest) from depositing gratuitous funds in bank accounts is not taxed. In Kazakhstan, passive income of regular NPOs is taxed; the exception is interest income on bank deposits. Passive income of SSOs is completely tax exempted. In Russia, passive incomes are included in the profit-tax base of NPOs if they do not form the endowment (target-purpose capital), and are taxed.

8) Assets and property received by NPOs gratuitously are traditionally not subject to income tax. Armenia, Kyrgyzstan and Kazakhstan follow this approach. The exception is Belarus, where gratuitous revenues are taxed. However, at the same time, the legislation sets such a wide list of exceptions that most NPOs are not actually subject to taxation. In Russia, for all basic types of gratuitous revenues of NPOs (gratuitous aid, grants, donations, etc.) tax exemption is set.

At the same time, special requirements for using such funds are often applied. For example, in Armenia, a time limit for the use of funds received gratuitously is established; in Belarus, there is a requirement to use such funds exclusively for the statutory purposes.

9) The tax regime of donors making donations in favor of non-profit organizations differs for individuals and legal entities. As a rule, all EAEU countries (except Russia) provide tax benefits to corporate donors (in the form of deductions from their tax base). Rates of deduction vary. In Belarus, the deducted amount can reach 10% of gross profit: in addition, the corporate donors of sports organizations and all donors that are individual entrepreneurs can deduct their donations without limits. In Kyrgyzstan, donors of charitable, sports and cultural organizations can also deduct their donation in the amount of 10% of taxable income. In Kazakhstan, the rates of deduction are much more modest: 3% of taxable income for large taxpayers and 4% for all other corporate donors. Minimum rates are set in Armenia, where donors can deduct their donation in the amount of 0.25% of gross income. As for deductions for individual donors, they are not set in 4 countries. The exception is Russia. Unlike its EAEU partners, Russian legislation contains a completely opposite concept - the abolition of benefits to corporate donors and the introduction of social tax

deductions for individual donors. Thus, donations to NPOs and religious organizations can be deducted from the tax base of the individual donor, up to 25% of annual income.

In most countries, the tax regimes of NPOs vary even within the one country. Nevertheless, each country uses different criteria for differentiating tax regimes. For example, the tax regime of an NPO may depend on its goals (this approach is used in Belarus); the charitable/public benefit status of the NPO (in Kyrgyzstan, Kazakhstan and Russia); the NPO's legal form (in Armenia and Belarus); the sector where the NPO operates (in Belarus). Table 17 summarizes data on tax regimes of NPOs and their donors in EAEU countries.

Table 17 – The tax regimes of NPOs[1118] and their donors in EAEU countries

	Armenia	Belarus	Kyrgyzstan	Kazakhstan	Russia
Are NPOs allowed to engage in business activities?	Yes, directly and indirectly	Yes, directly and indirectly	Yes, directly and indirectly	Yes, directly and indirectly	Yes, directly and indirectly
Is income from NPOs' entrepreneurial activities taxed?	Yes	Yes, except for the profit of educational institutions, cultural organizations	Yes, for regular NPOs. No, for charitable NPOs	Yes, for regular NPOs (except for income received under a state social contract). No, for SSOs and AEOs	Yes (except for the income of organizations established by religious organizations)
Are passive incomes of NPOs taxed?	Yes, except for dividends (as well as commercial organizations' regime)	Yes, except for income (interest) from depositing in bank accounts of funds received gratuitously	Yes, except for dividends (as well as commercial organizations' regime)	Yes, for regular NPOs (except for interest on bank deposits). No, for SSOs and AEOs	Yes
Are NPOs' gratuitous revenues taxed?	No, if the requirements on the expenditure of such funds are met	Yes, with many exceptions for different types of receipts	No	No	No, for all major types of gratuitous revenues

[1118] It should be noted that, as a rule, all countries set a special favorable regime for the taxation of organizations of disabled people. Since such organizations are not ordinary NPOs their tax regime is not studied in this paragraph.

Table 17 (cont.)

Tax incentives for corporative donors	Yes, donations to NPOs are deductible up to 0,25% of the donor's gross income	Yes, donations to NPOs are deductible up to 10% of the donor's gross income. Donations to some NPOs are deductible without limits	Yes, donations to cultural and sportive NPOs are deductible up to 10% of the donor's gross income.	Yes, donations to NPOs and SSOs are deductible up to 3-4% of the donor's gross income. AEOs' donors have unlimited deductions	No
Tax incentives for individual donors	No	No	No	No	Yes, up to 25% of the donor's total income
Criteria influencing the tax regime of NGOs within the country	Legal form of NPO	1) NPO purpose; 2) Legal form of NPO 3) Sector of NPO	Charitable/public benefit status of NPO	Charitable/public benefit status of NPO	Charitable/public benefit status of NPO
Source: Compiled by the author					

In Kazakhstan, Kyrgyzstan and Russia, the tax regime of non-profit organizations is established by the Tax Code. In Armenia, tax legislation is not codified, so taxation of NPOs is regulated by a set of laws. A specific procedure is established in Belarus. In addition to the Tax Code, tax rules in Belarus can be established by Presidential Decrees[1119]. this also applies to taxation of NPOs. For example, the Decree of the President of Belarus No. 191 "On rendering support to organizations of physical culture and sports" and the Decree of the President of Belarus No. 145 "On certain tax issues in the spheres of culture and information" not only repeat and clarify relevant provisions of the Tax Code, but they introduce additional tax benefits, and the amount of benefits set by these Decrees exceeds the amount of benefits provided by the Tax Code (in particular, for cultural organizations and for sports organizations). This circumstance considerably complicates understanding and application of tax legislation.

When assessing the national systems of taxation of NPOs and their donors, one can note that one of the strictest tax regimes is established in Armenia: the majority of incomes of non-profit organizations, such as passive income or income from entrepreneurial activity, is subject to taxation; Armenian legislation does not set any additional benefits for public benefit (charitable) organizations. The situation with obtaining an authorization to engage in entrepreneurial activities is also unclear. Moreover, low incentives for corporate donors and absence of benefits for individual donors do not increase the attractiveness of the Armenian tax regime to NPOs.

In Belarus, taxation of the NPO also does not look well balanced. In addition to the abundance of legislative acts regulating the taxation of NPOs, a serious defect, in our opinion, is the excessive emphasis on the sectoral affiliation of NPOs. For example, the gov-

[1119] The legal nature of the Decrees of the President of Belarus is also specific. The Decrees are intended to resolve issues falling within the competence of the President. For this reason, the President does not coordinate their adoption with the Parliament. Therefore, they are not subject to parliamentary legislative procedure. On the legal nature of the Decrees of the President of Belarus, see Lagun, D., *Analiz yuridicheskoj prirody ukazov prezidenta Respubliki Belarus'* (in Russian) / in V. Bibilo (ed.) Pravo i demokratiya. / – Minsk: BGU. – 2005. – Issue 16, pp. 42-55

ernment uses tax privileges for support of NPOs operating in certain sectors - the sphere of culture, mass media and sports.

In our opinion, one of the most balanced systems of NPO taxation is established in Kyrgyzstan. The legal form of an NPO cannot be a criterion for applying any specific tax regime. If the NPO receives business profit, it is subject to income tax, like all other legal entities. At the same time, the Tax Code stimulates the development of NPOs, since it contains tax exemptions for non-profit incomes of NPOs. In Kyrgyzstan, NPOs can request a public status (the status of a charitable organization). Activities of charitable organizations are more restricted, but this is compensated by a broader list of tax benefits.

Similar, albeit more cumbersome, tax incentive schemes have been established in Kazakhstan and Russia.

In general, it should be added that current tax systems of the EAEU countries have been formed over the past 20 years, spontaneously enough, influenced by current political and economic decisions; they are not the result of any targeted policy. This explains the significant difference in the tax benefits for NPOs established in these countries. This can also complicate the cross-border activities of national NPOs in the EAEU: even taking into account the application of a non-discriminatory regime to foreign (EAEU-based) NPOs operating on national territory, to obtain tax benefits, NPOs must meet the requirements of all national legislations simultaneously.

5.3. Tax regimes for foreign NPOs acting in EAEU countries

In this paragraph, we will examine how open is the legislation of the EAEU countries in granting tax exemptions to NPOs of other EAEU Member States. In other words we study how problematic is the implementation of the principle of non-discrimination implied by the EAEU Treaty in each country under consideration.

5.3.1. Armenia

Both residents and nonresidents are subject of income tax in Armenia. In the context of the definitions given by the Law, organizations created in foreign countries, international organizations, as well as the legal entities and organizations without the status of a legal entity created outside the Armenia shall be referred to as nonresidents[1120]. The separate subdivision of a nonresident registered in the Republic of Armenia shall be considered as the subdivision of a nonresident[1121].

Articles 53-68 of the Law establish the necessity of paying income tax by nonresidents (including nonresidental NPOs), receiving income from Armenian sources. Such incomes are considered to be:

a) income derived from the business activity implemented by a nonresident in the territory of the Republic of Armenia, in particular, income derived from the sales of goods and products, provision of services in the Republic of Armenia irrespective of the place of payment; income derived from mediator activities in the Republic of Armenia and income derived from administrative, financial and insurance services.

b) passive income of a nonresident received from a resident or a nonresident in the territory of the Republic of Armenia, through the investment (provision) of the property or other assets, in particular: dividends; interest; royalties; income from the lease of property located in Armenia; other passive income.

c) other income derived by a nonresident in the Republic of Armenia[1122].

The law particularly itemizes all types of income in each group.

[1120] Art. 4 of The Law of the Republic of Armenia N ZP-155 dated October 27, 1997 “On Profit Tax”
[1121] Ibid., Art. 54(1)
[1122] Ibid., Art.53

Taxation of the income of a nonresidents derived from Armenian sources shall be performed by a tax agent at the source of paying income. The corporate income tax shall be withheld (imposed) by tax agents at the following rates:

- 10% - for dividends, interests, royalty, income from the lease of property, increase in the value of property and other passive income (with the exception of the income received from the freight) as well as other income received from Armenian sources;

- 5% - for insurance compensation, reinsurance payments and income received from the freight[1123].

Dividends received by nonresidents from Armenian sources by the rate defined by the first section of this clause shall be taxed by rate of zero, provided that the following conditions are in place at the same time:

a) nonresidents gaining dividends are not subject to profit taxation in the country of residence;

b) dividends are gained from participation (share, stock), belonged to the nonresident no less than 2 calendar years;

c) in charter fund of resident distributing dividends, the participation of nonresident gaining dividends within the 2 calendar years preceding the day of payment of dividends, made no less than 25 %;

d) nonresident gaining dividends is their actual owner;

e) the organization distributing dividends is presented a certificate issued by tax entity by order established by the Government of the Republic of Armenia, stating that the nonresident gaining incomes meets all requirements specified in points "a" and "d" of this section[1124].

Considering that often NPOs are not subject to profit taxation in their countries of residence, the provisions of Article 57 provide for a real possibility of tax exemption of dividends received by foreign NPOs when they subject to items b)-d).

Another important source of income for NPOs is donations. With respect to residents, Article 8 of the Law of RA "On Profit Tax" says that **"**donated assets (including member fees) and gratis services rendered to non-profit organizations shall not be considered as income"[1125]. The articles of the Law regulating the taxation of nonresidents do not mention such benefits for nonresident NPOs. However, gratuitous receipts are neither listed in the exhaustive list of taxable incomes of nonresidents, received from sources in Armenia. Therefore it can be concluded that donations made to nonresidental NPO are also not considered as income and are not subject to taxation.

Let us analyze some other laws regulating the activity of NPOs in Armenia.

According to the Law of RA "On Public organizations" "an organization, in accordance with its charter, may become a member of international and foreign non-governmental non-profit organizations, and may have other international relations". An additional point is that "an organization, in accordance with its charter, may found separate subdivisions in foreign states, in conformity with the legislation of those states, unless international treaties adopted by the Republic of Armenia stipulate otherwise"[1126]. Organizations also may "cooperate with other non-profit organizations, including international and foreign non-governmental non-profit ones; as well as to form associaions with those organizations or become a member (participant) of the associaions formed by them, retaining its independence and the status of legal entity for the purpose of carrying out systemized activities, representing and protecting common interests"[1127].

The law specifies that its provisions regulating activities of the organizations shall also

[1123] Ibid., Art.57
[1124] Ibid., Art.57
[1125] Ibid., Art. 8
[1126] Art. 22 of The Law of the Republic of Armenia ZP-268 dated December 24, 2001 "On Public organizations"
[1127] Ibid., Art. 15

expand on activities of separate subdivisions (branches, representations) of international and foreign non-governmental non-profit organizations operating in RA[1128].

The Law of RA "On Charity" also allows NPOs to carry out international charity. The Article 20 says, that "benefactors may carry out international charity". International charity shall be carried out through creation and participation in international charitable programs, through involvement in the activities of international charitable organizations, through co-operation with foreign partners in the field of charity, if this does not contradict with the Armenian legislation and with the International Treaties of Armenia[1129]. An additional point is that, "foreign citizens, individuals having no citizenship, foreign and international organizations are entitled to act as participants of charity as stipulated by the law "On Charity"[1130].

As we noted in paragraph 5.1.1, charitable status in Armenia can be obtained not by organizations, but only by their projects. RA Governmental Decree #66 of January 16, 2003 "On Charitable Programs" clarifies that the programs implemented by international organizations can also be qualified as charitable. This Decree also emphasizes the right of foreign NPOs to be members of the Governmental Commission of the Republic of Armenia, which coordinates charitable programs and supervises the activities of charitable organizations in the country[1131].

So, the analysis of the three aforesaid legislative acts shows that they equally apply to resident and nonresident NPOs. However, they do not contain tax provisions and are not of interest for our research.

Thus, it can be concluded that in Armenia foreign NPOs, on a par with domestic NPOs, pay taxes on income from entrepreneurial activity, and a tax on dividends. An exception exists only with regard to exemption from the passive income tax, which some nonresident NPOs can claim. As for gratuitous donations to NPOs, they are exempt from taxation by different points of tax legislation for both resident and nonresident NPOs.

Consequently, resident NPOs do not have any special tax advantages that could provoke to discrimination against foreign (EAEU-based) NPOs operating in Armenia and violation of the provisions of the EAEU Treaty.

5.3.2 Belarus

The foreign organizations are not tax residents in the Republic of Belarus and are subject of taxation only concerning the activity carried out in Belarus, concerning the incomes from the sources in Belarus and the property located on the territory of Belarus[1132].

The legislation of Belarus prohibits the activities of unregistered organizations. Therefore, to carry out continuing activity a foreign non-profit organization should legitimize its presence on the territory of the country. The easiest way is to open a permanent establishment of a foreign organization.

According to the legislation of the Republic of Belarus for tax purposes a permanent establishment of foreign organizations is:

1) a fixed place of business through which a foreign organization fully or partially carries out entrepreneurial and other activities in the territory of Belarus, including the sale of goods, the performance of various kinds of work, the provision of services on the territory of Belarus, the implementation of other activities not prohibited by law, except for preparatory or auxiliary activities;

2) an organization or an individual person carrying out activities on behalf of a foreign

[1128] Ibid., Art. 23
[1129] Art. 20 of The Law of the Republic of Armenia ZR-424 dated November 8, 2002 "On Charity"
[1130] Ibid., Art. 21
[1131] Para. 4 of RA Governmental Decree N 66 dated January 16, 2003 "On Charitable Programs"
[1132] Art.14 of the Tax Code of the Republic of Belarus (Special Part) N 71-Z dated 29.12.2009

organization and (or) in its interests and/or having and exercise powers of the foreign organization to conclude contract or discuss on its essential terms.

Agreement for avoiding double taxation may provide for other rules on determination of the presence of a permanent establishment of a foreign organization in Belarus for tax purposes. If the norms of such agreements differ from the norms of the legislation of Belarus, the norms of international agreements have priority[1133].

It can be noted that according to the Belarusian legislation, the permanent establishment is necessary to carry out not only entrepreneurial activities, but also other activities, with the exception of preparatory and auxiliary activities. As we believe, the concept of "other" activity also includes non-profit activities.

Permanent establishment of a foreign non-profit organization in Belarus can be opened only for implementation:

1) social support and protection of citizens, including improving the financial situation of the poor, social rehabilitation of the unemployed, disabled people and other socially vulnerable persons;

2) preparation of the population for the prevention of accidents, catastrophe, spontaneous or other disasters, social, ethnic, religious conflicts and assistance in overcoming their consequences, as well as assistance to victims of repression and refugees;

3) contribution in: strengthening peace, friendship and harmony among peoples, preventing social, ethnic and religious conflicts; strengthening the prestige of the family in society; protection of motherhood, paternity and childhood; activities in the field of education, science, culture, art, individual development; activities in the field of prevention and protection of public health, as well as the promotion of a healthy lifestyle, improving the moral and psychological state of citizens; activities in the field of physical culture and mass sport;

4) conservation of the environment and wildlife protection;

5) protection and proper maintenance of buildings, structures, other objects and territories of historical, cultural or environmental significance, and burial places;

6) other socially beneficial activities.

Non-profit organizations statutorily registered in a foreign country have the right to open their permanent establishment[1134] in Belarus after receiving permits issued by the Ministry of Foreign Affairs.

Nonresidents operating in Belarus through a permanent establishment pay all taxes and fees provided by Belarusian legislation for Belarusian entities (unless the rules of international agreements establish other rules)[1135].

A major defect of this option is that the governmental bodies of Blarus give permits to open a permanent establishment to a limited number of foreign non-profit organizations[1136]. There are several alternatives to the creation of permanent establishment of foreign NPOs in Belarus:

1) Establishment in Belarus of a branch of a foreign public association. A significant drawback of this option is that the legislation permits creating in this way exclusively the branches of "international public associations". It is unclear whether this term is used in a narrow sense, to designate a particular legal form or, in a broad sense, to designate all NPOs.

[1133] *Taxation of nonresidents operating in the Republic of Belarus through a permanent establishment* / URL: http://www.startbiz.by/open-biz/inostr-investor/nalogi_nerezidentov.html (accessed: 03.09.2014)

[1134] Regulation on the procedure for the opening and operation of representative offices of foreign organizations in the Republic of Belarus N1189 of December 31, 2013

[1135] *On the procedure for the opening and operation of representative offices of foreign organizations in the Republic of Belarus* (in Russian) / Survey for January 2016 / URL: http://vmp.by/publications/predstavitelstva_inostrannyih_organizatsiy_belarus/

[1136] *Legalization of a foreign non-profit organization* (in Russian) / URL: http://www.lawtrend.org/other/inostrannye-organizatsii

2) Founding (co-founding) of a Belarusian legal entity. The disadvantage of this option is that, unlike the case of permanent establishment, the funds transferred by the founder to the legal entity created by him, will constitute for the latter the foreign gratuitous aid, and, therefore, will be subject to registration in the Department for Humanitarian Activities under the Property Management Directorate of the Republic of Belarus. The same rule applies to branches of international public associations established on the territory of a foreign state.

3) Concluding a treaty on joint activities. In this case the parties do not create a new legal entity. A significant disadvantage of this option is the possibility of rescission of a contract following the petition of the related parties[1137].

In addition to active entrepreneurial and public benefit activities, foreign NPOs can receive passive income from sources in Belarus. In carrying out this type of activity, an NPO do not need to create permanent establishment. Nonresidents who do not carry out activities leading to the creation of permanent establishment but who derive income from sources in Belarus are also payers of corporate income tax. In this case kinds of taxable incomes are established in Article 146 of the Tax Code of Belarus. The list of revenues is exhaustive and includes the followings:

- payment for carriage, freight, demurrage and other payments arising in relation to carrying out international carriage (with some exceptions) and also payments for rendering forwarding services (with some exceptions).
- incomes from debt obligations, including: incomes on credits, loans; incomes on securities; incomes for usage of temporarily available means on accounts in the banks of the Republic of Belarus.
- royalty;
- dividends and incomes equated to them;
- incomes from realization of goods in the territory of the Republic of Belarus on the basis of civil-law contracts;
- incomes from organization and holding in the territory of the Republic of Belarus of cultural events and shows;
- incomes in the form of penalty fees and other sanctions for breaching contract conditions;
- incomes from performance of research and development, technological and experimental works and other similar works);
- incomes from alienation of: immovable property located in the territory of the Republic of Belarus; securities, stakes in the statutory funds (stocks, shares) of organizations located in the territory of the Republic of Belarus or parts thereof;
- incomes from rendering services;
- incomes from immovable property located in the territory of the Republic of Belarus, transferred into trust management;
- incomes from activities on processing of data and placement of information;
- …..[1138]

The tax base for income tax is defined as the total amount of income, while for certain types of income it is permitted to deduct documented costs. The tax agent i.e. the Belarusian organization paying income to a foreign organization, must calculate and withhold income tax.

Tax rates are:

- 6% for payments for carriage, freight, demurrage and payments for rendering for-

[1137] Ibid.

[1138] The full components of taxable income are listed in Art. 146 of the Tax Code of the Republic of Belarus (Special Part) N 71-Z dated December 29, 2009

warding services

- 10% for incomes from debt obligations;
- 12% for dividends, incomes from alienation of stakes in the statutory funds (stocks, shares) of organizations located in the territory of the Republic of Belarus;
- 15% for other incomes, according to the list established by the Tax Code.

5.3.3. Kyrgyzstan

The tax jurisdiction of Kyrgyzstan, like the jurisdiction of Armenia and Belarus, provides two options for taxation foreign companies - the taxation of a permanent establishment of a nonresident and taxation by tax agent through withholding tax at the source of income payment.

1) Permanent establishment of a nonresident. The Tax Code of the Kyrgyz Republic in Article 25 establishes that a permanent establishment is a permanent place of business through which a foreign organization wholly or partly carries out its economic activity.

The fact of the opening by a foreign company of permanent establishment in itself does not cause the appearance of tax liabilities of this company in Kyrgyzstan. Tax liabilities arise when carrying out regular business activities in the territory of the Kyrgyz Republic. In this case, a permanent establishment is subject to income taxation on a par with domestic organizations and pays tax independently. The tax base of a foreign company is defined as the difference between income of a permanent establishment and expenses associated with it[1139].

2) Activities not requiring creation of a permanent establishment.

The specifics of the taxation of foreign companies receiving income from a source in Kyrgyzstan without creation a permanent establishment are defined in articles 222-223 of the Tax Code of the Republic of Kyrgyzstan. In this case proceeds received by a foreign organization are subject to taxation by tax agents at the source of income payment, without any deduction, at the following rates:

a) dividends and interests - 10% (with some exceptions for certain securities);

b) income in form of insurance payments received:

aa) under insurance/reinsurance contracts, except for compulsory contracts - 5%;

ab) under compulsory insurance/reinsurance contracts - 10%;

c) income in form of royalties - 10%;

d) income from management and consulting services - 10%.

e) income from telecommunication or transport services in international communication and transportation activities between the Kyrgyz Republic and other states - 5%.

f) income from other works and services performed - 10%[1140].

In such a case, the organization paying income to a foreign organization automatically becomes a tax agent obliged to calculate and withhold income tax for income paying to a nonresident[1141].

Laws of Kyrgyzstan “On Non-Commercial Organizations” and “On philanthropy and charitable activity” also mention foreign NPOs. Article 1 of the Law “On Non-Commercial Organizations” states that the Law in question regulates social relations arising in connection with the creation, activities, reorganization and liquidation of non-profit organizations, including foreign non-profit organizations operating in the territory of the Kyrgyz Republic[1142]. Article 8 of the same Law also allows Kyrgyz NPOs to establish branches and to open representations/permanent establishments in Kyrgyzstan and abroad in accordance

[1139] Art.219 of the Tax Code of the Republic of Kyrgyzstan N 230 dated October 17, 2008, (with subsequent amendments as of August 12, 2016)
[1140] Ibid., Art.223
[1141] Ibid., Art.222
[1142] Art. 1 of the Law of the Kyrgyz Republic N 111 dated October 15, 1999 “On Non-Commercial Organizations”

with the legislation[1143].

The Law "On philanthropy and charitable activity" mentions foreign NPOs in several Articles. Article 6 defines the international charitable organization. It states that international charitable organization is that one that carries out its activities through its branches, permanent establishments or institutions in the territory of two or more states. The procedure of creation and liquidation of charitable organizations is also determined by the Kyrgyz legislation[1144]. Article 14 regulates the international charitable activities performed by residents. According to this article, residents involved in charitable activities may carry it out in manner established by the legislation of the Kyrgyzstan and international Treaties of the Kyrgyzstan. Resident charitable organization may receive charitable donations from foreign citizens, persons without citizenship, as well as from foreign and international organizations[1145]. Article 15 of the Law states that foreign citizens, foreign and international organizations may participate in charitable activities on the territory of the Kyrgyz Republic[1146].

5.3.4 Kazakhstan

The activities of international and foreign non-profit organizations, as well as the opportunity of domestic NPOs to conduct activities abroad are regulated by the Constitution of the Republic of Kazakhstan, the Civil Code, the Tax Code of Kazakhstan, the Law "On Non-commercial Organizations", the Law "On Charity" and other laws[1147] [1148].

For example, Article 3 of the Law "On Non-commercial Organizations" states that it applies "to the activity of the non-profit organizations of any organizational and legal form, branches and representative offices (separate subdivisions) of foreign and international non-profit organizations, established and operating in the territory of the Republic of Kazakhstan"[1149]. Article 24 of Law defines essence of branches and representative offices of non-profit organization, and pointed out that "the branches and representative offices shall not be legal entities. They shall carry out activity on behalf of a non-profit organization that established them"[1150].

For its part, Article 9 of the Law dated 16 November, 2015 No.402-V "On Charity" states that "foreigners, foreign and international organizations can participate in charitable activities in the territory of Kazakhstan performed in accordance with the laws of the Republic of Kazakhstan and international treaties of the Republic of Kazakhstan"[1151].

The aforementioned laws do not regulate the taxation of the activities of foreign NPOs. Taxation of foreign NPOs is governed by Section 7 of the Tax Code, which sets out all provisions relating to taxation of income of the nonresidents.

According to the Tax Code, nonresident legal entities and individuals are subject of income tax on revenues from sources in Kazakhstan. Depending on the income category, the entrepreneurial activity of nonresidents may or may not require the creation of a permanent

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[1143] Ibid., Art. 8

[1144] Art. 6 of the Law of the KR N 119 dated November 6, 1999 "On philanthropy and charitable activity" from // http://medialaw.asia/document/-1616

[1145] Ibid., Art. 14

[1146] Ibid., Art. 15

[1147] For example, the Decree of the Government of the Republic of Kazakhstan N 854 dated July 25, 2011 "On the establishment of the Country Coordinating Mechanism for Work with International Organizations"; the Decree of the Government of the Republic of Kazakhstan N 2091 dated December 11, 2009 "On the establishment of the Commission for Cooperation of the Republic of Kazakhstan with International Organizations" (as amended and supplemented on 30.03.2012)

[1148] *National blueprint action for the development of non-governmental organizations in the Republic of Kazakhstan for 2014-2020*: the project as of November 7, 2013

[1149] Article 3 of the Law of the Republic of Kazakhstan N142 dated 16 January, 2001 "On Non-commercial Organizations" (as amended and supplemented on 08.04.2016) http://adilet.zan.kz/eng/docs/Z010000142

[1150] Ibid., Art. 24

[1151] Article 9 of the Law of the Republic of Kazakhstan N 402-V dated November 16, 2015 "On Charity"

establishment in the territory of Kazakhstan.

To a nonresident who has a permanent establishment on the territory of the Kazakhstan, the same procedure for income taxation as for residents is generally applied. Such nonresidents pay taxes on the base of self-assessing the taxable income. Their taxable income is defined as the difference between income from sources in Kazakhstan and deductions provided for by the Tax Code[1152].

In addition to corporate income tax the net income of a nonresident legal entity from the activity in Kazakhstan performed through a permanent establishment shall be subject of "tax on the net income" at the rate of 15 percent. The basis of taxation is the net income remaining after payment of corporate income tax[1153].

The income of a nonresident legal entity carriyng out activities without creation of a permanent establishment is subject to corporate income tax at the source of payment without deduction, at the following rates: capital gains, dividends, remunerations, royalties - 15%, income from provision of international transportation services – 5%, the insurance premiums – 5-15%, other types of income - 20%[1154].

A full list of income of nonresidents from sources in Kazakhstan (a total of 28 points) is given in Article 192 of the Tax Code. It includes, for example: income from realization of goods, execution of works, provision of services in the Republic of Kazakhstan; income from provision of management, financial, consulting, auditing, legal services outside the Republic of Kazakhstan; income from fine, penalty and others of sanctions, income in the form of dividends, remunerations, royalties; income from leasing of property, located in the Republic of Kazakhstan; income in the form of insurance remunerations; income from provision of services for international transportations and other incomes which appear as a result of the activity in the Republic of Kazakhstan[1155]. The list is not exhaustive and suggests the possibility of adding other types of income.

It can be noted that a wide range of incomes of nonresidents that are subject to taxation on the national territory is a feature of Kazakh legislation. This list directly affects the interests of NPOs. Thus, according to point 26 of Article 192 of the Tax Code, *the income in the form of gratuitously received or inherited property, including works and services, is also subject to taxation.* The exception is only the property gratuitously received by a nonresident individual from a resident individual[1156].

In other words, nonresident NPOs like other nonresident legal entities also should pay income tax on revenue in the form of gratuitously received or inherited property, including works, services at a rate of 20%. It should be noted that the resident NPOs being in the same situation and receiving the income "in the form of [...] grants, entry and membership fees, contributions of participants of a condominium, charitable aid, gratuitously received property, subsidies and donations on the gratuitous basis shall not be subjected to taxation"[1157]. The tax also applies to inherited property. Therefore, we can conclude that, despite the absence of a tax on inheritance and donation in Kazakhstan, it actually exists for foreign NPOs, in contrast to resident NPOs.

As for nonresident individuals who receive donations in the form of inheritance, they enjoy the same tax exemption as domestic inheritors: again, according to point 26 of Article 192(1) of the Tax Code the property received by a nonresident individual from a resi-

[1152] Akisheva, A. *Peculiarities of taxation of incomes of nonresidents* (in Russian) / URL: http://online.zakon.kz/Document/?doc_id=30194352

[1153] Article 199 of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017)

[1154] Ibid., Article 194

[1155] Ibid., Article 192

[1156] Ibid., Article 192(26)

[1157] Ibid., Article 134

dent individual gratuitously, is not considered as an income[1158].

Let's move on to the features of the taxation of resident donors donating funds to foreign NPOs. The question is whether resident taxpayers may deduct donations made in favour of nonresident NPOs from their tax base.

Article 133 of the Tax Code of Kazakhstan, that regulates a calculation of the taxable income of residents, with respect to legal entities and entrepreneurs states: "A taxpayer may reduce the taxable income by the followings of expenses:

1) the cost of the property, transferred to a non-profit organization or social-sphere organization on a gratuitous basis;

2) charitable donations based on a request from the person, receiving such donations".

The deduction is up to 3% of the taxable income for taxpayers who are qualified as large taxpayers and up to 4% of the taxable income for other taxpayers[1159]. For legal entities made donations *to foreign NPOs* no deductions are provided for.

As for individual donors, when calculating personal income tax, no donations are deductible.

Thus, comparing the tax regimes for resident NPOs and nonresident NPOs, we can conclude that they are different, and someday this issue is likely to require a solution within the framework of the EAEU, as it happened in the EU.

5.3.5 Russia

Several Russian laws in different way regulate the activities of foreign NPOs in Russia and the international activities of Russian NPOs. One of the most important Laws is the Law "On Non-profit Organisations". The law gives definition of foreign NPO[1160], establishes restrictions on the involving of certain categories of persons in the activities of foreign non-profit organizations[1161], and lays down a procedure for monitoring the activities of foreign NPOs[1162].

Other laws regulate certain aspects of the international activity of Russian NPOs. For example, Art. 46 of the Federal Law "On Public Associations" states that "Russian public associations in accordance with their charters can join to international public associations, have rights and bear responsibilities corresponding to the status of these international public associations, maintain direct international contacts and communications, enter into agreements with foreign non-profit non-governmental organizations"[1163] [1164]

Federal Law "On charitable activities and organizations" in Article 21 stipulates the possibility for resident organizations to participate in international charitable activities. This Law emphasizes the possibility for a charitable organization to receive donations from foreign citizens, foreign and international organizations. Article 22 of the Law entitles foreign citizens, foreign and international organizations to carry out charitable activities in the territory of the Russian Federation[1165].

The taxation of foreign organizations including non-profit organizations is regulated by Articles 306-309 of the Tax Code. The Tax Code sets the specifics of tax calculation by

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[1158] For comparison: Article 156 (28) excludes from taxable income of an individual "the cost of property, received by an individual in the form of a gift or inheritance from another individual (except the property, received by an individual entrepreneur to perform his/her activity).

[1159] Article 133(1) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017)

[1160] Art. 2(4) of the The Federal law N 7-FZ dated January 12, 1996 "On Non-profit Organizations"

[1161] Ibid., Article 30.1

[1162] Ibid., Article 32

[1163] Art. 46 of the Federal Law N 82-FZ dated May 19, 1995 "On Public Associations"

[1164] Gnezdilova, O. *Regulation of the activities of NPOs performing the functions of a foreign agent (Review of Russian and international legislation)* (in Russian) / URL: http://www.ihahr-nis.org/sites/default/files/files/regulirovanie-nko-ekspert.pdf

[1165] Art. 22 of the Federal Law N135-FZ dated August 11, 1995 "On charitable activities and organizations"

foreign organizations receiving income from sources in Russia, in cases where their activity leads to creation of a permanent establishment, and in cases when it does not.

To carry out business activities in Russia a foreign NPO, as a rule, should create of a permanent establishment (a complete list of business activities is given in Article 306 of the Tax Code).

Article 307[1166] of the Tax Code sets the rules of taxation of foreign organizations operating through a permanent establishment in the Russian Federation. They are subjects of the same tax regime that applies to residents. The income tax rate for foreign organizations operating in the Russian Federation through a permanent establishment is 20%.

Article 307 also states that in determining the tax base of a foreign non-profit organization the provisions of point 2 of Article 251 of the Tax Code shall be taken into account. In particular, Article 251(2) says, that in determining the tax base special-purpose receipts shall not be considered. In sense of the Law, special-purpose receipts are those received from other organizations and (or) individuals to maintenance of NPOs and to conduct statutory activities of NPOs, used by NPOs exclusively in according to designated purpose[1167].

Article 251(2) lists all types of special-purpose receipts. They were studied in section 5.2.5 describing the tax regime of NPOs in Russia. It should be pointed out that according to Article 307 of the Tax Code foreign NPOs operating in Russia through a permanent establishment may exclude from the tax base the same special-purpose receipts as domestic NPOs do.

For foreign organizations that do not carry out activities through a permanent establishment in the Russian Federation, profits are recognized as income received from sources in the Russian Federation. Such incomes are also consolidated into the list:

1) dividends paid to a foreign organization which is a shareholder of Russian organizations;

2) income received as a result of the distribution in favour of foreign organizations of profit or assets of organizations, other persons or associations thereof, including upon their liquidation;

3) interest income from any types of debt obligations;

4) income from the use in the Russian Federation of rights in intellectual property;

5) income from the sale of shares (share interests) in Russian organizations, more than 50 percent of whose assets consists of immovable property situated in the territory of the Russian Federation;

6) income from the sale of immovable property which is situated in the territory of the Russian Federation;

7) income from the rental or sublease of assets which are used in the territory of the Russian Federation, including income from leasing operations, and income from the rental or sublease of ships and aircraft and (or) means of transport and containers used in international traffic;

……

10) other similar income[1168].

All the above mentioned incomes are subject to withholding tax.

The tax rates for income of foreign organizations which is not associated with activities carried out in the Russian Federation through a permanent establishment shall be established as follows[1169]: 15% - for income received in the form of dividends from Russian organizations by foreign organizations, as well as dividends from participation in the capital of the organization in a different form; 10% - for income from the operation, maintenance or rental (chartering) of vessels, aeroplanes or other mobile means of transport or

[1166] Art. 307 of the The Tax Code of the Russian Federation (part 2) N117-FZ dated August 5, 2000
[1167] Ibid., Art. 251(2)
[1168] Ibid., Art. 309(1)
[1169] Ibid., Art. 284(2)

containers (including trailers and auxiliary equipment required for transportation) in international traffic; 20% - for all other types of income.

The income in the form of financial assistance, donations, and other transfer of property in this list is not directly indicated (unlike, for example, Kazakhstan, where income in the form of property located in Kazakhstan and received gratuitously, as well as income from such property are recognized as income from sources in Kazakhstan)[1170]. However, the mentioned list is not closed; it contains an indication that *other similar incomes* are also subject to income tax[1171].

In our opinion, this indistinctness of the Law gives the tax authorities broad mandate to determine whether donations received by foreign NPOs gratuitously are subject to income tax. In addition, the exact tax procedures for foreign NPOs depend on the provisions of international agreements of Russia with other countries. This follows from Article 310(2)(4) of the Tax Code: "the amount of income tax paid by foreign organizations shall be calculated and withheld on all the types of incomes listed in Article 309 and in all cases of receiving such incomes, *except the cases when in accordance with international agreements (treaties) the income is not taxable in the Russian Federation*[1172].

5.3.6. Interim findings

The analysis of national legislations regarding the activities of foreign NPOs operating in the territory of the EAEU countries allows us to draw a number of common conclusions.

First, in all EAEU countries, laws on non-profit organizations and charitable organizations allow for carrying out the activities of resident NPOs abroad and the activities of nonresident NPOs in the national territory. At the same time, the taxation of incomes resulted from these activities of nonresident NPOs is regulated by the tax legislation.

Secondly, the tax jurisdictions of the analyzed countries apply to residents and foreign nonresident individuals who operate or have another source of income in national territories.

Third, the principles of taxation of nonresident organizations in the analyzed countries, in general, also correspond to international taxation practices, including OECD practice. According to national legislations, there are two options for taxation of nonresident organizations, namely the taxation of permanent establishment of a nonresident and the withholding of tax by a tax agent at the source of payment of income to a nonresident.

Fourthly, in all the countries in question, the concept of permanent establishment, set out in national legislation, coincides with the concept proposed by the OECD. Although the OECD [1173] international standards do not have legal force in the EAEU countries, and do not apply on determining the status of a permanent establishment in these countries, nevertheless, the national definitions of permanent establishment essentially repeat the one given in the OECD Model Tax Convention on Income and Capital[1174]. The exception is Belarus, which in defining a permanent establishment mentiones not only “commercial”, but also “other” activities.

Basically, permanent establishments of nonresidents in the analyzed countries pay taxes in the same regime as resident legal entities.

[1170] Art. 192(1)(26) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017)

[1171] Art. 309(1)(10) of the The Tax Code of the Russian Federation (part 2) N117-FZ dated August, 5, 2000

[1172] Art. 310(2)(4) of the Tax Code of the Russian Federation (part 2) N 117-FZ dated August 5, 2000

[1173] In accordance with the publication of practices / norms, the OECD’s criteria are the basic criteria for determining the need for a nonresident a permanent establishment.

[1174] According to Article 5 of the OECD Model Tax Convention on Income and Capital (the OECD Convention) the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on. OECD (2015), *Model Convention on Income and on Capital*, 2014 (Full version), OECD Publishing // http://www.oecd.org/ctp/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm

Taxpayers who receive income without a permanent establishment pay taxes separately for each type of income received in the national territory. The tax laws of the EAEU countries contain more or less exhaustive lists of revenues that are considered to have been obtained from sources in the countries in question and are subject to taxation. As a rule, it does not lead to creation of a permanent establishment of foreign NPOs to receive passive income from the activities of third parties in the national territory, revenues from international transportation and other revenues.

In general, national laws establish for incomes received without permanent establishment, lower tax rates than rates applied to residents. In addition, these rates can be reduced as a result of international agreements between countries. This is the fifth common feature of the EAEU countries: in their legal systems norms and principles of international law have priority over the norms of national law. If the international treaties on taxation establish other rules and norms than those provided for by national tax legislation, the rules and norms of international treaties apply. For organizations originating from the countries with which the EAEU countries have agreements on the avoidance of double taxation, the provisions of these agreements, and especially the exceptions made for the notion of permanent establishment, regulate their activities in the EAEU countries. Thus, Treaties for the avoidance of double taxation can reduce or even completely eliminate the taxation of income received by organizations operating without a permanent establishment in the EAEU countries. Table 18 illustrating the rates of taxes on income from sources in the EAEU countries (without taking into account the terms of international agreements) is given below.

Table 18 – Tax rates for incomes of nonresident NPOs received from sources in the EAEU countries

	Armenia	Belarus	Kyrgyzstan	Kazakhstan[1175]	Russia
Dividends	10%	12%	10%*	15%*	15%
Interest income	10%	10%	10%*	15%*	20%[1176]
Royalties	10%	15%	10%*	15%*	20%
Capital gains	10%	12% (on income from the alienation of shares in the statutory fund of organizations located in the territory of the country)	not applicable	15%*	15%
International transportation	5%	6%	5%**	5%*	10%
Insurance claim payments	5%	not applicable	5-10%*	5-15%*	20%
Other income and remunerations	10%	15%	10%**	20%**	20%
* The rates of withholding tax may be reduced in accordance with treaties on the avoidance of double taxation of the country ** Payments made to recipients may be tax exempt in accordance with treaties on the avoidance of double taxation of the country					
Source: Compiled by the author on the basis of: 1) Comparative table on taxes. Central Asia / Baker Tilly International Limited. – 2013. – 21 p.; 2) Country Tax Guide (Russia) //Baker Tilly International Limited. – 2015. – 8 p.; 3) Tax guide 2017 (Belarus) / Baker Tilly International Limited. – 2017. – 51 p.					

[1175] For all types of listed income for residents of countries with preferential taxation in Kazakhstan, the rate is 20%

[1176] Lower rates may apply to certain types of interest

Thus, in all countries of the EAEU the regular entrepreneurial activity of the NPO requires creation of a permanent establishment, and assumes that a permanent establishment of nonresident is subject to taxation on a par with residents. Dividends, interest income and some other passive incomes listed in national laws do not lead to creation of a permanent establishment and are taxed by a tax agent at the source of payment.

The question is, whether a foreign NPO should have a permanent establishment in the analyzed countries if its sole purpose is fundraising? And in general, should it pay tax on gratuitous proceeds received in the territory of the EAEU countries?

The legislation of **Armenia, Kazakhstan, Kyrgyzstan** and **Russia** requires a nonresident to create a permanent establishment for carrying out commercial activities (i.e. the activities aimed at making profit) in the national territory. Donations are not considered as an income from entrepreneurial activity, so to obtain donation NPO does not need to create of a permanent establishment in the territory of these 4 countries. The legislation of **Belarus** established another rule. The Belarusian Tax Code requires nonresident organizations to create a permanent establishment not only for carrying out commercial/economic activities, but also for any other activities carried out in accordance with its charter. As we believe, the "other" activity includes non-profit activities, including fundraising. Therefore, for any activity including fundrising carried out in the territory of Belarus, a nonresident NPO should create a permanent establishment and pay taxes in the same regime as Belarusian NPOs.

Theoretically, in other countries, donations may be taxed as income not related to a permanent establishment. This approach is established in **Kazakhstan**. In the tax legislation of Kazakhstan the gratuitously received funds are listed in the list of incomes received without the creation of a permanent establishment.

This is not the case of **Armenia** and **Kyrgyzstan**. The tax legislations of these countries contain exhaustive lists of incomes of the nonresidents, which are considered to have been obtained from sources in the national terrirory without the creation of a permanent establishment and are taxed at the source of payment. These lists do not include the item on donated funds. From this we can conclude that the funds gratuitously received by nonresidents in the territory of Armenia and Kyrgyzstan are not taxed.

The relevant provisions of legislation of Russia are less clear. In Russian tax legislation, donations are not mentioned as a type of income derived from sources in Russia. However, the list of such incomes is not exhaustive; it includes the category "other revenues". In our opinion, the funds gratuitously received by NPOs may be included in this category.

In favor of this assumption, the explanatory letter given by the tax authorities of the Russian Federation concerning the Order of the MTL of RF states: "In favor of this assumption, the explanatory letter given by the tax authorities of the Russian Federation concerning the Order of the MTL of RF states: "Subparagraphs 1-9 of paragraph 1 of Article 309 lists the incomes from sources in the Russian Federation which are not related to the performance of activities by a foreign organization in the Russian Federation. At the same time, subparagraph 10 specifies "other similar incomes". The similarity of incomes lies not in similarity with any of certain types of income listed in subparagraphs 1-9 of paragraph 1 of Article 309, but in being an income from sources in the Russian Federation that are not related to activities through permanent establishment (with the exception of incomes directly mentioned as incomes not related to incomes from sources in the Russian Federation)"[1177].

Despite the fact that this Order of the MTL of RF was canceled, up to now there are no other comments of the tax authorities that would explain the application of this item. We

[1177] Para. 1.1 of The Order of the Ministry of Taxes and Levies N BG-3-23/150 of the Russian Federation of 28.03.2003

do not exclude that opinion of Russian tax authorities on this issue has not changed. It can be assumed that under such an approach the assets gratuitously received by foreign NPOs are recognized as the income of nonresident from a source in the Russian Federation and are subject to income tax.

From this example, two more conclusions can be done. First, legal vagueness gives the national tax authorities too broad powers with regard to taxation of donations received by foreign NPOs. Secondly, this position of the tax authorities gives rise to other ambiguities. For example, in accordance with national legislation, a tax agent providing an income to an NPO that does not have a permanent establishment and receives passive income, must calculate and withhold tax with each payment. In this way it is not clear, for example, how a foreign NPO that does not have a permanent establishment should pay taxes from donations received from individuals through the cash boxes.

Table 19 summarizes data on taxation of various types of incomes of non-resident NPOs in all the EAEU countries.

Table 19 – Income taxation of non-resident NPOs in the EAEU countries

	Armenia	Belarus	Kyrgyzstan	Kazakhstan	Russia
Profit from entrepreneurial / economic activities	Taxation of PE under the regime of resident NPOs	Taxation of PE under the regime of resident NPOs	Taxation of PE under the regime of resident NPOs	Taxation of PE under the regime of resident NPOs + tax on the net income 15%	Taxation of PE under the regime of resident NPOs
Passive income	Withholding tax without creating a PE	Withholding tax without creating a PE	Withholding tax without creating a PE	Withholding tax without creating a PE	Withholding tax without creating a PE
Funds and property received gratuitously	Not taxed	Taxation of PE under the regime of resident NPOs	Not taxed	Withholding tax without creating a PE	Probably withholding tax without creating a PE
Source: Compiled by the author					

Irrespective of approaches the EAEU countries chose for taxation of nonresidents, as a rule they do not impose discriminatory tax conditions to foreign NPOs. The only exception is Kazakhstan. Analysis of tax regime of nonresident NPOs revealed at least 3 elements that differ from the tax regime of resident NPOs:

1) In addition to corporate income tax the net income of a nonresident NPO from the activity in the Republic of Kazakhstan carryed out through a permanent establishment shall be taxed at the rate of 15%;

2) The income of nonresident NPO in the form of gratuitously received or inherited property, including works and services is considered as income from a source in Kazakhstan and is subject to taxation at the source of payment at a rate of 20%;

3) Donations in favor of nonresident NPOs are not deductible from the tax base of donor legal entities.

In according to the EAEU Treaty these items can be considered as potentially discriminatory with respect to other EAEU Members. So in future this issue is likely to require a solution within the framework of the EAEU.

5.4 Legal restrictions for foreign funding of non-profit organizations in the EAEU countries as a barrier for their cross-border activities

As noted by Maina Kiai, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, in the second thematic report to the Human Rights Council, pursuant to Council resolutions 15/21 and 21/16, "the ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources"[1178].

In recent years, civil society actors have been facing increased control and undue restrictions in relation to funding they received, or allegedly received. This problem is not isolated and exists in all parts of the world, usually as a result of undue restrictions occurring when an association: (a) seeks; (b) secures; or (c) uses financial resources[1179]. These processes can be explained by a number of reasons and historical backgrounds, which the American researcher Douglas Rutzen has studied in detail in his article "Aid barriers and the rise of philanthropic protectionism"[1180].

Twenty years ago, the world was in the midst of an "associational revolution". Internationally, civil society organizations had a generally positive aura, recognized for their important contributions to health, education, culture, economic development, and a host of other publicly beneficial objectives. As the 20th century closed, commentators noted the fall of the Berlin Wall, the rise of the Internet, and the renaissance of civil society. Political, technological, and social developments were weaving themselves together into an era of civic empowerment. Reflecting this era, in September 2000, the United Nations General Assembly adopted the Millennium Declaration. Among other provisions, the Declaration trumpeted the value of "non-governmental organizations and civil society, in general".

One year later, the zeitgeist changed. After the terrorist attacks of September 11, 2001, discourse shifted away from human rights and the positive contributions of civil society. President Bush launched the War on Terror, and NPOs became an immediate target: "just to show you how insidious these terrorists are, they oftentimes use nice-sounding, non-governmental organizations as fronts for their activities…. We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organizations"[1181]. Following the United States, the governments around the world became increasingly concerned about civil society, particularly NPOs receiving international support.

Anxiety heightened after the so-called "color revolutions". The 2003 Rose Revolution in Georgia and the 2004 Orange Revolution in Ukraine caught the attention of world leaders.

Restrictions also gained momentum from efforts to promote the effectiveness of foreign aid. In March 2005, ninety countries endorsed the Paris Declaration on Aid Effectiveness, which incorporated the concept of the "alignment of aid with partner countries' priorities". Soon thereafter, a number of governments introduced restrictive measures to regulate international funding, covering not only bilateral aid but also cross-border philanthropy. According to data from the International Center for Not-for-Profit Law, between 2004 and 2010, more than fifty countries considered or enacted measures restricting civil society.

[1178] Kiai, M. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (A/HRC/23/39) // Human Rights Council Twenty third session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN General Assembly, 24 April 2013 / URL: http://www.icnl.org/research/library/files/Transnational/A.HRC.23.39_EN.pdf

[1179] Ibid.

[1180] Rutzen, D. *Aid barriers and the rise of philanthropic protectionism* // International Journal of Nonprofit Law. – 2015. – Vol. 17. – N 1, pp. 5-44

[1181] Ibid.

A second wave of legislative constraints then emerged after the so-called "Arab Awakening", which began in late 2010. Once again, countries around the world took notice and initiated measures to restrict civil society. Since 2012, more than ninety laws constraining the freedoms of association or assembly have been proposed or enacted.

Governments employ diverse measures to impede civic empowerment. However, legal barriers impeding the ability of civil society organizations to access international assistance, in the form of grants and donations or otherwise, are the second most commonly used constraint[1182]: approximately one-third (36%) constrain international funding of NPOs, including cross-border philanthropy.

All the legal barriers that stand in the way of the international financing of NPOs are divided into the restrictions imposed by the "donor country" on the outflow of financial resources and the restrictions imposed by the "recipient country" on their inflow.

"Donor country" restrictions (the restrictions on outflow of resources) include:

(1) significant limitations on foreign grantmaking by tax-exempt entities;

(2) advance governmental approval for cross-border giving;

(3) burdensome procedural requirements for foreign grants;

(4) counter-terrorism measures;

(5) restrictions on financial transactions with sanctioned countries;

(6) limited, or no, tax incentives for international philanthropy.

The latter (of the mentioned) type also includes "landlock" tax restrictions, which we examined in the second chapter of the dissertation. The ECJ's judgment in the Persche case has triggered a wave of reform of tax legislation within the EU. Most countries have now reformed tax laws to comply with the ECJ ruling and recognize the ability of donors to claim deductions for donations to qualifying foreign organizations resident in the EU or EEA. Nevertheless, even in countries that have reformed legislation to allow for tax relief for cross-border donations/gifts (to recipients in the EU or countries in the EEA), there are procedural rules aimed to ensure that the foreign recipient is equivalent to resident non-profit organization.

The "recipient country" restrictions on the inflow of philanthropic giving include:[1183]:

(1) requiring prior government approval to receive international funding;

(2) enacting "foreign agents" legislation to stigmatize foreign funded NPOs;

(3) capping the amount of international funding that a NPO is allowed to receive;

(4) requiring that international funding be routed through government-controlled entities;

(5) restricting activities that can be undertaken with international funding;

(6) prohibiting NPOs from receiving international funding from specific donors;

(7) constraining international funding through the overly broad application of counter-terrorism and anti-money laundering measures;

(8) taxing the receipt of international funding, including cross-border philanthropy;

(9) post-receipt procedural burdens, imposing onerous reporting requirements on the receipt of international funding;

(10) foreign exchange requirements;

(11) using defamation laws, treason laws, and other laws to bring criminal charges against recipients of international funding[1184].

In this preambular part we wanted to show that, firstly, the restraining of foreign funding of domestic NPOs and the activities of foreign NPOs in a national territory is a worldwide trend. Secondly, that tax barriers are only one of a wide range of methods that can

[1182] *A Mapping of Existing Initiatives to Address Legal Constraints on Foreign Funding of Civil Society* / ICNL. – July 1, 2014

[1183] Rutzen, D., Moore, D. *Legal Framework for Global Philanthropy: Barriers and Opportunities* / ICNL Report on Global Philanthropy. – 25.10.2010. – 40 p.

[1184] Ibid.

limit the activities of foreign NPOs. In the following subparagraphs, we will consider in more detail the legal restrictions on the activities of NPOs in the EAEU countries, which implicitly hamper the harmonization of tax legislation in regard to NPOs.

5.4.1 Armenia

In comparison with other EAEU Member States, Armenia has a quite liberal legal regime for activities of non-profit organizations. International experts consider Armenia as one of the most favorable countries for the NPO in the post-Soviet countries (in addition to Georgia and Kyrgyzstan until recent time).[1185].

In Armenia, the legislation does not prohibit foreign financing of public organizations. Restrictions are described in paragraph 2, 7 and 8 of Article 25 of the Law "On Parties" of the Republic of Armenia. According to its provisions political parties can not receive funding from foreign states, citizens and legal entities, as well as from legal entities with foreign equity, if the share of a foreign equity in the statutory capital of such legal entity exceeds 25%, from international organizations and international public movements. Article 13 of the Law of the Republic of Armenia "On liberty of conscience and religious organizations" also notes that religious organizations whose spiritual centers are outside the territory of the Republic of Armenia can not be financed by these religious centers[1186].

For today, several thousand NPOs are registered by the Ministry of Justice of Armenia. The US diplomatic missions and the US embassies, representations of the UK, France, Germany, Poland, Switzerland and other countries fund small projects which declare as their goal the protection of human rights, development of media, organization of conferences and roundtables, student and scientific exchange. An independent category of entities that provide financial, organizational and technical assistance to Armenian NPOs covers specialized international or foreign organizations operating in the region. Sometimes they work in close contact with the diplomatic representations of their countries or with international organizations. They include, particularly: USAID and Eurasia Partnership Foundation, Swiss Agency for Development and Cooperation (SDC), British Council and UK Department for International Development (DFID), German Organisation for Technical Cooperation (GTZ) and others[1187].

The activity of some organizations has a more local character, concentrating in separate, sometimes rather narrow spheres of social and political activity. There iinclude, for example International IDEA, International Organization for Migration (IOM), World Vision Armenia, NDI, IREX, Environmental Public Advocacy Center (EPAC), OSI Assistance Foundation and others. Most of them have been operating in Armenia since the beginning or the middle of the 1990s, although some organizations have begun to implement the first humanitarian programs in the country since 1988 (after the Spitak earthquake).

Except a liberal regime of receiving financing from foreign NPOs, in Armenia it is also possible to observe a quite close interaction of a number of NPOs with authorities that allocate governmental grants. As the press secretary of the president of Armenia stated, "distribution of government grants is controlled by a "monitoring group", which includes officials of the presidential administration, as well as representatives of "partner organiza-

[1185] *Recommendations of the International Center for Not-for-Profit Law on the Legislation of the Republic of Belarus Regulating Foreign Gratuitous Assistance* (ICNL). March 26, 2015 / URL: http://actngo.info/sites/default/files/files/recomendation_of_icnl.pdf

[1186] Kondrat, E. *International financial security in the context of globalization. The main directions of law enforcement cooperation of States* (in Russian) / Monograph / E.N. Kondrat / – Moscow: ID FORUM. – 2013. – 512 p.

[1187] *Who do the Armenian NGOs work for?* (in Russian) // Independent international newspaper "Noev kovcheg". – 2013. – N12 (218)

tions"[1188]. According to official information of the Ministry of Finance, in 2010-2012, 31 Armenian organizations received government grants totaling $1.2 million[1189].

Thus, Armenian NPOs enjoy liberal Armenian legislation for attracting government grants, as well as donations from foreign donors and assistance from foreign NPOs. Despite the favorable legal prerequisites, the NPOs originated from the EAEU countries are not presented in Armenia. Only Russian NPOs are active in the territory of Armenia (the term "active" is relative enough here, since the ratio of number of organizations of the United States and the European countries to the number of Russian NPOs in Armenia is 350:10)[1190]. Data on the number of NPOs from the other countries of the EAEU operating in Armenia are not available.

5.4.2. Belarus

In Belarus, any foreign funding of NPOs is subject to state registration. As a rule, funds of foreign organizations intended for use by Belarusian NPOs are of two kinds: in the form of "foreign gratuitous aid" and in the form of "international technical assistance". As we previously noted, the receipt of funds in these two forms is accompanied by certain tax benefits, discussed in paragraph 5.2.2.

In March 2016, Presidential Decree №5 "On Foreign Donations" went into effect. It directly regulates cross-border activities of NPOs, in particular, contains a number of provisions that are important for NPOs attracting foreign gratuitous assistance for their activities, including assistance from the EAEU countries. Decree №5 replaced Decree № 24 of 2003 and, with some minor positive changes, left the previous procedure of receipt of foreign donations unchanged.

According to the Decree[1191], "foreign gratuitous assistance means cash, including those provided by foreign founders for financing the institutions of Belarus created by them, contributions of foreign founders (members) of Belarusian non-profit organizations, interest-free loans, as well as goods (property), with the exception of real estate, located outside the Republic of Belarus, gratuitously granted to recipients for use, possession and (or) disposal".

The remarkable thing is that the definition itself creates a problem for non-profit organizations. The legislator assigns contributions of foreign founders (members) of Belarusian non-profit organizations to foreign gratuitous assistance, so if an institution or fund is created by a foreign individual or legal entity, the contributions of these individuals are considered as gratuitous foreign aid.

Any foreign aid coming to organizations in Belarus must be pre-registrated in the Department for Humanitarian Activities under the Administration of the President of the Republic of Belarus. The exceptions are 1) individuals, for which the Decree abolished the need for registration of donations received from abroad, excluding cases of applying for exemption of such donations from the individual income tax, and 2) foreign donations obtained in the form of goods (property) in the amount not exceeding 500 basic units as at the date of its receipt and designed to be used in production and business operations of a legal entity.

The Decree contains a limited list of purposes that are permitted to obtain foreign dona-tions according to the standard procedure. For example, according to the Decree, financial funds and property received as an aid may be used to: eliminate the consequences of

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[1188] Ibid.
[1189] *Western grants by Armenian NGOs* (in Russian) (accessed: 13.06.2014) / URL: https://ria.ru/cj_analytics/20140613/1012353820.html
[1190] *Skorikov: Non-profit organizations are a weak link of the "soft power" of Russia* (in Russian) / URL: http://nahnews.org/300942-skorikov-nekommercheskie-organizacii-eto-slaboe-zveno-myagkoj-sily -rossii/
[1191] The Decree of the President of the Republic of Belarus N 5 dated August 31, 2015 "On Foreign Gratuitous Aid"

natural and man-made emergencies; carrying out scientific research; assistance in protection of historical and cultural legacy, development of libraries and museums, cinematography, fine arts, applied arts, music, theater, and other arts, carrying cultural events; development of specially protected natural areas, environmental protection and rational use of natural resources; health care; providing social assistance to socially vulnerable groups of citizens; development of physical culture and sports and other purposes.

Property and other funds received as foreign gratuitous aid may not be used to carry out extremist activities, other acts prohibited by law, as well as to prepare and conduct pre-elections and other political activities.

Comparing with the previous Decree №24, Decree №5 expanded the list of approved uses of foreign aid. But as before, the listcontains no educational activities, human rights, promotion of healthy lifestyles, gender equality, protection of animals, and other aspects of NPOs' activities.

Foreign donations for the purposes not specified in the list [1192] can be obtained only by a decision of the Property Management Directorate of the President of the Republic of Belarus (when obtaining the aid in the amount exceeding 500 basic units[1193], such decision shall be taken only by the Directorate upon agreement with the President of Belarus)[1194].

It should be noted that the legal listing of the uses of foreign gratuitous aid makes it difficult to implement projects that use both foreign and domestic financing because of the fact that the directions of using of foreign and domestic (sponsor) aid may not coincide. In addition, decision of whether the NPO activity corresponds to the one of designations set by law, is often subjective[1195].

A wide range of documents defined by law is required to register foreign gratuitous aid. In addition, the Department is entitled to request additional documents and/or information.

Organizations or individuals receiving foreign gratuitous aid are required to open a special account in the bank. However, access to the funds on this account is available for the, only after the obtaining of the registration certificate issued by the Department[1196]. In addition to the certificate, the bank asks the recipient to present a detailed plan for use of aid. Such plan should also be agreed with the Department. Department for Humanitarian Activities requires the indication of amounts for each budget item, including wages, equipment purchased, and administrative expenses. As noted by Belarusian researchers, the fulfillment of this requirement at the stage of receiving funds is often problematic for NPOs[1197]. Worse yet, that the bank monitors the use of foreign grants, giving sums of money from the account in strict accordance with the plan of their intended use[1198].

Recipients of foreign gratuitous aid in cash are required to submit to the Department a report of the use (distribution) of foreign gratuitous aid[1199].

A special regime is established for the use of real estate. According to this regime the recipient can not carry out any transactions with real estate received as foreign aid without

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[1192] One of the most common reasons for refusing to register foreign gratuitous assistance is an indication of non-compliance with the goals listed in the Decree. Decisions are often based on a judgmental estimate.

[1193] It is approximately 5 150 euros for 01.01.2017

[1194] *Freedom of associations and legal conditions for non-profit organizations in Belarus.* Review Period: 2015 / Legal Transformation Center, Assembly of Pro-Democratic NGOs / URL: http://www.lawtrend.org/wp-content/uploads/2016/02/SA-2015_en.pdf

[1195] Smolianko, O. *The main problems of the legislation on foreign donations* (in Russian) / Center for Legal Transformation. – 2016 / URL: http://lawtrend.org

[1196] *Foreign Gratuitous Aid* / URL: http://www.lawtrend.org/other/inostrannaya-bezvozmezdnaya-pomoshh

[1197] Smolianko, O. *The main problems of the legislation on foreign donations* (in Russian) / Center for Legal Transformation. – 2016 / URL: http://lawtrend.org

[1198] Ibid.

[1199] Art.61 of the Decree of the President of the Republic of Belarus N 5 dated August 31, 2015 "On Foreign Gratuitous Aid"

the approval of the Department for Humanitarian Activities. The same is applied to the reconstruction of real estate and changing its technical characteristics[1200].

A huge defect of the new Decree, especially in the light of creation of favourable conditions for the tax harmonization in the EAEU countries, is the excluding a provision on its non-application to foreign citizens who, under international treaties signed by Belarus, are entitled to the same rights in the field of civil legal relations as the citizens of the Republic of Belarus. This is about the citizens of the Russian Federation. In accordance with the Treaty between the Republic of Belarus and the Russian Federation on equal rights of citizens dated December 25, 1998 (entered into force on July 22, 1999), citizens of the Republic of Belarus and the Russian Federation enjoy equal civil rights and freedoms. In the previous Decree №24, the requirement to register foreign gratuitous aid did not affect foreign citizens who, in accordance with the norms of international treaties of the Republic of Belarus, were accorded equal rights with citizens of the Republic of Belarus in the field of civil legal relations[1201]. Thus, in accordance with the new legislation the aid granted by the citizens and legal entities of the Russian Federation is considered as foreign donations.

In general, the Decree tightens the reporting requirements, increases state control over the use of donations, complicates the process of exemption such donation from taxes as well as puts in a privilleged position the humanitarian projects approved by the government as compared with the projects performed by the NPOs independently. It contains the requirements for numerous approvals and bureaucratic procedures that make it difficult to obtain foreign donations for NPOs, while making it easier to obtain foreign donations for humanitarian programs of the state bodies.

Another type of foreign funding of NPOs in Belarus is international technical assistance. This is one of the types of assistance gratuitously provided to the Republic of Belarus, to its organizations and citizens by donors of international technical assistance (foreign countries, international organizations) to support social and economic transformation, environmental protection, infrastructure development through research, training, transfer of experience and technologies, cash, equipment and other property under approved programs of international technical assistance.

The main legal act regulating the issues of international technical assistance is the Decree of the President of Belarus of October 22, 2003 №460 “On international technical assistance provided to the Republic of Belarus”.

It should be noted that, unlike the regulation of foreign gratuitous aid, in the regulation of international technical assistance greater progress has been made. Since 2015 significant progress has been made in providing access to the funds of foreign states and international organizations which are defined as international technical assistance. For 2 years, the number of documents for registration of projects has been reduced (earlier the term for registration of international technical assistance could have reached a year or more)[1202] and reporting procedures have been simplified. In addition the Coordination Council has been created for interaction between of state bodies and the donors of international technical assistance.

5.4.3. Kyrgyzstan

Legislation of the Kyrgyz Republic does not require the permission of state bodies to receive foreign aid and does not contain a legally fixed procedure for registering /receipt of

[1200] Smolianko, O. *The main problems of the legislation on foreign donations* (in Russian) / Center for Legal Transformation. – 2016 / URL: http://lawtrend.org

[1201] *Foreign Gratuitous Aid* / URL: http://www.lawtrend.org/other/inostrannaya-bezvozmezdnaya-pomoshh

[1202] *Assistance in “one contact”* / Belarusians and the market. – 2015 – N 40 (1173) 24 (October 30, 2015) / URL: http://www.belmarket.by/ru/345/16/27073

foreign aid. Foreign aid is regulated in the same way as funds received from in-country sources.

Currently the majority of Kyrgyz NPOs entirely depend on foreign funding[1203]. In Kyrgyzstan NPOs can receive the following types of foreign aid: 1) donations; 2) grants; 3) humanitarian assistance[1204]. Most of the foreign funds come in Kyrgyzstan in the form of grants.

Legislation of the KR does not set differences between donations, grants and humanitarian assistance received from domestic sources and similar types of assistance derived from abroad. In accordance with the Tax Code, all assets (including foreign funds) gratuitously allocated to the NPOs are exempt from profit tax, provided that they are used for statutory (non-profit) purposes. Humanitarian aid, grants and voluntary donations received by NPOs are also exempt from income tax if they are used for statutory purposes[1205]. Goods imported to the territory of the Kyrgyz Republic as humanitarian aid and grants are exempted from VAT[1206] and can enjoy a special customs regime[1207] (upon approval by the Government of the Kyrgyz Republic).

The reporting requirements for NPOs receiving foreign funding are similar to those faced by the other NPOs. All organizations in Kyrgyzstan, both for-profit and non-profit organizations, submit reports to three governmental bodies: to the State Tax Service, the Social Fund and the National Statistical Committee of the KR. The Kyrgyz legislation does not have any particular requirements for the NPO's reports. Receiving of foreign aid is not a reason for additional inspections of NPOs. Kyrgyz NPOs can receive foreign aid in cash, as well as make and receive anonymous donations. Any transactions with cash and property are subject to mandatory control if the sum of transaction involved equals or exceeds 1 million KGS[1208] (about $16 400).

Therefore, it can be noted that to date the Kyrgyz legislation regulating the procedure for obtaining of foreign aid comply with democratic standards and allows NPOs to receive financing from foreign sources. Government bodies do not have overly broad powers to regulate foreign financing.

Unfortunately, in recent years efforts to restrict on foreign funding of NPOs are intensifying in Kyrgyzstan. NPOs receiving foreign financing are considered by certain state authorities as a potential threat to the country. In order to prevent this threat, they propose to introduce total control over the activities of NPOs receiving foreign funding[1209].

In September 2013, two parliamentarians developed a draft law that is almost identical to the Russian Law "On foreign agents". The draft law provides for amending the current Law "On Non-Profit Organizations", by introducing burdensome oversight and reporting obligations for all NPOs, and in particular, for those receiving foreign funding[1210]. As in Russia, the non-governmental organizations of Kyrgyzstan will be labeled "foreign agents" if they receive funding from foreign and international sources and participate in "political activity". The latter term is defined very broadly as activities aimed at influencing government policy or public opinion.

[1203] According to a study conducted by the Association of Civil Society Centers in 2006, the share of foreign funding in NPO budgets is on average more 65%.

[1204] The definitions of these types of assistance were given in paragraph 5.2.3

[1205] Art. 189 (3) of the Tax Code of the Republic of Kyrgyzstan N 230 dated October 17, 2008 (with subsequent amendments as of August 12, 2016)

[1206] Ibid., Art. 257(1)(8)

[1207] Art. 178 of the Customs Code of the Kyrgyz Republic N 87 dated July 12, 2004

[1208] Art. 6(1) of the Law of the Kyrgyz Republic N 135 dated July 31, 2006 "On counteracting the financing of terrorism and legitimization of income obtained by criminal means".

[1209] *Some issues of legal regulation of NPOs' activities in Central Asian countries* (in Russian) / ICNL. – 2015 / URL: http://www.icnl.org/programs/eurasia/Comparative%20research%20CAR.pdf

[1210] *A Mapping of Existing Initiatives to Address Legal Constraints on Foreign Funding of Civil Society* / ICNL. – July 1, 2014

This draft law potentially has a negative effect not only on public benefit NPOs provided social services to the population. The draft law proposes to give to state bodies broad powers to interfere in the internal affairs of domestic and foreign NPOs, to carry out hidden inspections of such organizations and their documentation, and to suspend their activities or to liquidate them at their discretion, without a court judgment and beyond any administrative rules. The law also allows for persecution the employees of NPOs[1211].

Discriminatory norms of this draft law can be grouped into four groups: (1) norms directed against all NPOs, (2) norms directed against NPOs that are recognized as "foreign agents", (3) norms directed against branches and representations of foreign NPOs, and 4) norms on criminal liability of representatives of domestic and foreign NPOs[1212].

As at 1 January 2016 there are 14 000 non-profit organizations registered in the country. In case of adoption of the draft law its effect would cover all Kyrgyz NPOs since they all depend on foreign funding. This would limit access to financing of non-profit organizations from foreign and international sources that will negatively affect their public benefit activities[1213].

As noted by Rupert Colville, spokesperson for the UN High Commissioner for Human Rights[1214], the draft law "On Foreign Agents" would contradict international standarts in the field of political rights and human rights. In his opinion, using the term "foreign agents" can lead to stigmatization, distrust and hostility and cause "negative comments" about these organizations in the society[1215].

The draft law known as the Law "On Foreign Agents" caused such a wide resonance in Kyrgyzstan and whithin the international community that it was removed from the agenda by the Parliament of Kyrgyzstan for further discussion and consultations. On May 12, 2016, the Kyrgyz Parliament voted on this draft law. The majority members of parliament voted against it. Thus, the draft law "On Foreign Agents" was rejected[1216].

The efforts to restrict the non-profit sector activities have been undertaken also in the past. For example, in 2013, It had been proposed to adopt the draft Law "On Money Laundering", which would provide for new reporting requirements for NPOs; the draft Law "On Unregistered NPOs", which would prohibit the activities of unregistered NPOs; and the draft Law "On Treason" which would allow for the designation of any person working with a foreigners as a traitor. However, these initiatives were rejected due to the advocacy efforts of NPOs[1217].

Even before the draft Law "On Foreign Agents" was officially submitted to the Parliament, it was obvious that some politicians do not trust NPOs, are suspicious of foreign funding, and are ready to restrict foreign funding. Recent years one have seen numerous media assaults on NPOs as well as public campaigns by activists calling for the adoption of discriminative draft laws that limit the activities of foreign-funded NPOs.

One of the lingering problems for NPOs is lack of domestic funding. Even though a Law "On Social Services Contracting" was adopted in 2008, the volume of financing has been extremely low due to the country's economic hardships. Currently, the social services

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[1211] *The UN has criticized the draft law "on foreign agents" in Kyrgyzstan* (in Russian) / URL: http://newskaz.ru/world_news/20150526/8240581.html

[1212] *Analysis of the Draft Law of the Kyrgyz Republic "On Amendments and Additions to Some Legislative Acts of the Kyrgyz Republic" (the draft law "On Foreign Agents")* / URL: http://ekois.net

[1213] *Kyrgyzstan: Parliament withdrew the bills on foreign agents and on the prohibition of propaganda of homosexuality* (in Russian) / URL: http://www.fergananews.com/news/23566

[1214] *The UN has criticized the draft law "on foreign agents" in Kyrgyzstan* (in Russian) / URL: http://newskaz.ru/world_news/20150526/8240581.html

[1215] The term covers a very wide range of meanings, but in Russian usage it has an unambiguously negative connotation, being a synonym for the term "spy". This shade is not present in the phrase "foreign representative" or "representative of foreign interests".

[1216] *Civic Freedom Monitor: Kyrgyz Republic* / The International Center for Not-for-Profit Law / URL: http://www.icnl.org/research/monitor/kyrgyz.html

[1217] Ibid.

contracting system is being reformed and the volume of financing is also increasing. Philanthropy, another important source of funding for NPOs, is almost non-existent in the Kyrgyz Republic due to economic conditions and poor implementation of tax legislation. When granting to donors some incentives to encourage donations in favour of NPOs, Kyrgyz tax legislation nevertheless needed improvement. The NPOs may carry out economic activities (selling goods and services), but the resulting income is taxable unless the NPO qualifies as a charitable organization, which is a status almost impossible to maintain because of operational restrictions[1218].

5.4.4. Kazakhstan

In the Republic of Kazakhstan, NPOs may freely receive funding from foreign sources. Despite the fact that a significant part of the financial resources of NPOs comes from government, foreign aid still plays an important role in the financing of many NPOs.

The foreign funds enter to Kazakhstan in the form of 1) gratuitous technical assistance [1219], 2) charitable assistance[1220], 3) sponsorship[1221], 4) donations[1222], 5) grants[1223], humanitarian assistance[1224].

The law imposes restrictions on the financing solely certain types of NPOs. For example, foreign states, foreign organizations and citizens, international organizations may not provide grants, charitable assistance to political parties and trade unions in the territory of the Republic of Kazakhstan. This restriction does not apply for other types of NPOs, i.e. they can freely use foreign financing in Kazakhstan.

Moreover, Kazakh taxpayers receiving foreign gratuitous aid in the form of grants, donations, and charitable donations are subject to the same preferential tax treatment as those receiving domestic gratuitous aid (for more details on the tax regime of NPOs in Kazakhstan, see paragraph 5.2.4). If the NPO receives foreign aid that does not comply with the criteria set for the grants or gratuitously received assistance, it can use foreign funds in question without enjoying any tax benefits.

NPOs receiving foreign aid are subject to additional reporting obligations. For example, the Law "On non-profit organizations" states that "NPO gratuitously funded by foreign countries, international and foreign organizations ... shall provides a report on the use of foreign funds to state fiscal authorities in accordance with legislation of the Republic of Kazakhstan"[1225]. In other words, the NPO should show the movements of funds derived from foreign states, organizations and individuals in its tax and statistical reports. The law also specifies that all information on the structure and amount of incomes of NPOs, including information on received foreign financing, should be available and be presented to state bodies at the first request[1226].

In addition to the reporting obligation, Kazakh NPOs used foreign aid can be subject to inspections for compliance with the requirements of legislation on currency regulation

[1218] Ibid.
[1219] Art.3(1) 64) of the Budget Code of the Republic of Kazakhstan N 95-IV dated December 4, 2008 (with amendments and additions as of November 30, 2016)
[1220] Art.12(1) 24) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017)
[1221] Ibid., Art.12(1) 13)
[1222] Art. 516 of the Civil Code of the Republic of Kazakhstan (General part) dated December 27, 1994 (as amended on July 26, 2016)
[1223] Art.12(1) 11) of the Tax Code of the Republic of Kazakhstan N 99-IV dated December 10, 2008 (as amended on 30 July 2017)
[1224] Ibid., Art.12(1)12)
[1225] Art.41(2) of the Law of the Republic of Kazakhstan N142 dated 16 January, 2001 "On Non-commercial Organizations" // (as amended and supplemented on 08.04.2016) http://adilet.zan.kz/eng/docs/Z010000142
[1226] Ibid., Art.41(4)

and control[1227] and legislation on countering the legalization, or laundering, of the proceeds of crime and the financing of terrorism. Anonymous bank transfers in Kazakhstan are prohibited in accordance with the Law of the Republic of Kazakhstan "On payments and payment systems"[1228].

In December 2015 after a heated debate a law was adopted on introducing a new legal mechanism of financing of NPO services within the framework of the state contracts[1229] [1230]. It expanded the scope of the Law of Kazakhstan dated April 12, 2005 "On the state social order". Now this law is called the Law "On the state social order, grants and bonuses for non-governmental organizations in the Republic of Kazakhstan" and regulates "public relations arising in the implementation of the state social order, grants and bonuses for non-governmental organizations in the Republic of Kazakhstan"[1231] . Thus, there was created a previously not existing specialized "framework" law regulating the procedure for provid-ing funding to NPOs from any sources, including foreign ones[1232].

The crucial provisions and consequences of the Law are the following:

1) Creation of a unified database of NPOs. Since the beginning of 2016, all domestic and foreign NPOs (as well as branches and representative offices of foreign and international non-profit organizations[1233]) should be necessarily registered by state authorities. In case of providing of inaccurate, incomplete or unreliable data, the authorized state body is entitled to impose administrative sanctions, up to the suspension of activities of NPOs[1234].

2) The increasing sophistication of NPO's reporting. The law introduces the obligation for NPOs to publish their financial statements annually in national mass media. Before the law was enacted, the NPOs were required to submit their financial statements only to tax authorities).

3) Expansion of powers of the authorized state body regulating financing of NPOs. This state body will determine the procedure for providing grants and funding of NPOs in the territory of the Republic of Kazakhstan, monitor the allocation and implementation of grants to NPOs (regardless of the source of origin of the funds). In practice, this also means that NPOs are required to provide all information on their grants[1235].

4) The creation of special body, the so-called "Operator" for distribution of grants for Kazakh NPOs. According to the Law, the "Operator" can be "a non-profit organization in the form of a joint-stock company, presidentially nominated to provide grants and monitor their using in Kazakhstan"[1236]. This point gave rise to a heated public debates among Ka-

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[1227] The Law of the Republic of Kazakhstan N 57-III dated June 13, 2005 "On Exchange Regulation and Exchange Control" (as amended and supplemented as of July 26, 2016) and the Law of the Republic of Kazakhstan N 237-I dated June 29, 1998 "On payments and money transfers"

[1228] Art. 27(2) of the Law of the Republic of Kazakhstan N 11-VI dated July 26, 2016 "On payments and payment systems"

[1229] Law of the Republic of Kazakhstan N 429-V dated December 2, 2015 "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Activities of Non-Governmental Organizations"

[1230] Gendasheva, A. *Development of Non-Profit Organizations Social Services Funded by the State: The Experience of Kazakhstan* (in Russian) // Vestnik Povolzhskogo instituta upravleniya. – 2016. – N 2(53), pp. 31-37

[1231] Preamble of the law of the Republic of Kazakhstan N 36 dated April 12, 2005 "On the state social order, grants and bonuses for non-governmental organizations in the Republic of Kazakhstan" (with amendments and additions as of April 18, 2017).

[1232] Shormanbayeva, A. *Consequences of the adoption of the draft Law of the Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Activities of Non-Governmental Organizations" for non-governmental organizations and international organizations operating in the Republic of Kazakhstan.* 26.03.2015 / URL: http://www.zakon.kz/4745794-posledstvija-prinjatija-proekta-zakona.html#_ftnref4

[1233] *Kak provoditsya rabota po formirovaniyu Bazy dannyh NPO* (in Russian) / URL: http://www.zakon.kz/4782653-kak-provoditsja-rabota-po-formirovaniju.html?_utl_t=fb

[1234] *Some issues of legal regulation of NPOs' activities in Central Asian countries* (in Russian) / ICNL. – 2015 / URL: http://www.icnl.org/programs/eurasia/Comparative%20research%20CAR.pdf

[1235] Shormanbayeva, A. *Consequences of the adoption of the draft Law of the Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Activities of Non-Governmental Organizations" for non-governmental organizations and international organizations operating in the Republic of Kazakhstan.* 26.03.2015 / URL: http://www.zakon.kz/4745794-posledstvija-prinjatija-proekta-zakona.html#_ftnref4

[1236] Ibid.

zakh human rights activists. They expressed serious misgivings that the single "operator" will legally monopolize distrubution of grants in Kazakhstan, put NPOs under the state control and limit the access of "disaffected" NPOs to funding from any sources. Representatives of the UN High Commissioner for Human Rights also "expressed their apprehension that in the process of drafting the law the proposals and remarks of the NPOs on the need to bring it in line with international standards were largely ignored"[1237].

5) Regulation of the field of activities of NPOs receiving grants from any sources. The law defines a limited list of activities to which donors can provide grants in Kazakhstan, namely: 1) the achievement of goals in education, science, information, physical culture and sports; 2) protection of citizens' health, promotion of a healthy lifestyle; 3) protection of the environment; ... 7) support of socially vulnerable groups of population; ... 11) the development of culture and art, etc.[1238] (15 points in total).

Before the law was enacted, the regulation of grant-making sphere itself did not exist in Kazakhstan. Now, regardless of whether donors provide grants directly or through the "Operator", they are not able to independently choose the activities they would like to support by their grants [1239].

However, not all researchers are equally definitive in assessing the negative consequences of the Law. So, A.Gendasheva notes the benefits of the adoption of this Law. She noted that until recently in Kazakhstan, at constant (over the last 10 years) increase in state expenditures for the services of NPOs within the framework of the state contracts, the NPOs were not responsible for the targeted using of the received funds[1240]. Until recently, Kazakhstan had neither a register of NPOs, nor quality regulations for their services, nor a body authorized to monitor the activities of NPOs. Up to now there is not even accurate information on how many NPOs work in Kazakhstan. According to various estimates, this figure ranges from 5 000 to 30 000. The staff of NPOs is constantly and very intensively updating, and a significant number of NPOs exist only nominally, without any activity. Experts note the existence of a fairly large number of NPOs that do not have a permanent staff and are represented by one representative who can register several organizations at once. According to the researchers, a unified database of NPOs will finally help calculate the number of active and inactive organizations, obtain data on the number of staff and volunteers, on the amount and sources of funding of NPOs.

In general, it can be concluded that, although these legislative changes are obviously of a restrictive nature, they do not discriminate explicitly or implicitly foreign NPOs and their capital. At the same time, of course, it is likelihood that the adopted law may further affect the ability of Kazakh NPOs to obtain foreign financing. Measures that prevent international donors from providing grants directly to NPOs can lead to the curtailment of some of their programs and projects[1241].

[1237] *The concerns of Kazakh NGOs regarding the bill are groundless – as the "curator" of the new document argue* (in Russian) / URL: http://www.inform.kz/rus/article/2835484

[1238] Art. 5 of the law of the Republic of Kazakhstan N 36 dated April 12, 2005 "On the state social order, grants and bonuses for non-governmental organizations in the Republic of Kazakhstan" (with amendments and additions as of April 18, 2017)

[1239] Shormanbayeva, A. *Consequences of the adoption of the draft Law of the Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Activities of Non-Governmental Organizations" for non-governmental organizations and international organizations operating in the Republic of Kazakhstan.* 26.03.2015 / URL: http://www.zakon.kz/4745794-posledstvija-prinjatija-proekta-zakona.html#_ftnref4

[1240] Gendasheva, A. *Development of Non-Profit Organizations Social Services Funded by the State: The Experience of Kazakhstan* (in Russian) // Vestnik Povolzhskogo instituta upravleniya. – 2016. – N 2(53), pp. 31-37

[1241] Shormanbayeva, A. *Consequences of the adoption of the draft Law of the Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Activities of Non-Governmental Organizations" for non-governmental organizations and international organizations operating in the Republic of Kazakhstan.* 26.03.2015 / URL: http://www.zakon.kz/4745794-posledstvija-prinjatija-proekta-zakona.html#_ftnref4

5.4.5 Russia

At of beginning of 2015, in Russia there were 225 724 non-profit organizations. They are financed by private, state or other donations, governmental and non-governmental grants and other sources, including international funding[1242].

Article 26 of the Federal Law "On non-profit organizations", listing sources of formation of property of a non-profit organization, does not distinguish features of donations from foreign sources[1243]. This makes it possible to assert that in Russia the NPOs do not require the state's permission for receiving foreign aid. Article 1 of the Federal Law "On gratuitous aid (assistance) to the Russian Federation..." of 04.05.1999 defines three types of foreign gratuitous aid: 1) gratuitous aid, 2) technical assistance, 3) humanitarian assistance[1244].

However, since 2012, the legal regime for foreign financing of Russian NPOs has changed due to the adoption of the so-called Law "On foreign agents"[1245]. According to the Law, all NPOs that receive or intend to receive funding from any foreign sources, when they are already participating or going to participate in political activities, should be called "NPOs performing the functions of a foreign agent" (hereinafter – "NPO-foreign agents". The term "foreign agent"[1246] in Russian language has a negative connotation, moreover, this term and term "foreign spy" are usually used as synonyms.

The Law recognizes the NPOs as foreign agents if they have both characteristics at the same time. First, they are obtaining financing from foreign sources and second, they are participating in political activities[1247].

A non-profit organization is recognized as participating in political activities in the territory of the Russian Federation, if, regardless of the purposes specified in its statutory documents, it participates (including through financing) in organization and conducting of political actions with a view to influencing the making by state bodies of decisions, aimed at changing the state policy, as well as in forming public opinion aimed at the same end. The law excludes from the list of political activities those in the field of science, culture, art, health, prevention and protection of citizens' health, social support and protection of citizens, protection of motherhood and childhood, social support for disabled people, promotion of healthy lifestyles, physical culture and sports, protection of plant and wildlife, charitable activities. The Law says that organization is considered to be engaged in political activities even if it participates in such activities organized and funded by other organizations.

As for types of financing, according to the Law, all NPOs receiving funds from any foreign legal entities or persons, including membership fees, donations or payment for services, are considered recipients of foreign funds. This applies also to individuals who are residents of the EAEU countries (Belarus, Kazakhstan, Armenia and Kyrgyzstan), and to foreign citizens permanently residing in the Russian Federation.

[1242] *What will change for non-profit organizations?* (in Russian) / URL: http://ria.ru/infografika/20120713/698766052.html

[1243] Gnezdilova, O. *Regulation of the activities of NPOs performing the functions of a foreign agent (Review of Russian and international legislation)* (in Russian) / URL: http://www.ihahr-nis.org/sites/default/files/files/regulirovanie-nko-ekspert.pdf

[1244] Federal Law N 95-FZ dated May 4, 1999 "On gratuitous aid (assistance) of the Russian Federation and amendments and additions to some legislative acts of the Russian Federation on taxes and on the establishment of benefits for payments to state non-budgetary funds in connection with the implementation of gratuitous aid (assistance) of the Russian Federation"

[1245] The Federal Law N 121-FZ dated July 20, 2012 "On Amendments to Some Legislative Acts of the Russian Federation Regarding Regulation of Activities of Non- Profit Organizations Performing the Functions of a Foreign Agent"

[1246] A foreign agent (also a foreign representative) is a person (entities or persons) representing the interests of the principal abroad.

[1247] *Non-profit organizations performing the functions of a foreign agent. Features of state registration and provision of annual reports* (in Russian) / URL: http://minjust.ru/ru/node/270565

Let's consider the negative changes caused by the Law, which impede the access of foreign NPOs to activities in Russia:

1) Ambiguous definition of "NPOs-foreign agents". The law gives an ambiguous definition of these NPOs, since: 1) it includes those NPOs that only intend to receive foreign financing and conduct political activities; 2) it defines "political activity" in obscure and general terms; 3) it includes in its scope foreign financing from all sources, regardless of their scope.

2) Inclusion of Russian NPOs-foreign agents into a special register. The law requires that all NPOs must be registered by a special governmental body before they receive funding from foreign sources. Incorporation into the register becomes mandatory not only when NPOs do receive foreign funding and start to participate in political activities, but also when they are only going to commit such actions in the future[1248]. Currently, the register of NPOs-foreign agents contains information on 114 organizations[1249]. Initially, the Law did not establish a procedure for the exclusion of NPOs from the register. However, in 2015, the procedure for the exclusion of NPOs from the register was enshrined in legislation[1250].

3) The requirement to indicate in all materials issued by NPOs that they were issued by NPOs-foreign agents.

All materials published and/or disseminated by NPOs-foreign agents, including through the mass media and/or the Internet, should contain a reference to the fact that the NPO publisher is a "foreign agent", regardless of whether these materials are related to political activity, and whether their publication was funded from foreign sources.

4) Expansion of the state supervisory control and administrative burden on NPOs. The law requires that NPOs-foreign agents: 1) keep separate accounting for funds and other property received from domestic and foreign sources; 2) submit a report on their activities every two years, and 3) every three months report on the use of funds and other property (while the ordinary NPOs do it once a year). NPOs-foreign agents are also required to undergo an annual independent audit. In addition, the law provides to the state the possibility to interfere in the internal affairs of NPOs and even suspend their activities.

5) Introduction of criminal sanctions for violation of the Law in the form of imprisonment for up to 3 years[1251].

This Russian law has caused a mixed assessment in society. Russian NPOs have repeatedly expressed their disagreement with the law and appealed against it, including to the European Court of Human Rights. The Council of Europe Commissioner for Human Rights called on the Russia to suspend application of the Law "On foreign agents" and to refrain from additional restrictions on the work of civil society organizations in Russia[1252]. Experts of the Venice Commission also recommended that the Russian authorities reconsider the regime of registration set for NPOs[1253]. The European Parliament expressed disappointment with this Russian law and called for the Russian authorities "to stop register-

[1248] ICNL Review of Federal Law N 121-FZ of July 20, 2012 "On Amendments to Some Legislative Acts of the Russian Federation Regarding Regulation of Activities of Non-Profit Organizations Performing the Functions of a Foreign Agent", 24.07.2012

[1249] *In Russia, foreign financing of NGOs exceeded 80 billion rubles in 2015* (in Russian) / URL: http://www.article20.org/ru/news/v-rossii-inostrannoe-finansirovanie-nko-prevysilo-80-mlrd-ru#.WG1t01OLR0w

[1250] The Federal Law N 43-FZ dated March 8, 2015 "On Amending Articles 27 and 38 of the Federal Law "On Public Associations" and Article 32 of the Federal Law "On Non-Profit Organizations"

[1251] ICNL Review of Federal Law N 121-FZ of July 20, 2012 "On Amendments to Some Legislative Acts of the Russian Federation Regarding Regulation of Activities of Non-Profit Organizations Performing the Functions of a Foreign Agent", 24.07.2012

[1252] *The Council of Europe Commissioner calls on the Russian Federation to suspend the law on "foreign agents"* (in Russian) / URL: http://ria.ru/society/20150709/1123186074.html

[1253] *Federal'nyj zakon 121 "Ob inostrannyh agentah"* (in Russian) / URL: http://ria.ru/spravka/20140616/1011656413.html

ing NGOs as 'foreign agents' on the basis of a law which extended state control over NGOs, stigmatising NGOs and creating an atmosphere that is hostile to civil society[1254].

The Law was accused of being extremely broad and vague about definition of "political activities". The Law unclearly formulates the criteria for including non-profit non-governmental organizations into the register of "foreign agents"[1255]. The Russian authorities, in turn, state that the Law is primarily aimed at countering the external influence on the political life of the country. As an argument they also demonstrate the relevant statistical data: according to the information of the Ministry of Justice of Russia, the financing of the third sector has increased during the past 3 years by more than 10 times[1256] [1257], but the designation of the funds derived from abroad is not always clear.

As in Kazakhstan, in Russia tax restrictions are also applied. In order for foreign funds received by NPOs to be considered as gratuitously aid or a grant and to be exempt from tax, a foreign donor must be registered in a special list. This list is approved by Decree of the Government of the Russian Federation of June 28, 2008, №485 and lists the foreign and international organizations, whose grants are not included for tax purposes in tax base of Russian organizations-recipients[1258]. If the foreign donor is not specified in the list, the amount of its grant is subject to income tax for Russian NPO-recipient. The only exception to this rule is the case when the income of NPO is formed as targeted revenues from abroad in the form of donations, cash and other property received for charitable activities[1259].

5.4.6 Interim findings

Access to resources is important, not only to the existence of the NPO itself, but also to the enjoyment of other human rights by those benefitting from NPO's activity[1260]. In accordance with this logic, countries should strive to ensure access of NPOs to the maximum number of financial sources. However, often NPOs financed from abroad become the objects of accusations of promoting the "political interests" of foreign donors and of "destabilizing the internal political situation"[1261]. Therefore, restraining the activities of non-profit organizations financed from abroad becomes a worldwide trend[1262]. For its part, the legislation regulating foreign aid is transforming from an instrument of creating favorable conditions for NPOs to an instrument for limiting their financing. So, according to the study of Douglas Rutzen, as of January 2015, fifteen laws were pending that would restrict access to international funding, including cross-border philanthropy. So, according to the study of Douglas Rutzen, as of January 2015, fifteen laws are pending that would restrict access to

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[1254] European Parliament resolution of 13 June 2013 *On the rule of law in Russia* (2013/2667(RSP) / URL: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0284+0+DOC+XML+V0//EN&language=EN

[1255] *Inclusion of NGOs in the list of "foreign agents" is sometimes controversial* (in Russian) / URL: http://ria.ru/society/20150506/1062931113.html#ixzz3wYBF4Ujs

[1256] *In Russia, foreign financing of NGOs exceeded 80 billion rubles in 2015* (in Russian) / URL: http://www.article20.org/ru/news/v-rossii-inostrannoe-finansirovanie-nko-prevysilo-80-mlrd-ru#.WG1t01OLR0w

[1257] *More than 4 thousand Russian NGOs are financed from abroad* (in Russian) / URL: https://iz.ru/news/585291#ixzz4Upp6dUVW

[1258] Resolution N 485 of June 28, 2008 "On the list of international and foreign organizations, grants received by taxpayers (gratuitous aid) of which are not subject to taxation and are not taken into account for tax purposes in the income of Russian organizations - grants recipients"

[1259] Sinelnikov-Murylev, S., Trunin, I., Goldin, M., Ilyasova, G., et al. *Problems of taxation of non-commercial organizations in Russia* (in Russian) / – Moscow: Transition economy institute. – 2007. – N 108. – 371 p.

[1260] Kiai, M. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (A/HRC/23/39) // Human Rights Council Twenty third session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN General Assembly, 24 April 2013 / URL: http://www.icnl.org/research/library/files/Transnational/A.HRC.23.39_EN.pdf

[1261] *Za sobytiyami v Armenii vnimatel'no sledyat v Moskve* (in Russian) / URL: https://www.1tv.ru/news/social/286485

[1262] Zhauynbai, T. *Restriction of the activities of non-profit organizations financed from abroad, becomes a world trend* (in Russian) / International Information Agency "Kazinform" / URL: http://www.inform.kz/rus/article/2832017

international funding, including cross-border philanthropy[1263]. As a rule, common justifications offered by governments to defend restrictions placed on international funding fall into four broad categories: (1) state sovereignty; (2) transparency and accountability in the civil society sector; (3) aid effectiveness and coordination; and (4) national security, counterterrorism, and anti-money laundering concerns[1264].

According to some studies, in this respect one of the most sensitive regions of the world is the post-Soviet region. The post-Soviet countries received their political identity more recently and currently try to limit external influence on internal NPOs as much as possible. Post-Soviet states initially felt less appetite for civil society support. Years had passed, and governments no longer considered themselves to be in "transition". Rather, they were now focused on the consolidation of governmental institutions and state power. The "color revolutions" that occurred in some post-Soviet countries have led to even more stringent legislation on NPOs in the entire region. Soon after Orange Revolution, Belarus enacted legislation restricting the freedoms of association and assembly. In 2005, the counterrevolution gained prominence when Russia adopted a high-profile law restricting civil society. The same year, Uzbekistan, and other countries followed suit[1265]. It can be noted that a significant part of the recently adopted laws on restricting foreign funding of NPOs also falls on the post-Soviet region (Annex D).

It looks interesting the rating of the post-Soviet countries drew up by an independent watchdog organization "Freedom House2 in the Freedom World 2014, 2015 and 2016 surveys. The rating is based on an assessment of the general political and civil rights of NPOs in each country. Each pair of political rights and civil liberties ratings is averaged to determine an overall status of "Free" (1.0-2.5), "Partly Free" (3.0-5.5), or "Not Free" (5.5-7.0). Here is how the ratings of the countries of the EAEU look (Table 20):

Table 20 – The rating of development of civil and political freedoms of NPOs in the EAEU countries

Country	2014[1266]			2015[1267]			2016[1268]		
	PR	CL	Free	PR	CL	Free	PR	CL	Free
Armenia	5	4	Partly	5	4	Partly	5	4	Partly
Belarus	7	6	Not	7	6	Not	7	6	Not
Kazakhstan	6	5	Not	6	5	Not	6	5	Not
Kyrgyzstan	5	5	Partly	5	5	Partly	5	5	Partly
Russia	6	5	Not	6	6	Not	6	6	Not
Key: - PR - Political Rights, CL - Civil Liberties, Free Status: Free, Partly Free, Not Free									
Source: Compiled by the author on the basis data of "Freedom in the World 2014 / Freedom House. – 24 January 2014", 2015, 2016									

[1263] Rutzen, D. *Aid barriers and the rise of philanthropic protectionism* // International Journal of Nonprofit Law. – 2015. – Vol. 17. – N 1, pp. 5-44
[1264] Ibid.
[1265] Rutzen, D. *Aid barriers and the rise of philanthropic protectionism* // International Journal of Nonprofit Law. – 2015. – Vol. 17. – N 1, pp. 5-44
[1266] *Freedom in the World 2014 /* Freedom House. – 24 January 2014
[1267] *Freedom in the World 2015 /* Freedom House. – 28 January 2015
[1268] *Freedom in the World 2016, /* Freedom House. – 28 January 2016

The ratio of the ratings of the EAEU's countries is provided below (Figure 10)

Country	Status
Armenia	Partly free
Kyrgyzstan	Partly free
Russia	Not free
Belarus	Not free
Kazakhstan	Not free

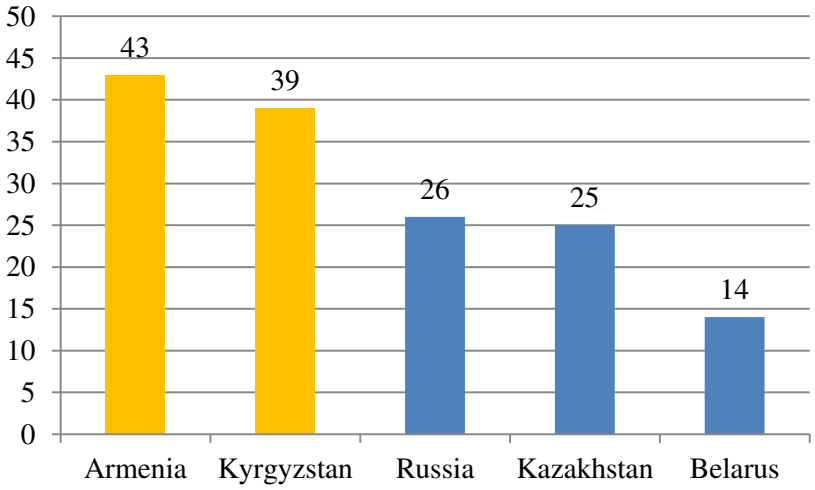

Figure 10[1269] – Rating of civil and political freedoms of NPOs in the EAEU countries

Armenia has the most favorable conditions for the development of non-profit sector. Armenian legislation is the most liberal among the EAEU countries, and one of the most favorable in the entire post-Soviet region (along with Georgia and Kyrgyzstan until recently)[1270]. The legislation of Armenia does not prohibit foreign financing of NPOs, does not establish the procedure for their registration. Existing restrictions are insignificant and concern only certain areas of financing (for example, financing of political parties).

The most challenging environment for the activities of NPOs is created in **Belarus** (the country is among the three countries with the least favorable conditions). In Belarus, the law establishes a complicated and burdensome procedure for obtaining, registering and using foreign gratuitous aid by non-profit organizations. The current permissive system of registration of foreign gratuitous aid is based on subjective approach. In addition, this system creates difficulties in the implementation of long-term projects of NPOs: the legislation requires the registration of each amount of foreign aid received under long-term projects and the provision of separate reporting on them that does not facilitate the effective implementation of projects[1271].

As the experts note, the belarusian system of registration of foreign donations does not meet the international commitments of the Republic of Belarus and international standards for freedom of association, such as the OSCE Guidelines on Freedom of Association, under which the unimpeded obtaining of resources, including foreign and international ones, is an integral part of freedom of associations[1272]. The most authoritative international expert centers in the field of non-profit law, namely the International and European Centers for Not-for-Profit Law (ICNL) and (ECNL)[1273] also note that current Belarusian legislation

[1269] Freedom in the World 2014 / Freedom House. – 24 January 2014

[1270] *Recommendations of the International Center for Not-for-Profit Law on the Legislation of the Republic of Belarus Regulating Foreign Gratuitous Assistance* (ICNL). March 26, 2015 / URL: http://actngo.info/sites/default/files/files/recomendation_of_icnl.pdf

[1271] Smolianko, O. *The main problems of the legislation on foreign donations* (in Russian) / Center for Legal Transformation. – 2016 / URL: http://lawtrend.org

[1272] *Freedom of associations and legal conditions for non-profit organizations in Belarus.* Review Period: 2015 / Legal Transformation Center, Assembly of Pro-Democratic NGOs / URL: http://www.lawtrend.org/wp-content/uploads/2016/02/SA-2015_en.pdf

[1273] *Non-profit organizations sent their proposals on legislation on foreign aid* (in Russian) / URL:http://www.lawtrend.org/freedom-of-association/nekommercheskie-organizatsii-napravili-svoi-predlozheniya-k-zakonodatelstvu-ob-inostrannoj-pomoshhi

does not solve the problem of encouraging foreign donors to finance humanitarian projects in Belarus and hinder the flow of foreign grant aid to Belarus[1274].

Kyrgyzstan, Kazakhstan and Russia are in intermediate positions. Among of these countries, **Kyrgyzstan** has the most liberal legal regime. Until recently, Kyrgyzstan had a well-deserved reputation as one of the most progressive countries in Central Asia and in the Commonwealth of Independent States (CIS) in ensuring and protecting fundamental human rights and freedoms, creating legal conditions for the functioning of civil society[1275]. Now, Kyrgyzstan still has fairly liberal legislation on the regulation of foreign funding for NPOs, since there is no registration procedure for receiving foreign aid, no authorization is required, and no additional reporting is introduced. This is in full compliance with positive international practice[1276]. Nevertheless, in our opinion, at present the rating of Kyrgyzstan has fallen somewhat because of the past discussions about the possibility of introducing a law similar to the Russian Law "On Foreign Agents".

Kazakhstan and **Russia** have less favorable legal regimes. Although these countries do not prohibit foreign funding of NPOs[1277], they closely follow foreign incomes of NPOs and establish a number of serious barriers to the spread of foreign aid. In these two countries, we can observe almost the whole set of world-known methods of limiting of foreign financing of NPOs, inter alia: requiring the transfer of funds to a centralized Government fund (Kazakhstan); banning or restricting foreign-funded NPOs from engaging in human rights or advocacy activities (Russia); stigmatizing or delegitimizing the work of foreign-funded NPOs by requiring them to be labeled as "foreign agents" or other pejorative terms (Russia); initiating audit or inspection campaigns to harass NPOs (Kazakhstan and Russia); and imposing criminal penalties on NPOs for failure to comply with the foregoing constraints on funding (Russia)[1278]. Another instrument to restricting foreign financing of NPOs known in the world practice is taxation. Particularly, the income from foreign grantmakers is subject to taxation unless the foreign grantmaker is included on a government-approved list. This method of restriction is also used in Kazakhstan and in Russia.

In general, the most complicated situation with attracting foreign funding to NPOs can be observed in Russia. This is due to the introduction of the so-called Law "On foreign agents". Initially, the law was frankly "harsh", especially given the uncertainty and blurriness of many of its formulations. However, over time the Law was amended, the procedure for excluding agents from the register was introduced; the concept of political activity leading to the recognizing as a "foreign agent" was clarified[1279]. Now, according to some scientists and practitioners, Russian legislation in the sphere of NPOs is less stringent than the legislation of many other countries [1280].

It should be noted that in legislations of Kazakhstan and Belarus there is no exactly analagous to the Russian Law "On foreign agents". However both countries are following a similar path of restriction, rather than encouraging the financing of domestic NPOs from foreign sources. Many scientists and practitioners in these countries (of course, with the exception of the NPOs themselves) believe that such legislation serves to streamline the

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[1274] *Recommendations of the International Center for Not-for-Profit Law on the Legislation of the Republic of Belarus Regulating Foreign Gratuitous Assistance* (ICNL). March 26, 2015 / URL: http://actngo.info/sites/default/files/files/recomendation_of_icnl.pdf

[1275] *Analysis of the Draft Law of the Kyrgyz Republic "On Amendments and Additions to Some Legislative Acts of the Kyrgyz Republic" (the draft law "On Foreign Agents")* / URL: http://ekois.net

[1276] *Some issues of legal regulation of NPOs' activities in Central Asian countries* (in Russian) / ICNL. – 2015 / URL: http://www.icnl.org/programs/eurasia/Comparative%20research%20CAR.pdf

[1277] Zhauynbai, T. *Restriction of the activities of non-profit organizations financed from abroad, becomes a world trend* (in Russian) / International Information Agency "Kazinform" / URL: http://www.inform.kz/rus/article/2832017

[1278] Rutzen, D. *Aid barriers and the rise of philanthropic protectionism* // International Journal of Nonprofit Law. – 2015. – Vol. 17. – N 1, pp. 5-44

[1279] The Federal Law N 179-FZ dated June 02, 2016 "On Amending Article 8 of the Federal Law "On Public Associations" and Article 2 of the Federal Law "On Non-Profit Organizations"

[1280] See, for example, *Foreign agents in Russia and in USA* (in Russian). 22.11.2015. / URL: http://voprosik.net/inostrannye-agenty-v-rossii-i-ssha/

activities of NPOs, to increase effectiveness NPOs and their responsibility for the received funds. Of course, one can agree that in the majority of countries of the world there are rules restricting and regulating foreign financing of NPOs[1281]. Perhaps one can even agree with the examples of some researchers who call multiple examples of much more rigorous approaches adopted in other countries [1282].

Nevertheless, the complexity of the situation for the EAEU countries is that the internal institutions of charity, patronage, volunteer activity in these countries are poorly developed. There are also no effective tax benefits to stimulate the financing non-profit organizations by domestic individuals and business entities. Under these conditions, the availability of foreign funding for non-profit organizations can be especially important for their charitable activities. Despite the increasing role of public funding, foreign aid remains an important source of financial support for domestic organizations in most of the EAEU countries. Therefore, a more balanced policy of attracting foreign resources would not only impede "the promotion of the political interests of foreign donors" and "the destabilization of the domestic political situation", but would also reduce the burden on state and solve problems in the areas of social protection, health, education and other important social spheres.

[1281] *V Kremle perepishut zakon ob inostrannih agentah* (in Russian) / URL: http://www.rbc.ru/politics/01/10/2015/560d57e59a7947360f78cbe2

[1282] Gendasheva, A. *Development of Non-Profit Organizations Social Services Funded by the State: The Experience of Kazakhstan* (in Russian) // Vestnik Povolzhskogo instituta upravleniya. – 2016. – N 2(53), pp. 31-37

CHAPTER 6. PROSPECTS FOR HARMONIZATION OF TAXATION OF NON-RPOFIT ORGANISATIONS IN THE EURASIAN ECONOMIC UNION. RELEVANCE OF THE EUROPEAN UNION' EXPERIENCE

6.1. The EAEU as an integration grouping: current and prospective ways for tax harmonization in the EAEU countries

The modern world demonstrates the growing interdependence of the economies of different countries; the development of integration processes at macro and micro levels; the intensive transition from closed national economies to a global, open-type economy.

Two interrelated and multifaceted processes are taking place simultaneously. On the one hand, we can see the growing international economic integration which involves the process of establishing uniform economic relations between states. In this case, the growing interdependence of countries gradually leads to the fusion of national markets of goods, services, capital and labor, the formation of a single market space with a single legal system, and the coordination of domestic and foreign economic policies of multiple states. On the other hand, regionalization can also be observed, which is the process of coalescing economies of neighboring countries into a single economic complex, primarily through deep and sustained interaction between their companies. Regionalization is manifested in the development and improvement of existing and the formation of new economic regional integration groupings, unions, or blocs[1283].

In an era of instability in the global economy, in the context of the global financial crisis, cooperation between different blocs of countries, along with the development of regional integration in different parts of the world, is becoming particularly relevant. Regional integration is becoming an instrument through which countries can maximize the benefits of globalization and minimize its inevitable costs[1284]. Therefore, one of the most significant trends in the development of international relations in recent years is the growth in the number of regional trade and economic blocs. Now, in fact, each country is included in at least one of the regional blocks.

One of these blocs is the Eurasian Economic Union (the EAEU). It is an international organization of regional economic integration created in 2015 by some post-Soviet countries. Today, the member states of the Eurasian Economic Union are the Republic of Armenia, the Republic of Belarus, the Kyrgyz Republic, the Republic of Kazakhstan and the Russian Federation.

We could say that the integration processes in the post-Soviet space began almost immediately after the USSR ceased to exist. At that time, the economies of the former Union's republics received a crushing blow, comparable in scale to the consequences of the most difficult wars. Suffice it to say that the decline in production, especially in science-intensive industries, reached 70, 80, and in some cases 90 percent[1285]. Therefore, the main reasons for integration were the need to restore and regenerate the economic ties of the post-Soviet countries, and develop entrepreneurship, industry, trade, scientific and technical cooperation and other spheres. The basis of such cooperation was the long-standing close socioeconomic relationship of the post-Soviet countries and the remnants of the industrial and economic complex created in the soviet period. The most important integrating factor of the EAEU Member States and other post-Soviet countries was also the Russian language.

[1283] Ratushnyak, E. *Forming a single economic space within the EAEU* (in Russian) / Thesis for the degree of candidate of economic sciences. – Moscow. – 2014

[1284] Butorina, O., Zakharov, A. *Scientific basis of the Eurasian Economic Union* (in Russian) // Eurasian Economic Integration. – 2015. – N 2 (27), pp. 52-68

[1285] Panina, E. *Socio-economic and legislative aspects of the Eurasian Economic Union development* (in Russian) // Evrazijskaya integraciya: ehkonomika, pravo, politika. – 2012. – N 12, pp. 15-20

Understanding the need to preserve cooperative ties led to the formation in 1991 of the Commonwealth of Independent States (hereinafter the CIS). Until the mid-90s, integration in the post-Soviet space was carried out exclusively on the basis of the CIS. However, despite partially fulfilling integration tasks, for a number of reasons, it could not form a single economic space from its Member States.

Nevertheless, integration processes in the post-Soviet space continued and took new forms. In 1994, the "Central Asian Union" of Kazakhstan, Kyrgyzstan and Uzbekistan was set up. In 1996, the Union State of the Republic of Belarus and the Russian Federation was formed, and an agreement was signed on the creation of the Customs Union (CU) of Belarus, Kazakhstan and Russia.

In October 2000, the Treaty on the Establishment of the EuroAsian Economic Community (EurAsEC) was signed. With this, the integration process received the necessary structures: supranational bodies, including the Inter-Parliamentary Assembly of the EuroAsian Economic Community were created. It made a great contribution to tasks of convergence and unification of the Member States' legislation[1286].

In November 2011, the Presidents of the CU Member States signed the Declaration on Eurasian Economic Integration, which announced the transition starting in 2012 from the Customs Union to the Common Economic Space (CES), based on the norms and principles of the World Trade Organization (WTO). The Declaration also envisaged the creation of the Eurasian Economic Commission (EEC) as a supranational body designed to coordinate the implementation of 17 agreements signed by the heads of Belarus, Kazakhstan and Russia on the main directions of the CES's functions[1287].

The Eurasian Economic Union became the highest point of integration of the CU Member States. The EAEU was established by the Treaty on the Eurasian Economic Union, signed on May 29, 2014. On January 1, 2015, it entered into force and from that date, the Eurasian Economic Union started its activities.

The Eurasian Economic Union is a regional economic integration grouping with international legal personality. According to the OECD classification, the EAEU is an "economic union" that is the highest stage of regional economic integration[1288].

The economic union as a level of integration implies a common market, and the harmonization of some important directions of economic policy: competition policy, structural, fiscal, monetary, social policy. Unlike the earlier stages of integration, the economic union calls for the establishment of supranational institutions[1289]. In addition to the goals of the previous stages of inter-state integration, the Eurasian Economic Union also sets the goal of developing a common trade, monetary, and tax policy of its Member States[1290]. In addition, supranational administrative, supervisory and judicial bodies are created within the framework of the EAEU[1291].

[1286] Panina, E. *Socio-economic and legislative aspects of the Eurasian Economic Union development* (in Russian) // Evrazijskaya integraciya: ehkonomika, pravo, politika. – 2012. – N 12, pp. 15-20

[1287] Id.

[1288] OECD distinguishes four levels of regional ecoomic integration: Free Trade Area, Customs Union, Common Market, Economic Union

[1289] Vinokurov, E., Pelipas, I., Tochitskaya, I. *Quantitative analysis of economic integration of the European Union and the Eurasian Economic Union: methodological approaches* (in Russian) / Report N 23. – CII EABR. – 2014. – 62 p. http://www.eabr.org/r/research/centre/projectsCII/

[1290] Ziatdinov, E. *The Eurasian Economic Union: what changes to wait in the tax sphere*? (in Russian). – 2014. / URL: http://www.nalogplan.ru/article/3660-evraziyskiy-ekonomicheskiy-soyuz-kakih-peremen-jdat-vnalogovoy-sfere

[1291] For more information on the integration stages in the territory of the EAEU countries, see. Ziatdinov, E. *The Eurasian Economic Union: what changes to wait in the tax sphere*? (in Russian). – 2014. / URL: http://www.nalogplan.ru/article/3660-evraziyskiy-ekonomicheskiy-soyuz-kakih-peremen-jdat-vnalogovoy-sfere; Kapustin, A. *The Treaty of the Eurasian Economic Union – New Page of Legal Development of Eurasian Integration* (in Russian) // Journal of Russian Law. – 2014. – N 12, pp. 98-107; Golodova, Y. *Tax harmonization in the EU and CIS countries: general and special* (in Russian) // Finance and credit. – 2010. – N 7(391), pp. 68-72; Toropygin, A., Maryshev, A. *Improvement of National and Supranational Governance in the Eurasian Economic Community* (in Russian) // Upravlencheskoe konsul'tirovanie. – 2012. – N 3, pp. 14-20

According to the EAEU Treaty, the EAEU is created to strengthen the economies of the Member States; to form within the Union a single market of goods, services, capital and labor; and to modernize and improve the competitiveness of countries in the world market[1292]. The EAEU Member States undertake to ensure the free movement of goods, services, capital and labor; to implement coordinated policies in key sectors of the economy: energy, industry, agriculture, transport; and to unify regulation in 19 other economic sectors[1293].

The main directions of economic development of the EAEU are the following:

- Stimulating business activity and increasing investment attractiveness (removal of barriers, harmonization and unification);
- Innovative development and modernization;
- Ensuring the availability of financial resources and the development of the financial sector;
- Infrastructure development, including the implementation of the transit potential;
- Development of human resources;
- Increase of energy efficiency and resource saving;
- Regional development and cross-border cooperation;
- International cooperation.

The choice of directions for development of the EAEU is determined, firstly, by common national priorities. The purpose of the current long-term programs (strategies, plans) for the economic development of the EAEU Member States is to maintain macroeconomic stability and to increase the competitiveness of national economies, primarily through innovative forms of development and implementing system-wide economic transformations; improving the well-being of citizens; development of the social sphere; and strengthening of positions in the world community. Secondly, the choice of directions for development of the EAEU is determined by existing problems. Despite the measures taken, the rate and quality of economic growth of the EAEU Member States are not sufficient to reduce the existing gap between the EAEU countries and world economic leaders, in terms of competitiveness and investment attractiveness. Thirdly, the choice of directions for the development of the EAEU is determined by the possible contribution of integration to the achievement of the expected result.

According to experts, the general macroeconomic effect from the EAEU will be manifested as follows:

- Stable and sustainable increase of GDP, leveling the rates of economic development of the participating countries;
- Reduction of the price of goods, due to the removal of mutual trade restrictions, reducing the costs of transporting the raw materials and exporting finished goods;
- Increasing the competitiveness of the EAEU common market due to the entry of new players from the common space;
- Increasing of the level of wages due to reduction of the costs and increase of labor productivity;
- Increasing production due to increased demand for goods;
- Increasing the return on new technologies and products due to the increased market size;
- Increasing in the well-being of peoples of the EAEU countries through the growth of employment[1294].

[1292] Art. 4 of the Treaty on the Eurasian Economic Union dated May 29, 2014 (as amended on May 8, 2015)

[1293] Ziyadullaev, N. *EAEU: between politics and economy* (in Russian) // Problemy teorii i praktiki upravleniya. – 2014. – N 11, pp. 25-37

[1294] Ziyadullaev, N. *National priorities and prospects of the Eurasian Economic Union under integration and global instability* (in Russian) // Nacional'nye interesy: prioritety i bezopasnost'. – 2015. – N15 (300), pp. 2-19

As noted above, the formation of the common legal space of the EAEU is carried out in accordance with the basic codified normative act, the Eurasian Economic Union Treaty[1295]. This document is based on the legal framework of the Customs Union and the Common Economic Space. Its provisions were optimized and brought into line with WTO rules[1296]. The Treaty consists of 4 parts (including 28 sections, 118 articles) and 33 annexes.

Part one "Establishment of the Eurasian Economic Union" contains general provisions, basic principles, objectives, provisions on the competence and law of the EAEU, the authorities of the EAEU and the EAEU budget. The main objectives of the Union, formulated in Article 4 of the Treaty, are particularly important. It is necessary to emphasize that Parties to the Treaty have approached with sufficient caution the formulation of the main goals, taking into account the need for smooth economic integration without sacrificing the economy of each of the participants. An example of this delicate and compromise approach is the formulation of the goal as "*the desire* to form a single market for goods, services, capital and labor resources within the Union". The new (and the most important for the current stage of Eurasian integration) achievement of the EAEU Treaty is the introduction of the term "Union law"[1297], which is disclosed in Article 6 of the Treaty. The Treaty sets out that, in the case of a contradiction between the provisions of international Treaties concluded within the framework of the EAEU and the provisions of the EAEU Treaty, provisions of the latter are considered *lex superior* and have the priority[1298].

The second part of the EAEU Treaty is devoted to the legal regime of the Customs Union. It contains provisions on the functioning of the Customs Union, the regulation of the circulation of medicines, extra-trade policy and customs regulation, technical regulation, sanitary, veterinary-sanitary and quarantine phytosanitary measures, and protection rights of consumers, information interaction and statistics.

It should be noted that, depending on their readiness for economic integration, the EAEU Member States envisaged two types of integration strategy, namely *a unified policy* (a deep level of integration) and *coordinated* policy (less deep integration).

Within the framework of the Customs Union, the Member States predominantly implement unified policy. So, on the territory of the Custom Union, the unified Goods Nomenclature for the EAEU Foreign Economic Activities and the EAEU Common Customs Tariff are applied, unified import customs duties and unified mandatory requirements for technical regulation are established. The only exception is the scope of application of sanitary, veterinary-sanitary and quarantine phytosanitary measures and protection of consumers' rights, where the EAEU Member States conduct a coordinated policy.

The third part of the EAEU Treaty is devoted to the Common Economic Space regime. It codifies the norms of agreements concluded within the framework of the CES, namely the provisions on macroeconomic and foreign exchange policy, trade in services, investment policy, regulation of financial markets, taxation, general principles and rules of competition, the legal regime of natural monopolies, the legal regime in energy policy and

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[1295] Kotova, N. *Eurasian Economic Union: Improving the legal framework* (in Russian) // Vestnik Finansovogo Universiteta. – 2016. – N 5, pp. 126-132

[1296] Ziyadullaev, N. *National priorities and prospects of the Eurasian Economic Union under integration and global instability* (in Russian) // Nacional'nye interesy: prioritety i bezopasnost'. – 2015. – N15 (300), pp. 2-19

[1297] The Union law consists of: 1) the Treaty on the Eurasian Economic Union; 2) International agreements within the framework of the EAEU (contracts concluded by the Member States on the functioning and development of the Union); 3) International agreements of the Union with a third party (international treaties concluded with third countries, their integration grouping and international organizations); 4) Decisions and orders of the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council and the Eurasian Economic Commission, adopted within the framework of their powers stipulated by the Treaty on the EAEU and international treaties within the Union. *Eurasian Economic Union. The Architecture of the future*. Annual Report of the Eurasian Economic Commission, 2014, 55 p.

[1298] Balytnikov, V., Boklan D. *The Eurasian Economic Union: Preconditions of Creation, Formation Problems, Development Prospects* (in Russian) // Sravnitel'noe Konstitucionnoe obozrenie. – 2015. – N 3 (106), pp. 69-82

transport policy, the state procurement procedures, protection of intellectual property, industrial and agro-industrial policy, and labor migration.

In almost all these areas, the EAEU countries carry out economic integration on the basis of *coordinated* policy. The only exception is the scope of granting industrial subsidies for industrial goods, where *unified rules* are set for all Member States[1299].

Part Four, "Transitional and Final Provisions", contains transitional provisions concerning certain sections of the Treaty and final provisions governing the procedure for accession to the EAEU of other States or for obtaining the status of an observer state, as well as other requisites. The Annexes to the Treaty contain either provisions on the status, functions or competencies of the EAEU bodies (EEC, the Court of the EAEU), or regulations governing certain issues covered by the provisions of the CU or the CES[1300].

An integral part of the overall process of economic convergence is the elimination of tax restrictions. Therefore, in addition to expanding domestic trade turnover, maintaining coordinated macroeconomic policies and cooperation in many economic sectors, the economic integration of the EAEU Member States also implies the unification of the principles of taxation and the harmonization of national tax laws[1301].

In respect of taxes and taxation, it is provided that the Member States of the Union define areas of cooperation in the tax policy for harmonization and improvement of tax legislation, including the mechanism for collection of indirect taxes in performance of works, rendering services, and convergence of rates on the most sensitive excisable goods. The principle of non-discrimination lies at the heart of the arrangements; it will make it possible to prevent unfair price competition in mutual trade in goods and services[1302].

In the Treaty, taxation issues are dealt with in Section XVII "Taxes and Taxation". The section includes the following articles:

- Art. 71 "Principles of cooperation between the Member States in taxation";
- Art. 72 "Principles of indirect taxation in the Member States";
- Art. 73 "Personal income taxes".

This section also contains Annex No. 18, "Protocol on the procedure for collection of indirect taxes and the mechanism for controlling their payments on export and import of goods, performance of works and provision of services".

All three articles are aimed at harmonizing the tax legislations of the Member States. *Harmonization* in relation to tax law is a process of convergence of national systems of taxation legal regulation, reduction and even further elimination of differences between them[1303]. Tax harmonization is aimed at achieving a functional balance of international and national regulatory legal acts, allowing the national tax system to function and develop in the assigned integration directions[1304].

Indeed, without eliminating tax and customs barriers it is impossible to achieve one of the main goals of the EAEU, proclaimed in 1999 at the stage of the CES, namely the formation of a common market for goods, capital and labor[1305]. As E. Petrosyan notes, tax

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[1299] Ibid.

[1300] Kapustin, A. *The Treaty of the Eurasian Economic Union – New Page of Legal Development of Eurasian Integration* (in Russian) // Journal of Russian Law. – 2014. – N 12, pp. 98-107

[1301] Zaharova, O. *Tax harmonization as an integral part of general economic integration processes in the EAEU Member States* (in Russian) // Molodoj uchenyj. – 2016. – N11, pp. 750-753

[1302] *Eurasian Economic Union: Facts and Figures* / Library of EEC. – Moscow. – 2017. – 80 p. / URL: http://eec.eaeunion.org/ru/Pages/library.aspx

[1303] Mamaeva, A. *On the issue of the unification of taxation in the Eurasian Economic Union* (in Russian) / in Proceedings of the International Conference "The Theory and Practice of modern jurisprudence". – Samara. – 2014. – 43 p.

[1304] Korotina, V., Zhverantseva, M., Karimova, E. *Evolution of the Process of Eurasian Integration under the Influence of Tax Arrangements* (in Russian) // Izvestiya Saratovskogo universiteta. Seriya EHkonomika. Upravlenie. Pravo. – 2013. – N 3(1), pp. 294-299

[1305] Art. 3 of Treaty on the Customs Union and the Common Economic Space of February, 1999 (is no longer valid) http://www.consultant.ru/document/cons_doc_LAW_31914/

harmonization is needed, first of all, to remove obstacles for citizens and legal entities engaged in cross-border economic activity in the EAEU territory[1306].

Tax harmonization in the EAEU Member States has its own history.

By the time of the dissolution of the USSR, the governments of the union republics had faced a grave budget crisis and were in need of an urgent tax system reform. The first priorities were resolving budget deficit, social instability and structural imbalances in the economy.

Tax reforms in the CIS countries were multi-stage affairs. At the first stage, all countries chaotically formed new tax legislations. This led to the appearance of many overlapping taxes. At the second stage, the process of codification of laws began. The national Tax Codes, drafted and adopted at that stage, regularized the tax systems and largely laid the foundation of further tax harmonization. As a result of subsequent tax reforms, the number of set taxes was reduced, and duplicate taxes were eliminated[1307].

The idea of tax harmonization within the CIS countries was first documented in the Agreement between the Governments of the CIS Member States "On the Harmonized Principles of the Tax Policy" (1992). However, due to the refusal of some Member States to ratify this agreement, almost all its crucial progressive provisions remained declarative in nature.

In the second half of the 1990s, the intensification of integration processes began between individual CIS countries. In 1995, the "Agreement on the Customs Union between the Republic of Belarus and the Russian Federation" was signed. In 1996 Kazakhstan and Kyrgyzstan joined it. The activation of tax harmonization of the CIS countries at that time was also conditioned by the need to create more favorable conditions for the integration of their economies into the world economy. To achieve these goals, the Interstate Council and the Council of Heads of Government agreed on establishing an Interparliamentary Committee and the Integration Committee on the Harmonization of National Legislations. So, in the 1999 Program of the CIS Council of Heads of States on the creation of the Customs and Common Economic Space, among the main aspects to be harmonized was the need to achieve common positions in the tax regulation[1308].

The crisis of 1998 demonstrated the need to strengthen the integration of the CIS countries. which faced identical economic problems. This fully applied to taxation, which had a significant impact on the ability to overcome the economic downturn and to change the volume and structure of export-import transactions. In the period from 1999 to 2002, individual CIS countries signed a number of agreements on the principles of indirect taxation on the export and import of goods (works, services). In general, that period for the CIS countries was a period of formation of their tax systems, as well as a period of the declaration of the need for tax harmonization.

In the 2000s, there have been crucial changes aimed at improving the tax systems in the CIS countries. To such changes can be attributed the creation and implementation of the Tax Codes, the reduction of the total number of taxes, the introduction of a tax accounting system, the regulation of procedures of tax audit, the development of tax administration, etc. At the same time, there is an increasing harmonization of the tax systems of the participating countries. This new stage in the integration of tax systems started with the creation in 2001 by Belarus, Kazakhstan, Russia, Tajikistan, and Kyrgyzstan of the Eurasian Economic Community (EurAsEC)[1309]. Within the framework of this international or-

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[1306] Petrosyan, H. *Possible Ways of Further Evolution of Tax Systems in the EAEU Countries* (in Russian) // Ekonomicheskaya Politika. – 2016. – Vol. 11. – N 6, pp. 222-241, p. 223.

[1307] Golodova, Y. *Tax harmonization in the EU and CIS countries: general and special* (in Russian) // Finance and credit. – 2010. – N 7(391), pp. 68-72

[1308] Ranchinskaya, Y. *Features and Trends of Tax Harmonization (on the Example of EU, CIS and Customs Union Countries)* (in Russian) / Thesis for the degree of candidate of economic sciences. – Moscow. – 2012. – 27 p.

[1309] Agreement on foundation of Eurasian Economic Community of October 10, 2000 (entered into force on May 30, 2001) // http://wits.worldbank.org/GPTAD/PDF/archive/EAEC.pdf

ganization of regional economic integration, harmonization and unification of the tax systems took place in preparation for the signing of the Agreement on the EAEU[1310].

Along with the start of EurAsEC, real development and deepening of cooperation in taxation began. It was aimed at the unification of the structure and the principles of taxation, the formation of common vectors of tax reforms, and the harmonization of tax policy of Member States. In this regard, the unification of national tax laws, as well as the signing the interstate agreements established further directions of harmonization is becoming increasingly important[1311]. Thus, in May 2001 the CIS countries adopted a decision "On the establishment of the Coordinating Council of the Heads of Tax Services of the Member States of the Commonwealth of Independent States" (CCHTS CIS). The main objective of the Council was to develop mechanisms for interaction in the field of tax administration, development of recommendations on harmonization of national tax laws.

In general, the period of 1999-2007 can be considered a period of cooperation and exchange of information in the field of taxation. Closer interaction has been taking place since 2008, when many CIS countries almost simultaneously decided to lower the rates for certain taxes, to bring together approaches to the calculation of tax bases[1312]. As noted in 2011 by the executive secretary of the Advisory Committee on Tax Policy and Administration of the Eurasian Economic Commission, N. Mambetaliev, the main objectives of the harmonized tax policy within the framework of the Eurasian Economic Community were:

- harmonization of tax legislation;
- coordinated reforming of the tax systems of the EurAsEC Member States;
- elimination of tax barriers affecting the development of economic relations between Member States[1313].

Realization of these goals was carried out through the harmonization of indirect and direct taxes simultaneously.

Harmonization and unification of the legislation on indirect taxes.

From the very beginning of the integration processes in the field of taxation, attention was directed to the harmonization of indirect taxes, since they affect pricing, thereby determining the competitive strengths of the producers of different countries[1314]. In the past, the same trends were typical of European integration: the European countries also harmonized indirect taxes at the first stage of integration.

Within the framework of the Customs Union, the Eurasian Economic Community and the Common Economic Space, a number of agreements were reached. They set the basic principles of indirect taxation[1315]. Among the most significant achievements of Eurasian integration in indirect taxation are the following:

- It is determined that VAT is charged according to the principle of the country of destination, which implies a zero rate of export VAT and the collection of VAT by the tax authorities of the importing state;
- It was established that the rates of indirect taxes on imported goods should not exceed the rates of indirect taxes on similar domestic goods (one aspect of the principle of non-discrimination);

[1310] On October 10, 2014, the heads of the EurAsEC Member States signed documents on its liquidation from January 1, 2015, that is, from the date of the launch of the functioning of the EAEU.

[1311] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1312] Ranchinskaya, Y. *Features and Trends of Tax Harmonization (on the Example of EU, CIS and Customs Union Countries)* (in Russian) / Thesis for the degree of candidate of economic sciences. – Moscow. – 2012. – 27 p.

[1313] Mambetaliev, N., Mambetalieva A. *Taxes in the Customs Union and Common Economic Space* (in Russian) // Tax Bulletin. – 2011. – N 11, pp. 51–59

[1314] Golodova, Y. *Tax harmonization in the EU and CIS countries: general and special* (in Russian) // Finance and credit. – 2010. – N 7(391), pp. 68-72

[1315] Most of these agreements have lost their validity since the entry into force of the EEA Agreement, that is, from January 1, 2015.

– Minimum excise rates were established;
– A number of measures have been taken to harmonize the administration of indirect taxation. This was especially important for the functioning of the Common Economic Space, which assumes no customs and tax barriers[1316].

Harmonization and unification of legislation on direct taxes

Unlike indirect taxes, direct taxes do not have such a tangible impact on pricing and the magnitude of interstate trade turnover. Therefore, harmonization of direct taxes was a secondary issue in EurAsEC (and still is a non-core item on the agenda of the EAEU).

The largest effort was expended on harmonization of corporate income tax and personal income tax. This is due, in our opinion, to the fact that other taxes (in particular, the mineral extraction tax, property tax, land tax) are closely related to the peculiarities of the economy of each participating State.

In 2009, the Bureau of the EurAsEC Interparliamentary Assembly issued recommendations on the harmonization of the Member States' national legislation on direct taxes:

1) Recommendations on harmonization of the legislation of the EurAsEC Member States on income tax of December 2, 2009 No. 10;
2) Recommendations on harmonization of the legislation of the EurAsEC Member States on personal income tax as of December 2, 2009, No. 9.

These recommendations offer the following forms of harmonization:

– unification of terminology;
– unification of the methodology for the tax base formation;
– consideration of the issue of unification of tax rates;
– development of a unified approach to taxation of non-residents.

As intended targets of further harmonization, the maximum convergence of the methodology of the calculation of annual income, the list of deductions and tax rates were recognized. These measures were necessary for creating a common legal space and equal conditions for economic activity within CES[1317].

Treaty on the Eurasian Economic Union. The Eurasian Economic Union marked a new stage in the integration of the post-Soviet countries and a legal basis for convergence of their national legislations. The directions of the tax policy chosen as the strategy of the EAEU development were almost identical to the goals the Eurasian Economic Community set:

- promoting competitiveness in world markets;
- ensuring tax neutrality and avoiding imbalances;
- harmonization of national tax laws;
- improving tax control over the activities of economic agents[1318].

To achieve these goals, the following provisions were introduced in the EAEU Treaty:

1) Rules were introduced on the national tax regime with respect to goods imported from other Member States (Article 71 (2), Article 72 (5) of the EAEU Treaty)[1319]. This removed administrative tax barriers in collection of indirect taxes in mutual trade between Member States. The EAEU Treaty established a national regime provided that the imported goods must have no less favorable conditions in the domestic market than similar domestic products[1320].

[1316] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1317] Ibid., p. 77

[1318] Pavlova, N. *Comparative analysis of the tax systems of the Eurasian Economic Union in the context of integration processes* (in Russian) // The young scientist. – 2017. – N13, pp. 345-350

[1319] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1320] *Eurasian Economic Union. The Architecture of the future*. Annual Report of the Eurasian Economic Commission, 2014, 55 p.

2) A provision was introduced on the harmonization of tax legislation "with respect to taxes that have an impact on mutual trade" (that is, first of all, indirect taxes). In particular, the provision also implies the convergence of excise rates for the most sensitive goods (Article 71 (3) of the EAEU Treaty)[1321]. So, two drafts of the Agreement on harmonization (convergence) of excise rates with regard to alcohol and tobacco products of the EAEU Member States have been prepared. The signing of these documents will help to eliminate unnecessary barriers, create a single market for alcohol and tobacco products, ensure a competitive environment in the sphere of trafficking of the most sensitive excisable goods and minimize illegal and uncontrolled cross-border trade, which, accordingly, will increase the EAEU countries' budget revenues[1322]. The tax administration of indirect taxes (VAT, excise taxes) and the procedure for VAT refunding are facilitated; the mechanism of collecting VAT in the performance of works and rendering services is improved; exchange of information between tax authorities on indirect taxes paid to the Member States' budgets is intensified. The procedure for granting a zero VAT rate for the goods imported from the other Member States is set[1323].

3) For the first time in the history of multilateral agreements between post-Soviet countries, the EAEU Treaty raised the issue of individual income taxation (Article 73 of the EAEU Treaty). For example, a provision on the taxation of income from hired labor has been added. So, in the territory of each Member State, the personal income tax rate set for its residents must also apply to residents of all other Member States. This is a significant innovation, considering, for example, that the Tax Code of Russia currently provides a rate of 13% for residents, while the tax rate for non-residents, including residents of EAEU Member States, is 30%[1324].

4) Electronic document circulation and documents certified by electronic (electronic-digital) signature are developing throughout the Union's territory. As they begin to be accepted on a par with paper documents, the EAEU Treaty includes provisions allowing taxpayers to submit documents electronically[1325].

The signing of the EAEU Treaty, of course, is an important step towards bringing the economies and laws of the Member States closer together[1326].

In addition to the EAEU Treaty, which enshrined common principles of taxation, the process of economic integration is reflected in the EAEU Member States' national tax laws. For example, due to the fact that document circulation among the EAEU Member States is carried out mainly electronically, in the law of Armenia, Kyrgyzstan and Russia, a new provision has been introduced, allowing the VAT declaration to be submitted in electronic form. In the Republic of Kazakhstan, as of January 1, 2015, it is possible to make out a VAT invoice in foreign currency if the invoice is made out electronically[1327]. After the admission of the Kyrgyz Republic to the EAEU, significant additions and changes were made to the conceptual part of the Kyrgyz national Tax Code. In particular, the terms "Import of goods" and "Legislation of the Customs Union" were introduced. In addition, a new chapter 40-1 "VAT taxation when exporting and importing goods, performing work, rendering services in the Customs Union" was added. In Armenia, starting from January 1,

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[1321] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82
Eurasian Economic Union. The Architecture of the future. Annual Report of the Eurasian Economic Commission, 2014, 55 p.

[1323] Id.

[1324] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1325] See, for example para. 4 (3) of section II, and paras. 20(1), 20(8) of section III of Appendix No. 18 to EAEU Treaty

[1326] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1327] Information and analytical review: *The tax legislation of the CIS Member States and its role in the development of the national economy*. Information and analytical review / – M.: Executive Committee of the CIS. – 2015 / URL: www.e-cis.info/foto/pages/25145.docx

2015, the law "On the Specifics of the Calculation and Payment of Indirect Taxes between the Republic of Armenia and the Member States of the Eurasian Economic Union" came into force[1328].

Prospective directions of the tax policy within the EAEU

To date, the regulatory and legal framework in the field of taxation and tax administration has been implemented. At the same time, the EEC plans to conduct the following activities:

1) Improving the Conventions for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital as an effective tool for stimulating and protecting cross-border investments and business activities.

In this regard, it is planned to develop coordinated approaches to taxation of electronic commerce aimed at:

- prevention of concealment and unreasonable understatement of taxes by e-business participants;
- reduction of tax barriers and creation of conditions for fair competition in electronic commerce in the EAEU.

2) Improvement of tax administration by expanding information interaction of the tax departments of the EAEU Member States. This concerns tax, customs, banking and other services involved in tax administration, control over currency and export operations.

3) Conclusion of an interagency agreement on cooperation and mutual assistance on issues of direct taxation between the Member States. In this regard, the EEC, together with the competent authorities of the EAEU Member States, developed a draft Protocol on the exchange of electronic information between the tax authorities of the EAEU Member States.

4) Improvement of the system of VAT collection in mutual trade, including through the use of information technologies.

5) Harmonization of excise rates for the most sensitive excisable goods.

As we noted above, work is currently proceeding on preparing and adopting the Agreements:

- on the principles of tax policy in the field of excise duties in relation to alcohol products of the EAEU Member States;
- on the principles of tax policy in the field of excise duties in relation to tobacco products of the EAEU Member States[1329].

Summing up, we can say that, at the current stage of the tax harmonization of the EAEU Member States, significant progress has been made in unifying indirect taxation. Harmonization of the legal systems in direct taxation is more restricted and involves significant difficulties in finding a compromise, since direct taxes are more closely related to the national economy of each country, the level of its economic development, its social policy, and so on.

However, these factors are not an obstacle to the harmonization of tax administration, which is urgently needed. At the moment, the tax procedures in the EAEU Member States in terms of simplicity and uniformity are at a rather low level. For the unification and improvement of the tax systems of the EAEU Member States, it is necessary to study the positive experience of those Member States where a certain tax procedure works most effectively, and then gradually extend this experience to the entire integration area.

[1328] Ibid.

[1329] *Financial policy in the framework of the Eurasian integration* / Khulkhachiev B. (ed.). – Moscow, The Eurasian Economic Commission. – 2015. – 48 p.

6.2 Harmonization of the direct taxation of NPOs in the EAEU: relevance and applicability of European Union's experience

As we noted before, today in the Eurasian integration space there is a general tendency towards convergence and unification of national tax systems. This policy is caused by the understanding that only through the tax harmonization will it be possible to reach the main goal of the EAEU, i.e., to create a fully-fledged common market for goods, capital and labor and provide equal competitive conditions for economic activities in all Member States. The main legal basis for convergence of national laws is the Treaty on the Eurasian Economic Union. Section XVII, with Appendix No. 18, of the EAEU Treaty contains norms and principles of taxation of goods and services imported/exported within the integration zone.

Researchers studying the processes of formation and development of the EAEU note its similarity with the European Union. This supranational economic and political association already has some of the features of a federal state, through the gradual voluntary surrender by the participating countries of part of their sovereignty on certain issues. The EU Member States already have a common market, open borders within the Union, and a common foreign and domestic policy[1330].

Nowadays, the EU is the most successful international integration grouping. In terms of its aggregate GDP (more than $17 trillion as of 2013), the EU is the largest player in the global economy. Despite structural problems related to the debt crisis, the EU in many respects is a benchmark for other regional associations, especially for coordination of economic interaction[1331]. It is, therefore, not surprising that the EU integration experience was used as a guide during the formation of the EAEU, and that EU legal models were used to prepare the legal base of the EAEU.

As N. Kaveshnikov pointed out, integration in the post-Soviet area, from the very beginning, had taken place with an eye on the European Union. Many structures and mechanisms in the post-Soviet area were similar to those that had proved themselves in Europe, so it was logical that a step-by-step strategy for integration, enshrined in the EAEU Treaty, was based on the experience of the EU[1332].

The EAEU Treaty did not adopt only the general idea of the Treaties on the European Community and the European Union; many of its articles coincide word for word with those texts. So, for example, it is worth noting the four fundamental freedoms that are the foundation of the European Union. They consist in creating conditions for the free movement of goods, services, labor and capital, and have also become a symbol of economic integration for the EAEU[1333].

Another example is the non-discriminatory approach adopted in the EAEU and enshrined in the EAEU Treaty. In EU legislation, the principle of non-discrimination is reflected in Art. 110 of the Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty of 2007):

- "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products";

[1330] Ivanova, N., Aleksandrov, K. *EU & EAEU: History and Parallels* (in Russian) / in Gamidullaev S. (ed.) The Eurasian Economic Union in the Context of Globalization. Challenges, Risks, Trends. – 2015. – pp. 61-64

[1331] Nikolajchuk, L. *Does the EAEU rhyme with the EU?* (in Russian) 07.04.2015 / URL: http://zviazda.by/ru/news/20150407/1428354174-eaes-rifmuetsya-s-es

[1332] Kaveshnikov, N. *On the possibility of using the experience of the European Union for the economic integration of the CIS countries* (in Russian) // Materials of the international conference "Modern Russia and the World: Development Alternatives". – July 2003 / URL: www.hist.asu.ru/aes/diss_ru.htm#_Toc49240886

[1333] Nikolajchuk, L. *Does the EAEU rhyme with the EU?* (in Russian) 07.04.2015 / URL: http://zviazda.by/ru/news/20150407/1428354174-eaes-rifmuetsya-s-es

- "No Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products"[1334].

By analogy with provisions of the Treaty on the Functioning of the European Union, the EAEU Treaty included the rules on the national taxation regime in relation to goods imported from other Member States (Article 71 (2), Article 72 (5)[1335]. The rule on discrimination is a new, but fundamentally important norm introduced in addition to the previously signed international agreements codified in the Treaty [1336]. Parties assumed the obligation to apply non-discriminatory taxation, when no EAEU Member State can set for goods imported from the territory of other Member States a less favorable tax regime than that for similar goods originating from its territory[1337]. This rule is aimed at preventing restrictions on competition that could impede the formation of the Common Economic Space[1338].

The EU countries have been tax harmonizing for several decades; they began with the harmonization of indirect taxes, and only when the indirect taxes were substantially harmonized, they started to take up the issue of the convergence of direct taxation[1339]. This sequence is explained by the fact that it is indirect taxes that have the greatest impact on price formation in mutual trade between countries. Since the functioning of an international grouping involves a significant expansion of mutual trade turnover, it is from indirect taxes that one should expect the effect of increasing tax revenues for national budgets[1340].

In addition to the harmonization of indirect taxes, the EAEU Member States have the task of gradually adjusting and unifying regulatory legal acts in the field of direct taxation. At the same time, as our study showed (§6.1), unlike the EU, in the EAEU the task of harmonizing the taxation of NPOs is not on the agenda. Moreover, unlike the European Union, the very strategy of harmonization of direct taxes in the Eurasian Economic Union focuses rather on the taxation of individuals, than on corporate taxation[1341].

Nevertheless, the similarity of strategic goals and fundamental statutory principles of the two international groupings suggests that, at a certain stage of integration, the EAEU countries will also face the need to harmonize the taxation of NPOs. To assess the possibility of this scenario, we need to more deeply compare the nature and features of the development of the EU and the EAEU, as well as properties and development trends of the nonprofit sector in the Member States of these groupings. Let's consider which characteristics would affect the decision of the EAEU members to begin harmonizing the taxation of NPOs in the foreseeable future and in what ways.

After studying the literature comparing the EU and the EAEU, in terms of their objectives, conditions of creation, structure and directions of tax harmonization, we can distinguish three groups of factors that may affect the relevance of the harmonization of NPO taxation in the EAEU.

The first group of factors is generated by the fundamental differences between the EU and the EAEU and consists of a difference in the general conditions for tax harmonization in these international groupings. The first set of factors includes:

[1334] Art. 110 of TFEU. Consolidated version of the Treaty on the Functioning of the European Union. 2012/C 326/01 // Official Journal C 326 , 26/10/2012 P. 0001-0390

[1335] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1336] Ibid.

[1337] Zaharova, O. *Tax harmonization as an integral part of general economic integration processes in the EAEU Member States* (in Russian) // Molodoj uchenyj. – 2016. – N11, pp. 750-753

[1338] Zorina, R. *Prospects for Harmonization of the Tax Legislation of the EAEU Member States* (in Russian) // Zakonodatel'stvo. – 2015. – N 7, pp. 75-82

[1339] Golodova, Z., Ranchinskaya, Y. *Personal income tax in EAEU: Analysis of parameters and harmonization* (in Russian) // Vestnik RUDN (seriya Ekonomika). – 2015. – N 4, pp. 79-86

[1340] Zaharova, O. *Tax harmonization as an integral part of general economic integration processes in the EAEU Member States* (in Russian) // Molodoj uchenyj. – 2016. – N11, pp. 750-753

[1341] Golodova, Y. *Tax harmonization in the EU and CIS countries: general and special* (in Russian) // Finance and credit. – 2010. – N 7(391), pp. 68-72

1) Differences in the legal and political systems of the participating countries. Although the legal systems of the EAEU countries are based on very similar principles and legal doctrine, each of these countries has its own model of political system and integration, its own level of understanding of democracy and economic freedoms, its own path to the market and into the world community. All the EAEU countries adopted new tax codes after the collapse of the Soviet Union. These codes reflect the changes in the political, legal and social situation in each country[1342]. The EAEU Member States have significant differences in the levels of income from tax liabilities, in determining the tax base, and in the principles and approaches used in national taxation systems. These differences are largely determined by the level of socio-economic development, the geographic location of the countries and resources available to them[1343].

2) Different levels of economic development. The asymmetry in the economic structure and the associated imbalance of risk represent the greatest danger to the integration goals of the EAEU[1344]. Comparing the EAEU with the EU in its inception, we find that six of the EU founding countries had roughly the same, relatively high level of economic development. Despite the fact that some of these countries, such as Germany and France, outnumbered and influenced other European countries, none of them totally dominated others. Germany, as the largest economy of the EU, according to the 2011 data, is no more than 20% of the total GDP at purchasing power parity (PPP)[1345]. The EAEU is not characterized by such homogeneity. On the contrary, here there is a considerable range of economic parameters: from Russia with its 85%-share in the EAEU' GDP to Armenia with its 0.4-0.6%-share. The creation of an equitable union with such significant differences in the size of the economies is obviously a difficult problem.

3) Political heliocentricity of the EAEU. At the time of their unification, the European countries had an approximately equal level of development of a market, equally mature political forces and the same level of development of democratic institutions. The same cannot be said of the participants of integration in the post-Soviet area. From the very beginning, the EU integration was promoted by the political elite of three large and equal countries - Germany, France and Italy. The presence of such a polycentric system greatly facilitated the development of collective decisions and the creation of common governing bodies. The EAEU integration has a single center – Russia; and this mono/heliocentricity of the EAEU greatly complicates the search for compromises[1346]. For example, it is unclear how to form the EAEU supranational governing bodies: if, for example, a decision-making process is based on the population or the size of the economy, then all countries other than Russia will have a small role in this association[1347].

4) Absence of a political component of the EAEU. The EAEU is an association with purely economic goals. The Treaty on the EAEU states only the desire of Parties to ensure the freedom of movement of goods, services, capital and labor, the conduct of coordinated or unified policy in some sectors of the economy[1348] in order to establish equal competitive conditions for economic activity in all EAEU Member States. At the same time, the EAEU

[1342] Golovina, S., Lyutov, N. *Is the Experience of the European Union Useful for Harmonizing the Labor Legislation of the States of the Eurasian Economic Union?* (in Russian) // Journal of Russian Law. – 2017. – N 4, pp. 70-83

[1343] Petrosyan, H. *Possible Ways of Further Evolution of Tax Systems in the EAEU Countries* (in Russian) // Ekonomicheskaya Politika. – 2016. – Vol. 11. – N 6, pp. 222-241

[1344] Irishev, B., Kovalev, M. *EAEHS na starte* (in Russian) // Belaruskaya Dumka. – 2015. – N 1, pp.56-65

[1345] Ivanova, N., Aleksandrov, K. *EU & EAEU: History and Parallels* (in Russian) / in Gamidullaev S. (ed.) The Eurasian Economic Union in the Context of Globalization. Challenges, Risks, Trends. – 2015. – pp. 61-64

[1346] Borko, Y., Butorina, O. *Ot Evropejskogo soyuza – k Soedinennym SHtatam Evropy? Evropejskij soyuz na poroge XXI veka. Vybor strategii razvitiya.* (In Russian) / – M: EHditoral URSS. – 2001, pp. 430-462

[1347] Ivanova, N., Aleksandrov, K. *EU & EAEU: History and Parallels* (in Russian) / in Gamidullaev S. (ed.) The Eurasian Economic Union in the Context of Globalization. Challenges, Risks, Trends. – 2015. – pp. 61-64

[1348] Ziyadullaev, N. *Evrazijskij ehkonomicheskij soyuz: istoriya uspekha ili myl'nyj puzyr'* (in Russian) // Nezavisimaya gazeta. – 2014. – N 197

sets limits for the sphere of harmonization and unification of legislation[1349]. Only those areas where the participating countries see their national interests are subject to integration[1350].

Theoretically, interstate associations always imply the restriction of the economic and sometimes political sovereignty of the integrating countries, since their activities are aimed at achieving not only their own but also common goals[1351]. An example is the European Union Member States, voluntarily and by mutual consent going into close integration in the financial/monetary, economic, military and other spheres, and surrendering a number of national prerogatives. However, this example did not inspire the EAEU Member States. The national sovereignty of countries in the Eurasian Economic Union is unshakable, and not the slightest hint of political integration within the framework of the EAEU has got into the Treaty. Probably in order to exclude any kind of speculation on this issue, the Treaty uses the phrase "Eurasian economic integration", and not simply "Eurasian integration" - a term that, as a rule, has political connotations[1352].

Unlike the developed EU countries using regional integration as a tool for facilitating trade and moving economic resources, the developing countries of the EAEU see it as a tool for national economic development and industrialization[1353]. Each member of the EAEU had its own motives for integration[1354], but they are all united in the common purpose of increasing the attractiveness of investment by creating a common market of almost 174 million consumers. Therefore, the exclusive goal of the EAEU is to remove barriers to the movement of goods, services, capital and labor and to restore lost volumes of mutual trade[1355].

The alertness and mistrust of CIS countries towards closer integration are also justified by years of imperial and Soviet history, and by fears that economic integration will inevitably lead to the loss of political sovereignty[1356]. Therefore, in preparing the text of the Treaty, the principled position of the participating countries was that the political sovereignty of members is "unshakable". In this context, economic integration is called upon to "strengthen national statehood, make it more stable", but not vice versa[1357]. Issues such as general citizenship, foreign and military-technical policies, general border protection, the idea of a common parliament, a passport and visa sphere, export control, etc. were excluded from the final agreement[1358]. All provisions related to health, education, science and culture were also excluded because they do not relate to economic integration. It was supposed that these forms of cooperation could be implemented within other integration grouping (for example, the CSTO and the CIS), as well as in bilateral agreements[1359].

5) Lack of supranational characteristics. Heliocentric structure, distrust of closer integration and protection of their own political sovereignty on the part of a number of CIS countries deprived the EAEU of any supranational symbols. Protecting the national sover-

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[1349] Golovina, S., Lyutov, N. *Is the Experience of the European Union Useful for Harmonizing the Labor Legislation of the States of the Eurasian Economic Union?* (in Russian) // Journal of Russian Law. – 2017. – N 4, pp. 70-83

[1350] *EAEHS i ES mogut zaklyuchit' "Soglashenie veka"* (in Russian) / URL: http://moscow-baku.ru/news/politics/eaes_i_es_mogut_zaklyuchit_soglashenie_veka/

[1351] Ziyadullaev, N. *CIS: The road to the third millennium. Issues of development and strengthening of the Commonwealth* (in Russian) / – Moscow, Institute of Socio-Political Research of Russian Academy of Sciences Publ. – 2002. – 210 p.

[1352] Sivitsky, A. *The Union with the political "exceptions"* (in Russian) // Evrazijskoe obozrenie. – 2014. – N 2, pp. 6-10

[1353] Ratushnyak, E. *Forming a single economic space within the EAEU* (in Russian) / Thesis for the degree of candidate of economic sciences. – Moscow. – 2014

[1354] For more details see Irishev, B., Kovalev, M. *EAEHS na starte* (in Russian) // Belaruskaya Dumka. – 2015. – N 1, pp. 56-65

[1355] Irishev, B., Kovalev, M. *EAEHS na starte* (in Russian) // Belaruskaya Dumka. – 2015. – N 1, pp. 56-65

[1356] Ziyadullaev, N. *Evrazijskij ehkonomicheskij soyuz: istoriya uspekha ili myl'nyj puzyr'* (in Russian) // Nezavisimaya gazeta. – 2014. – N 197

[1357] Ibid.

[1358] Ibid.

[1359] Sivitsky, A. *The Union with the political "exceptions"* (in Russian) // Evrazijskoe obozrenie. – 2014. – N 2, pp. 6-10

eignty of the Member States, Article 1(2) of the Treaty establishes that the Eurasian Economic Union is an international organization of regional economic integration with international legal personality. Being an interstate organization, the Union cannot have the symbols of supranationality, since it cannot rise above its founders[1360]. Although, in accordance with Art. 45 of the EAEU Treaty, the EAEU Member States handed over their powers for customs and tariff regulation to the supranational level by referring it to the Eurasian Economic Commission, this supranationality is functional[1361]; it has nothing to do with supranationality in the public legal sense and does not infringe the state sovereignty of the members.

As we can see, factors of the first group are macro factors. They determine the nature and character of the EAEU as an integration grouping and affect harmonization in all sectors. However, due to these factors, the harmonization of taxation of NPOs in the EAEU may be postponed for a long time or may not happen at all. For example, the exclusion from the EAEU Treaty of provisions regulating the spheres of education, science, culture, which are the main spheres of activity of NPOs, negatively affects the likelihood of harmonization of NPO taxation. The lack of supranational characteristics also hinders the harmonization of NPO taxation: since the activities of NPOs are outside the scope of economic laws, they traditionally have close ties with the state. Regulation of such ties at the level of the Union requires the jurisdiction of supranational bodies.

The second group of factors includes factors related to the role of NPOs in the community of the Member States. These factors include:

1) Use of NPOs as a "soft power". Whatever the relationships between the non-profit and public sectors may be, the NPO activity is always a tool of governmental "soft power". Although the EAEU, unlike the European Union, was not conceived as a basis for political integration, political goals are certainly present in the Eurasian integration process. Therefore, instruments of "soft power", including the activities of NPOs, are used to conduct an independent foreign policy. In the absence of a common political strategy in the EAEU, each Member State seeks, in our view, to use these tools to demonstrate political independence and the features of state social management. In addition, countries can use their NPOs to strengthen their influence on the territory of the EAEU[1362].

2) Low level of intra-regional economic interaction. Proceeding from economic goals of integration, tax harmonization should put all companies functioning in the EAEU territory on an equal footing, facilitate their access to the internal EAEU market and activate foreign direct investment within the framework of the EAEU[1363]. Nevertheless, as the researchers note, the level of mutual trade of the EAEU countries is very low. In comparison, intraregional trade in the EU reaches 65%, in NAFTA and ASEAN this figure is close to 40% and 25% respectively[1364], while, in the EAEU, this figure is not more than 20%. The growth of mutual trade among the future EAEU members was decreasing, recording in 2010 a growth rate of 41.6%, in 2011 a growth rate of 31.9%, in 2012 a growth rate of 10.1% and in 2013 about of 0.3%[1365]. Experts also note a minimal development of the sectoral component of Eurasian integration, and weak links between the economic subjects of

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[1360] Bekyashev, K. *EAEU: An international (interstate) organization or international (interstate) integration union?* (In Russian) // Eurasian Law Journal. – 2014. – N11 (78), pp. 14-16 https://www.eurasialaw.ru/index.php?option=com_content&view=article&id=6870:2015-01-12-09-19-56&catid=99:2010-06-02-08-56-30

[1361] Ibid.

[1362] Stetsko, E. *Non-governmental organizations in the EAEU countries: crossroads of "soft forces"* (in Russian) // Eurasian Law Journal. – 2016. – N 1 (92)

[1363] Korotina, V., Zhverantseva, M., Karimova, E. *Evolution of the Process of Eurasian Integration under the Influence of Tax Arrangements* (in Russian) // Izvestiya Saratovskogo universiteta. Seriya EHkonomika. Upravlenie. Pravo. – 2013. – N 3(1), pp. 294-299

[1364] Irishev, B., Kovalev, M. *EAEHS na starte* (in Russian) // Belaruskaya Dumka. – 2015. – N 1, pp. 56-65

[1365] Ibid.

participating countries[1366]. As in the CIS, the most important problem of integration in the EAEU is the predominance of external ties over internal ones. All participating countries are economically and technologically linked to third countries, mainly to the European Union[1367]. There is no statistical data on the share of the non-profit sector in the GDP of the EAEU, but it can be assumed that it is very slight. Under these conditions, even if NPOs are recognized as market participants and are able to use the four freedoms of the EAEU Treaty, the slight share of the non-profit sector in intraregional turnover does not justify discussion of the need to harmonize NPO taxation.

3) Hostility to foreign (EAEU-based) NPOs as a source of external political influence. The analysis of laws restricting the activities of foreign NPOs (paragraph 5.4) showed the desire of the national elites for self-preservation and stable development. Given that foreign NPOs are a soft power of their States, the Member States are wary of external NPOs, treating them as an instrument of foreign influence. In a situation where the EAEU Member States and other post-Soviet countries increase control even for domestic NPOs receiving financing from abroad, it is naive to assume that they are ready to grant the foreign (EAEU-based) NPOs the same privileges that domestic NPOs have.

The reason for this situation derives from two problems. The first problem is identical to one that for the past 11 years, since the judgement on the Stauffer case, the EU countries have been trying to solve: this is the distrust of Member States of the level of control of each other. As we found in paragraph 5.1, the EAEU countries use different approaches to the assignment of public benefit status to NPOs and apply different criteria for monitoring the NPOs' activities. The problem is complicated by the fact that, at the current stage of development of the EAEU, the interaction and exchange of information between the tax authorities of the Member States are not yet sufficiently developed.

The second problem is the different levels of loyalty of the governments of the EAEU Member States to foreign (from outside the EAEU) NPOs. As we noted in paragraph 5.4., Kyrgyzstan and Armenia are the most loyal to the presence of Western NPOs[1368], Kazakhstan occupies an intermediate position, Russia and Belarus demonstrate the least loyalty to foreign NPOs. A high level of loyalty to external NPOs, coupled with a low level of control over the activities of internal NPOs, can lead to a situation where domestic NPOs of more liberal Member States can be used for unimpeded transit of Western capital to the more closed Member States.

In contrast to the first problem, for the solution of which the 11-year European developments can be used[1369], the second problem is unlikely to be resolved anytime soon. These problems significantly reduce the integration potential of the non-profit sector of the EAEU countries.

The third group of factors is due to the peculiarities of the non-profit sector itself. Factors of the third group include:

1) Differences in the levels of development of the sector. Charity is widespread in most countries of the world. However, it is the European continent that is the progenitor of charity as a social phenomenon[1370]. A distinctive feature of European philanthropy is its centuries-old traditions, the strong influence of the Christian religion, and the existence of a di-

[1366] Treshchenkov, E. *European and Eurasian Integration Models: the Limits to their Comparability* (in Russian) // Mirovaya ehkonomika i mezhdunarodnye otnosheniya. – 2014. – N5, pp. 31-40

[1367] Butorina, O., Zakharov, A. *Scientific basis of the Eurasian Economic Union* (in Russian) // Eurasian Economic Integration. – 2015. – N 2 (27), pp. 52-68

[1368] In Armenia today there are about 200 foreign NGOs, an assistance of american USAID is especially significant. Numerous foreign NPOs provide financial, technical and methodological assistance to virtually all opposition parties of Kyrgyzstan

[1369] The first case - the Stauffer case - was heard in the Court in 2006

[1370] Borgman, K., Smit, D. *Foundations in Europe: the Historical Context* / in A. Schülter, V. Then and P. Walkenhorst (eds.) Foundations in Europe: Society, Management and Law / Directory of Social Change. – 2001. – 875 p., pp. 2-34

verse experience of countries[1371]. To date, there are approximately three million NPOs and 110,000 different funds in 22 European countries[1372]. They employ 750,000-1,000,000 people and annually allocate about 100 billion euros to their programs[1373]. The expansion of NPO activities in European countries is associated with the evolution of socio-economic conditions and the construction of a socially-oriented market economy, which is characterized by the prominence of public social goals and their linkage to economic tasks.

The formation of non-profit organizations in the EAEU countries (and in other post-Soviet countries) is connected to key revolutionary changes in the political system, the economic structure, and the forms of organization of society, at the beginning and end of the twentieth century. As we noted in chapter 5 of the thesis, although in all five EAEU countries the political, economic, and social need for NPO development persists, their current legislation varies considerably[1374].

2) The low level of intra-regional (within the EAEU) non-profit (especially charitable) activities. This, in turn, is caused by several reasons.

The first is the ill-conceived organization and lack of effective laws in the EAEU countries. Entrepreneurs are confused by the administrative difficulties of making donations and by the lack of tax breaks. As Bayazitov I. noted, big business in the EAEU countries is at the stage of "primitive greed", engaging only in accumulating capital in the situation of uncertain investment risks. At the moment, entrepreneurs of post-Soviet countries are in a position between the creation of reserves for their own well-being and investing in the economy. Only upon undergoing these two stages, will businessmen be ready for mass charitable activity[1375]. However, to stimulate this process, it is necessary to expand tax benefits for donors right now. The analysis carried out in paragraph 5.2 showed that all the EAEU Member States provide a variety of tax support to public benefit NPOs. However, tax benefits for donors, both corporate and individual, lag far behind the average European level. Thanks to tax incentives for donors, in European countries the donations represent a powerful source of funding for charitable, educational, scientific and religious NPOs.

Secondly, the low level of NPO activity is due to the high level of distrust of the NPOs that is atypical for European countries. Thus, in Russia, for 49% of the total number of organizations and population not participating in philanthropy, distrust of non-profit (charitable) organizations is the main reason for "charitable passivity". Among the people involved in charity in Russia, only one in four provides donations through NPOs; the rest provide charitable assistance to the needy individually. Such disproportion, according to experts, is also connected with the fact that most people believe that charity is their own business, and they do not need the services of any organizations[1376]. In addition, cases of fraud with charitable funds, regularly appearing in mass-media, also discredit Russian NPOs. The situation in Kazakhstan is even worse: according to the Kazakh media, only 0.5 percent of the citizens are engaged in charity in its classical sense. In addition, charity in Kazakhstan is chaotic and inconsistent[1377]. It can be assumed that a similar situation is observed in the other EAEU countries.

[1371] Peshkova, N. *Charity in Europe: whim of the rich or a way of solving social problems?* // Contemporary Europe. – 2014. – N 3, pp. 106-116

[1372] Ospanova, D., Saktaganova, Z. *The Historical Review of the World Experience of Development and Functioning of Non-Governmental Organizations* (in Russian) // Life Science Journal. – 2013. – N 10(12s), pp. 455-459

[1373] Ibid.

[1374] Stetsko, E. *Non-governmental organizations in the EAEU countries: crossroads of "soft forces"* (in Russian) // Eurasian Law Journal. – 2016. – N 1 (92)

[1375] Bayazitov, I. *Charities in Europe* (in Russian), 11.03.2014 / URL: http://www.yardem.ru/publ/stati/blagotvoritelnost_v_evrope/22-1-0-318

[1376] *Charity in Russia: yesterday, today, tomorrow* (in Russian) / URL: http://www.osspb.ru/experts/otrasli_MB/tvori_blago.php

[1377] *Rossiya zanimaet 127-e mesto v mire, iz 145 po stremleniyu kapitala k blagotvoritel'nosti* (in Russian) / URL: https://ru.wikipedia.org

Thirdly, the non-profit sector of countries which emerged from the Soviet legal tradition has its own specific characteristics of development. The formation of civil society throughout the area of the former Soviet Union occurred after 70 years of the command-administrative system of governance. During that period, the so-called "public organizations" existed within the framework of a single state policy under party-state control. Some of them were of a self-supporting nature, i.e., earned certain funds independently, but almost all organizations had additional state funding[1378]. Therefore, a misconception that all social problems should be resolved exclusively by the state, is widespread in post-Soviet countries[1379].

Fourth, the volume of domestic charity is small, because absolutely all the EAEU countries after the collapse of the USSR became objects, and not subjects of charitable flows. Charitable flows came from abroad and were expressed in the supply of humanitarian assistance, in the support of cultural, scientific and social projects, in training personnel of charitable organizations[1380]. Now in Russia, the stage of creation of its own charitable NPOs, specialized in different spheres, has come. Examples include the Vladimir Potanin Charity Fund, Dmitry Zimin's Dynasty Foundation and others. However, other countries cannot boast of this[1381]. This is especially true for Kyrgyzstan and Armenia. Civil society in both countries has also developed through the activities of foreign, non-governmental organizations; the presence of agencies of leading Western institutions, foundations and NPOs in these countries is retained up to now[1382].

It is easy to see that, despite the different degrees of influence of these factors, all of them are obstacles that limit the possibility of harmonization of NPO legislation, including the NPO tax law.

Needless to say, there are also some favorable features from the perspective of potential tax harmonization in the EAEU countries. From a legal point of view, the post-Soviet area is more homogeneous than the EU region, since, until 1991, all EAEU countries were part of a single state - the USSR. Unlike the EU countries, all post-Soviet countries emerged from a single legal system, including tax legislation. Although, after the collapse of the USSR, the tax law of the post-Soviet countries has undergone fundamental changes, nevertheless, the interaction between tax authorities, scientists, and statesmen from these countries has never ceased. Therefore, the adaptation of the tax law to the realities of the market economy has largely been carried out in similar directions, albeit with a number of national characteristics. This makes the creation of a single market technically simpler than in the EU countries. However, from the political point of view, technical compatibility makes little sense, and further harmonization in the Eurasian region may be even more complicated than in the EU[1383].

The low level of intraregional (within the EAEU) non-profit activity leaves no hope for stimulating integration "from below"; and the lack of supranational competencies, the declaration of purely economic goals, along with mistrust of national systems of NPO regulation and control, make early harmonization even less likely. Nevertheless, in the longer term, when integration is reinforced by political, cultural and social goals, and when supranational bodies gain the necessary competence, the spread of tax harmonization to the non-profit sector is very possible. It should be recalled that the European Union Member States

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[1378] Ospanova, D., Saktaganova, Z. *The Historical Review of the World Experience of Development and Functioning of Non-Governmental Organizations* (in Russian) // Life Science Journal. – 2013. – N 10(12s), pp. 455-459

[1379] Bayazitov, I. *Charities in Europe* (in Russian), 11.03.2014 / URL: http://www.yardem.ru/publ/stati/blagotvoritelnost_v_evrope/22-1-0-318

[1380] *Charity in Russia: yesterday, today, tomorrow* (in Russian) / URL: http://www.osspb.ru/experts/otrasli_MB/tvori_blago.php

[1381] Ibid.

[1382] Stetsko, E. *Non-governmental organizations in the EAEU countries: crossroads of "soft forces"* (in Russian) // Eurasian Law Journal. – 2016. – N 1 (92)

[1383] Golovina, S., Lyutov, N. *Is the Experience of the European Union Useful for Harmonizing the Labor Legislation of the States of the Eurasian Economic Union?* (in Russian) // Journal of Russian Law. – 2017. – N 4, pp. 70-83

also addressed the problem of discriminatory taxation of NPOs and raised the issue of improving taxation of cross-border activities of NPOs and their donors very recently. The first, and the turning point for the entire European non-profit sector, was the ECJ judgment in the Stauffer case, dated September 2006.

In the long term, the relevance of harmonization of NPO taxation in the EAEU will depend first of all on whether the EAEU Member States[1384], like the EU countries, recognize non-profit organizations as fully-fledged market participants and users of fundamental freedoms.

In paragraph 4.2 we studied the main options for addressing the problem of discriminatory taxation of NPOs that were proposed in the EU at various stages of the discussion. Let us consider which of them can be applied in the EAEU.

1) The mutual recognition of NPOs and their status by all Member States on the principle of home-country control is not considered by us as a potential solution. This approach could be feasible at the highest stage of integration only, so currently it is not achievable not only for the EAEU, but also for the EU.

2) A solution similar to the Proposal for a Council Regulation on the Statute for a European Foundation in Europe, which is still regarded as the most effective means of harmonizing the legal aspects of NPO activities throughout the European Union, is also unrealizable in the EAEU. This is due to differences in the level of economic development of Member States, the lack of supranational bodies with legislative powers and other factors listed above.

3) The introduction of a Model Statute of NPOs looks promising. Such a Statute could establish a single set of essential requirements for NPOs, which would summarize the requirements of all EAEU countries. Within the framework of the EAEU, the development of a model statute of NPOs could be even more effective than in the EU. Since the EAEU unites only 5 Member States, the generalization of their requirements in one document is not difficult. Adherence to the Model Statute should be made voluntary for NPOs (as proposed, for example, in the case of the European Foundation Statute in the EU). Without guaranteeing an equal tax regime in host countries (as opposed to the European Foundation Statute in the EU), the Model Statute, however, would facilitate the conduct of a comparability test for NPOs involved in cross-border activities.

4) The most common, and therefore most likely, way of harmonization in the EAEU is the signing of bilateral and multilateral tax treaties. They allow the Parties to mutually apply their tax benefits to each other's NPOs (probably by allowing some reservations and special conditions).

International tax agreements (bilateral or regional) are the main instruments of regulation of international taxation. International tax agreements, first of all, are aimed at avoidance of double taxation.

Relations between the EAEU countries in tax matters are regulated by protocols, conventions (for example, the Convention between Republic of Kazakhstan and Republic of Armenia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property and Convention between Republic of Kazakhstan and Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital), and by bilateral agreements (between all other countries). A list of existing tax conventions / agreements is given in Table 21.

[1384] Currently, the fundamental freedoms do not apply to NPOs

Table 21. Bilateral tax treaties between the EAEU countries

Country	Title of bilateral agreement	Date of signing	Effective date	Data on ratification
Kazakhstan - Armenia	Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property	06.11. 2006	19.01. 2011	N 361-IV of 15.12.2010 (RK)
Kazakhstan - Belarus	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property	11.04. 1997	13.12.1997	N 184-1 of 31.10.1997 (RK) N 86-3 of 13.11.1997 (RB)
Kazakhstan - Kyrgyzstan	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital	08.04. 1997	31.03. 1998	N 153-1 of 11.07.1997 (RK) N 23 of 19.03.1998 (KR)
Kazakhstan Russia	Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital	18.10. 1996	29.07. 1997	N 146-1 of 03.07.1997 (RK)
Kyrgyzstan - Belarus	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property	26.06. 1997	12.05. 1998	N 40 of 10.04.1998 (KR) N 73-Z of 11.11.1997 (RB)
Kyrgyzstan - Russia	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	13.01. 1999	06.09. 2000	N 72 of 29.08.2000 (KR)
Kyrgyzstan - Armenia	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	The agreement exists only in the draft. To date, the draft has been approved by Decision of the Government of the Kyrgyz Republic of 11.05.2017 № 151-p		
Belarus - Armenia	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property	19.07. 2000	19.11. 2001	N 21-3 of 16.05.2001 (RB)
Belarus - Russia	Tax Treaty for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property	21.04. 1995	21.01. 1997	Resolution N 230-XIII of 25.04.1996 (RB)
Armenia - Russia	Tax Treaty for the avoidance of double taxation with respect to taxes on income and property	28.12. 1996	17.03. 1998	
Source: Compiled by the author				

The main objectives of the tax conventions are:

- Elimination of double taxation of income or property;
- Protection of a resident of one contracting state from discriminatory taxation in another contracting state;

– Avoidance of tax evasion or abuse of the provisions of the tax conventions;
– Mutual exchange of information between the competent authorities of the contracting states;
– Distribution of taxing power between the contracting states.

Usually, tax conventions / agreements do not apply to non-profit organizations. However, there are exceptions that can be used in the EAEU as an example of stimulating cross-border activities of NPOs and their donors. For example, in North America, countries have concluded bilateral treaties which address cross-border giving. The scope of support for cross-border giving is, however, limited: the United States - Canada tax treaty permits U.S. taxpayers to receive a tax deduction for contributions to Canadian charities if certain requirements are met. Most importantly, the deduction may not exceed the amount of the donor's Canadian-sourced income. Canadians may treat donations to U.S. 501(c)(3) organizations just as they treat contributions to Canadian registered charities, with the condition that gifts be limited to 70% of U.S.-sourced income; the Canadian authorities interpret the tax treaty to place the same percentage limitation on gifts by Canadian registered charities to 501(c)(3) organizations[1385].

The United States - Mexico Double Taxation Treaty also envisions the possibility that contributions by a U.S. resident to a Mexican organization may constitute a charitable contribution and be tax deductible, "if the Contracting States agree that a provision of Mexican law provides standards for organizations authorized to receive deductible contributions that are essentially equivalent to the standards of United States law for public charities". Such contributions are deductible only for U.S. taxpayers with income from Mexican sources, and the extent of the deduction depends on the magnitude of the Mexican source income. The Double Taxation Treaty provides similar rules with respect to income tax deductions under Mexican law for Mexican residents who make contributions to U.S. public charities[1386].

In addition, as D. Rutzen noted, many jurisdictions have concluded bilateral investment treaties, which help protect the free flow of capital across borders. Some treaties, such as the U.S. treaties with Kazakhstan and Kyrgyzstan, expressly extend investment treaty protections to organizations not "organized for pecuniary gain"[1387] [1388].

5) Model laws can be another way to implement the harmonization of legislation in the field of NPO taxation.

Model laws are "soft law" instruments, containing model provisions and giving a normative orientation for national legislators. They are not binding for the legislators and serve only as a guide for them[1389]. In fact, Model laws are analogous to the Recommendations in European law.

In the Eurasian region, a number of qualitative model codes, model laws and recommendations were developed. For example, some of them were developed within the framework of the EurAsEC Interparliamentary Assembly[1390] and the CIS Interparliamen-

[1385] Art. 21 of the United States - Canada Income Tax Convention [Signed at Washington, D.C. on September 26,1980; entered into Force August 16, 1984] / URL: https://www.irs.gov/pub/irs-trty/canada.pdf

[1386] Article 22 of the United States - Mexico Income Convention [signed at Washington on September 18, 1992; entered into Force December 28, 1993] / URL: https://www.irs.gov/pub/irs-trty/mexico.pdf

[1387] Article 1(b) of United States of America - Kyrgyz Republic Bilateral Investment Treaty, 19/01/1993; Article 1(b) of United States of America – Republic of Kazakhstan Bilateral Investment Treaty, 19/05/1992. See also Article 1(2) of the China – Germany Bilateral Investment Treaty 01/12/2003: "the term 'investor' means … any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit" /URL: http://investmentpolicyhub.unctad.org/Download/TreatyFile/736

[1388] Rutzen, D. *Aid barriers and the rise of philanthropic protectionism* // International Journal of Nonprofit Law. – 2015. – Vol. 17. – N 1, pp. 5-44

[1389] Shestakova, E. *Model legislation of the CIS* (in Russian) // EZH – Yurist. – 2005. – N 42

[1390] The Interparliamentary Assembly of the Eurasian Economic Community is an international parliamentary organization, a body of parliamentary cooperation within the framework of the Eurasian Economic Community. It was established in accordance with the Treaty on the Establishment of the Eurasian Economic Community in 2000. It ceased its activities

tary Assembly. These laws are designed to make the law-making process in the participating countries more unified.

Nevertheless, the rich potential of Model laws remains unrealized. As K. Kurtser pointed out, in their lawmaking activity, the post-Soviet countries are not always guided by the Model laws and this reduces the intensity of harmonization[1391].

In our opinion, it is necessary to use the achievements of Model laws in the further step of harmonization. For example, the Model Law on Patronage and Sponsorship of April 3, 2008[1392] contains terms for describing the activities of non-profit (charity) organizations. Today it is the only document of which the terms and definitions are more or less common for all the EAEU countries. Thus, this law could be recommended for use as a single terminological basis for national legislation on NPOs in the EAEU countries.

Thus, we recommend for use in the EAEU the following approaches to harmonizing tax legislation in relation to NPOs:

1) Signing of bilateral/multilateral treaties, which, inter alia, may establish common rules for the contracting parties and taxation rules;

2) Adoption of model legal acts on the basis of which the countries of the EAEU can adopt their own legal acts;

3) Coordination of law-making activity, including joint discussion of adopted laws in the field of tax regimes of NPOs;

4) Making recommendations for the Member States to use in law-making activities;

5) Introduction of a Model Statute of NPO, which would include a single set of crucial requirements for NPOs set in all 5 participating countries.

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from the moment of the establishment of the EAEC. The Interparliamentary Assembly of the EEC ceased its operating since the establishment of the EAEU.

[1391] Kurtser, K. *Problems of the tax law unification in the context of Eurasian integration* (in Russian) // Eurasian Law Journal. – 2012. – N 12 (55), pp. 35-36

[1392] Model Law of the CIS On patronage and sponsorship dated April 3, 2008 [adopted at the tenth plenary session of the Interparliamentary Assembly of CIS Member States (Decree no. 30-9)] (in Russian) //Informacionnyj byulleten'. – 2008. – N 42, p.267

CONCLUSION

As a result of the study, we can draw the following conclusions:

1) The nonprofit sector is growing; it is also hugely fragmented. Due to historical, legal, political as well as cultural sheer complexity and richness of this phenomenon, many terms are used for designating it. The end result is a complicated terminological tangle.

It is especially important to understand the essential characteristics of organizations of the non-profit sector for tax law purposes. Terms denoting such organizations are much contested because of the tax consequences that follow from their status, especially the eligibility for taxation concessions. In this dissertation, more than 20 different terms used by scientists, legislators to identify organizations of the non-profit sector were analyzed.

We think that, from the point of view of tax law, it is important that NPOs, unlike traditional business entities, are created not for profit but for fulfilling some social goals. Therefore, when it comes to tax law, the most correct, in our opinion, are the terms "non-profit organizations" and "public benefit organizations". The first of these definitions contains an indication that these organizations, unlike commercial organizations, do not have the goal of maximizing profits. The term "public benefit organizations" emphasizes that the organizations work for public benefit purposes, for which they are encouraged by tax incentives. Without denying the possibility of making a profit, this definition emphasizes that the profit, if it is received, is used to fulfill the organization's mission, i.e., for the sake of the common good, and not for subsequent investments or enrichment of the members of the organization. Such participation in the production of public goods justifies the existence of certain tax incentives for such organizations.

2) The non-profit sector has clear advantages over the public sector in providing goods and services that are required by a society. The non-profit sector is also more innovative than the traditional public sector and focuses on service improvement, so it can provide more efficient delivery of some public goods and services to the end consumer. Finally, the existence of the non-profit sector reduces the financial burden of the state, freeing it from the need to provide the society with some goods and services, which helps to perform functions of budget fund distribution in more efficient way. A non-profit, non-state sector is not a market, but not a state; it is a reasonable compromise between the state and the market. Its task is to reduce the failures of not only the market, but also the state.

3) Numerous social functions of NPOs explain the desire of many states to support the non-profit sector. Often, along with a variety of direct and indirect methods of state support for the non-profit sector, governments grant tax benefits to non-profit organizations. In economic terms, a tax exemption is equivalent to a government subsidy. While a nonprofit organization enjoys the benefits of receiving unlimited amounts of tax-free income, the government is still subsidizing the operations of that nonprofit in the amount that the organization would have paid in taxes, had it been a for-profit company.

Science has developed a number of noteworthy theories that justify tax incentives for NPOs. At the same time, there are numerous criticisms of state support for NPOs as a whole, as well as the tax form of such support. Some opinions, both of supporters and opponents of preferential tax law provisions for NPOs, were examined in the thesis. Having evaluated their arguments, we are inclined to conclude that the tax form of supporting NPOs has certain advantages over direct budget financing. This conclusion is confirmed by the practice: according to numerous studies, the great majority of countries currently have various tax incentives for NPOs.

4) European NPOs receive tax benefits, primarily, in the form of tax exemption. The following categories of income may be exempt from taxation: income from grants, donations, and membership dues; income from economic activities; investment income; real estate; gifts and inheritance. In addition to tax benefits intended directly for NPOs, most

countries provide tax incentives to donors – to individuals or/and corporations donating to NPOs.

Although all EU countries grant tax benefits to NPOs and their donors, the variety and magnitude of tax benefits vary significantly. They reflect relationship between a state and the NPO sector. States with deeply-rooted democratic and legal traditions apply benefits to NPOs more widely and diversely than countries where such traditions were less developed historically. As a rule, providing greater state benefits goes with more stringent obligations and reporting requirements.

5) As a rule, only organizations with special legal status - so-called public benefit status - can qualify for special state support and tax incentives. In practice, the status is considered as an issue of fiscal regulation. It means that, through introducing public benefit status, governments generally want to ensure that tax benefits granted to NPOs are related to purposes and activities which are of benefit to the society. We conclude that, although everywhere the goal of introducing this status is to stimulate public benefit activities and public benefit organizations, legal procedures for granting public benefit status differ in countries throughout Europe. Numerous local factors (existing legal and regulatory framework, local culture and traditions, tax benefits, level of development of the third sector, relations with the government) influence the regulation significantly.

6) Undoubtedly, such differences complicate the harmonization of the tax policy with respect to NPOs in the EU and their cross-border activities. Along with other factors, the differences mentioned in points 4) and 5), have led to the fact that Member States are "unfriendly", for tax purposes, to NPOs originating from other EU countries and recognized under their national legislation. Mutual distrust of the systems of regulation and control of the non-profit sector in Europe is one of the main causes of discrimination in tax law relating to NPOs.

7) Tax discrimination among NPOs in the EU is expressed in more stringent tax regimes for foreign (EU-based) NPOs in comparison with internal NPOs. Although almost all Member States are familiar with the concept of tax exemptions for NPOs (e.g., exemption from inheritance tax and corporate income tax), they are not interested in granting tax benefits to foreign organizations.

Traditionally, Member States set limited eligibility for tax-privileged status for resident NPOs and their donors, although explicit justification for the exclusion of foreign-based NPOs is typically not found in the legal texts. We can conclude that, in general, there are two main arguments that countries use when establishing a tax regime for foreign (EU-based) NPOs different from that of domestic NPOs. According to the first argument, tax incentives for NPOs are given because those organizations fulfil tasks that are of interest and benefit to the state and should hence benefit the community of the given state. A second possible reason for the traditional exclusion of foreign-based NPOs from access to tax-privileged status is pure practicality: foreign NPOs are governed by different legal provisions, the comparability of which with domestic laws cannot, it is argued, readily be determined.

8) Internationalization has, for some years, been an important trend within the non-profit sector. NPOs have clearly become more and more active across borders. This objective reason led to the need to declare the principle of non-discrimination in relation to the NPOs tax law.

9) A non-discrimination principle as regards tax law in the area of public benefit activities was formulated by the European Court in a series of judgements specifically dealing with three typical scenarios of discriminatory taxation of NPOs and their donors (*Stauffer*, *Persche*, *Missionswerk* cases). In each of these scenarios, the European Court made decisions that are landmarks for the entire non-profit sector.

The European Court of Justice has developed a general non-discrimination principle and has set the following rule for Members States' national tax laws: The "non-

discrimination principle" provides that public benefit organizations and their donors acting across borders within the EU are entitled to the same tax incentives as would apply in a wholly domestic scenario, where a foreign EU-based public benefit organization can be shown to be comparable to a domestic one. In all three cases, the Court held that a denial of the tax incentive would only be permissible if the foreign (EU-based) NPO was not (notwithstanding its seat) comparable to a domestic NPO. Thus, the Court held that, although each country may independently establish a tax regime for NPOs, this regime cannot be more stringent with respect to foreign (EU-based) NPOs than for domestic NPOs without significant reasons.

10) The intervention of the ECJ in resolving the problem of the discriminatory tax regime for NPOs started with a discussion of whether the NPOs are full actors in the common market and whether they can enjoy the protection of the EU fundamental freedoms. The discussion arose because of the fact that certain freedoms declared by the EU do not apply (in a literal wording) to NPOs.

The analysis of the TFEU provisions, the study of some academic thinking and the ECJ judgments in cases of non-profit entities in relation to several fields of European law allowed us to conclude that non-profit entities are treated as "active and proud consumers" of European law. Like for-profit entities, they enjoy the different kinds of rights deriving from European primary and secondary legislation, because they are an essential part of the economic landscape of the single market. The literal wording of TFEU Articles limiting fundamental freedoms only to for-profit entities should be overcome by a systematic analysis of the position reached by non-profit entities in ECJ case law and the development of the single market.

11) The analysis of various activities of NPOs (management of immovable property, participating in the capital of a company, charitable activities of NPOs and donors) showed that they may be protected by the freedom of establishment, the free movement of capital or the free movement of services. Donors who effect cross-border donations, may under rather particular circumstances rely on the free movement of workers, the freedom of establishment or the free movement of capital. In each case, the fundamental factor in the choice of freedom is to what extent the landlocked tax barriers affect each of them. In view of the Court's broad interpretation of what constitutes the movement of capital, as well as its lenient approach towards the "economic" component of this freedom, the most extensive protection to non-profit organizations and their donors is provided by the free movement of capital.

12) The fundamental freedoms of the European Union do not allow a Member State to apply a discriminatory regime only on the basis of the residence criterion in relation to a foreign NPO, which, for its public purposes, is comparable to domestic NPOs. Governments' attempts to justify their landlocked tax regimes and counter-arguments of the Court obtained during the trial of cases of the Stauffer-Persche line showed that countries have a very limited range of possibilities for establishing different tax regimes for domestic and foreign NPOs. States are compelled to balance between a "sufficiently clear domestic link", which EU Member States may require, and a "pure criterion of location", which amounts to a direct or indirect discrimination prohibited by EU law.

13) Consideration of justifications for the "territoriality" of tax benefits for NPOs showed that the only rationale for the existence of landlocked provisions in tax laws relating to cross-border philanthropic transfers is found, inherently, in the legitimate concern regarding (1) control over the proper expenditure of the funds in accordance with public purposes and (2) maintaining the effectiveness of specific requirements for tax relief on philanthropic organizations. But, according to the Court's opinion, the concern of control and maintenance of the essential requirements applicable to philanthropic organizations does not justify the harshness of a strict requirement of domestic residence if this requirement goes beyond what is necessary in order to attain the objective of pursuing control and

enforcement of domestic law (the proportionality principle). So, in the ECJ opinion, no conceptual arguments can be found to support and explain the existence of landlocked tax provisions. In Stauffer-Persche types of cases, the ECJ offers use of other conceivable measures that would allow governments to achieve the intended result, without maintaining residence-based discrimination.

14) It can be seen in existing case law that the Court appears reluctant to admit Member States' justifications as an overriding reason in the public interest capable of neutralizing the protection granted to taxpayers by the fundamental freedoms. Moreover, in cases concerning charities and donors' taxation, the Court does not always consequently establish a distinction between the analysis of, on the one hand, the justifications of the difference in treatment and, on the other, the comparability between the two categories of taxpayers at stake. Although it can be argued that the latter should come before the former in the Court's reasoning, both issues are sometimes dealt with simultaneously.

15) The non-discrimination principle requires checking comparability of foreign and domestic NPOs when deciding whether to grant tax exemptions. The ECJ held that "where a body recognized as having charitable status in one Member State satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, so that it would be likely to be recognized as having charitable status in the latter Member State, which is a matter for the national authorities of that Member State, including its courts, to determine, the authorities of that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in its territory". The national court must determine the fulfilment of these conditions. Thus, the Court has formulated one of the solutions to the problem of landlocked tax incentives – the host country control solution.

16) Following the ECJ decisions in Stauffer, Persche and Missionswerk, most EU Member States have amended their rules concerning foreign non-profit entities. In particular, in light of the ECJ case law, tax laws of many European states have expanded the deductions for the benefit of non-profit entities registered within the European Union or the EEA in order to be in conformity with the above jurisprudence.

As can be seen from data given in the dissertation, most Member States have implemented the nondiscrimination rule of the ECJ in case of tax benefits for foreign EU-based NPOs and their donors. So, today the climate for NPOs' cross-border activities has improved significantly. However, the non-discrimination principle established by the ECJ has not yet been implemented in the text of the national tax laws of all the 28 Member States. There are still 22 out of a possible 84 cases (28 Member States × 3 possible discriminatory scenarios), where the wording of the law appears to discriminate against foreign EU-based NPOs.

17) Discrimination continues to exist also in a latent form. Even where Member states formally no longer discriminate from a tax point of view, significant procedural barriers for cross-border activity of NPOs continue to exist. For example, not all countries recognize the legal personality of foreign-based public benefit foundations, requiring registration or even creation of a branch in order for the foreign foundation to be able to operate in their territory. Another example is the complication of the comparability test. Even in the remaining 62 (of 84) cases in which the wording of the law does not discriminate against foreign-based NPOs and their donors, it is not at all clear under which circumstances Member States consider a foreign EU-based NPO comparable to a resident one. In the majority of Member States, no formal or uniform approach to the comparability test is foreseen: usually, it is the competent tax authority which decides on a case-by-case basis whether a foreign NPO is considered comparable to a domestic one. Having studied the theory and practice of using the comparability test for NPOs in the EU countries, we can conclude that, with the exception of a few single examples of good practice, like Luxem-

bourg and the Netherlands, the process of checking comparability of foreign EU-based NPOs is complex, costly, often lengthy and burdensome for users as well as the authorities.

The manifestations of both explicit and hidden discrimination allow us to note that, first, the tax environment of NPOs operating across borders within the EU is still far from satisfactory; and, secondly, the host-country control solution developed by the European Court, in its current form is not the best solution to the problem of tax discrimination. The detailed analysis of its shortcomings has shown that they lie in the imperfections of the procedure for determining the comparability of foreign and domestic NPOs.

18) The imperfection of the host-country control solution led to the development of a number of alternative solutions in the EU. All of them are in the framework of positive integration and allow solving the problem in the long term. In the dissertation, we analyzed the current solutions initiated by States and private initiatives that could improve the cross-border NPO taxation, as well as shortcomings of each of those solutions and crucial factors that influence their feasibility. Briefly, the application of tax incentives in cross-border situations can be regulated at different legal levels: at the national (unilateral solutions), international (bilateral and multilateral tax treaties) and supranational level (introduction of the Proposal for a Council Regulation on the Statute for a European Foundation or a model statute of NPO).

Besides governments, private parties can also undertake initiatives for overcoming the tax barriers to cross-border NPOs' activities. They can do so by circumventing the cross-border situation (by establishing a legal entity abroad), or by making strategic use of charities that function as an intermediary charity organization (establishing a "friends of" organization and use of intermediary charity organizations).

19) One of the most effective solutions for landlocked problems, in the opinion of most European scientists, is the introduction of the Statute for a European Foundation. The FE provides for a legal form that will be mutually recognized in all Member States and will be supervised by the home country, but which has to meet the requirements of the Regulation, which are the same in every Member State. This combination of home-country control with harmonized requirements could provide for a full and effective solution for all tax issues related to cross-border charitable giving and fundraising for charities that take the form of the FE.

This measure is not only effective, but also quite a radical solution to the landlocked problem. Aiming at the deep harmonization of civil and subsequently tax laws, this solution significantly infringes the sovereignty of the Member States in direct taxation. Introduction of the FE also limits the supervisory functions of national tax authorities over bodies established in the other EU countries and forces Member States to rely on each other's supervisory authorities on the "mutual recognition" principle. This and other shortcomings, discussed in the thesis, prevented Member States from reaching agreement and introducing the Statute for a European Foundation.

20) Having analyzed solutions to the landlocked tax benefits problem, and having studied the chronology of legal developments in this area, we can conclude that the EU Member States are not ready for any of the alternative solutions in the framework of positive integration. In this regard, in our opinion, the best solution to the problem of discriminatory taxation regimes is the Court's host-country control solution, provided there is a significant procedural simplification of the comparability test and improvement of its functionality.

Comparability should be verified within clear, simple and easily understood procedures. The dissertation contains a number of recommendations for improving the administration and functionality of the comparability test. For example, a significant easing of the process of equivalency determination could be achieved through limiting the checks carried out for the comparability test on some agreed core elements. Another approach could be to encourage Member States' fiscal authorities to focus their checks on a set of

common principles, rather than detailed rules. “Comparable” in the context of cross-border philanthropy should not mean “identical” and imply fulfilment of all details of respective national tax laws, but rather that the organizations have to be comparable in essence.

Examples of attempts to develop a simpler practice can be found in some Member States (e.g., the model certificate in Luxembourg and the approach of the Netherlands) and it should be in the interests of all Member States, as well as the sector (and society as a whole), to continue to try to simplify and ease the process of the comparability test.

21) To characterize the tax environment of NPOs in the EAEU countries, to compare it with the peculiarities of the tax environment in the EU, and to assess the possibility of using the EU experience in the practice of the EAEU, we analyzed the tax regimes of the EAEU countries according to several criteria. An analysis has shown that in all EAEU countries, with the exception of Belarus, NPOs are subject to internal selection for tax purposes. The expression of such selection is the awarding of a special status to individual NPOs, which is called charitable (in Armenia and Kyrgyzstan) or other names (as in Russia and Kazakhstan). Countries differ in the degree of formalism in the selection process - both in terms of requirements imposed on NPOs, and in terms of the tax breaks that are provided to them. A more formal approach is used in Russia and Kazakhstan, less formal in Armenia and Kyrgyzstan. As a rule, in all countries, the type of activity of NPOs is important for tax purposes. No country, with the exception of Armenia, has a specific procedure for obtaining a special tax status. It follows that the EAEU countries have chosen different concepts for the assignment of tax breaks for NPOs.

22) When assessing the national systems of taxation of NPOs and their donors, one can note that the least tax benefits are provided in Armenia: the majority of income of non-profit organizations, such as passive income or income from entrepreneurial activity, is subject to taxation; Armenian legislation does not set any additional benefits for public benefit (charity) organizations. The situation with obtaining an authorization to engage in entrepreneurial activities is also unclear. Moreover, low incentives for corporate donors and absence of benefits for individual donors do not increase the attractiveness to the Armenian regime of NPO taxation. In Belarus, taxation of the NPO also does not look well balanced. In addition to the abundance of legislative acts regulating the taxation of NPOs, a serious defect, in our opinion, is the excessive emphasis on the sectoral affiliation of NPOs. In our opinion, one of the most balanced systems of NPO taxation is established in Kyrgyzstan. The legal form of an NPO cannot be a criterion for applying any specific tax regime. If the NPO receives business profit, it is subject to income tax, as in the case of other legal entities. At the same time, the Tax Code stimulates the development of NPOs, since it contains tax exemptions for non-commercial incomes of NPOs. In Kyrgyzstan, NPOs can request a public status (the status of a charitable organization). Activities of charitable organizations are more restricted, but this is compensated by a broader list of tax benefits. Similar, albeit more cumbersome, tax incentive schemes have been established in Kazakhstan and Russia.

In general, it should be added that the current tax systems of the EAEU countries have been formed over the past 20 years spontaneously, influenced by current political and economic decisions, without being the result of any targeted policy. This explains the significant difference in the tax benefits for NPOs provided by these countries. This can also complicate the cross-border activities of national NPOs within the EAEU: even taking into account the application of a non-discriminatory regime to foreign (EAEU-based) NPOs operating on national territories, to obtain tax benefits NPOs must meet the requirements of all national legislations simultaneously.

23) The analysis of national legislations regarding the activities of foreign NPOs operating in the territory of the EAEU countries allows us to draw a number of common conclusions for these countries. First, in all EAEU countries, laws on non-profit organizations and charitable organizations allow the activities of resident NPOs abroad and the activities

of nonresident NPOs on the national territory. The tax aspects of the activities of nonresident NPOs are regulated by the tax legislation. Secondly, the tax jurisdictions of the analyzed countries apply to tax residents and foreign nonresidents who operate or have a source of income in national territories. Third, the principles of taxation of foreign companies' income in the targeted countries, in general, also correspond to international taxation practices, including OECD principles. Fourthly, in all these countries, the concept of permanent establishment (PE), which includes national legislation, coincides with the concept proposed by the OECD. Although the OECD international standards do not have legal force in the EAEU countries, and the practice of applying the OECD directives in determining the status of a permanent establishment does not apply to them, nevertheless, the local definitions of permanent establishment essentially repeat the definition of a permanent establishment given in the OECD Model Tax Convention on Income and Capital. The exception is Belarus, which includes in the definition of permanent establishment not only commercial, but also "other" activities.

24) Irrespective of differences in approaches to taxation of nonresident NPOs, the EAEU countries, except for Kazakhstan, do not impose discriminatory tax conditions for NPOs. In Kazakhstan, the analysis found at least 3 elements in taxation of nonresident NPOs that differ from the tax regime of resident NPOs:

- In addition to corporate income tax, the net income of a nonresident NPO from its activity in the Republic of Kazakhstan through a permanent establishment shall be taxed by the tax on net income at the rate of 15%;
- The income of a nonresident NPO in the form of gratuitously received or inherited property, works or services, is considered as income from a source in the RK and is subject to taxation at the source of payment at a rate of 20%;
- Donations in favor of nonresident NPOs are not deductible from the tax base of donor legal entities.

In our opinion, these provisions of Kazakhstan law can be considered by EAEU Treaty as potentially discriminatory with respect to other EAEU Members, which one day would require solutions within the EAEU.

25) The legal barriers that stand in the way of the international financing of NPOs are divided into restrictions imposed by the country - the "donor" - on the outflow of financial resources, and restrictions imposed by the "recipient country" of NPO funds in relation to their inflow. "Landlocked" tax restrictions are "donor country" restrictions. The analysis of the tax environment of cross-border activities of NPOs in the EAEU countries showed that all Member States, to varying extents, establish "recipient country" restrictions. As of January 2015, fifteen laws are pending that would restrict access of NPOs to international funding. A significant part of the recently adopted laws on restricting foreign funding to NPOs also falls on the post-Soviet region, including the EAEU countries. In this respect, Armenian legislation looks the most attractive. It does not prohibit foreign financing of NPOs, does not establish a procedure for their registration, and the existing restrictions are insignificant, concerning only certain areas of financing. The most challenging environment for the activities of NPOs was created in Belarus. In Belarus, the law established a complex and burdensome procedure for obtaining, registering and using foreign gratuitous assistance. Kyrgyzstan, Kazakhstan and Russia are in intermediate positions. Of these countries, Kyrgyzstan has a more liberal legal regime of foreign financing of NPOs; the legal regimes of Kazakhstan and Russia are less favorable. Although these countries do not prohibit foreign funding for NPOs, they pay close attention to monitoring foreign incomes of NPOs and establish a number of serious barriers to the use of foreign aid. Such a tough approach to regulating foreign financing of NPOs is a demotivating factor and a serious obstacle for tax-effective cross-border activities of NPOs within the EAEU.

26) The EAEU Treaty set the general principles of taxation and determined the task of further harmonizing tax laws and tax policies of Member States. The EAEU Treaty not on-

ly repeats many ideas of the EC Treaty, but many of its articles coincide word for word with the European texts. So, for example, it is worth noting the four fundamental freedoms that are the foundation of the European Union. They consist in creating conditions for the free movement of goods, services, labor and capital, and have become a symbol of economic integration also for the EAEU. Another example is the EU's non-discriminatory approach adopted by the EAEU.

27) At the same time, as our study showed, unlike the EU, the EAEU did not put on the agenda a task of harmonizing the tax regimes of NPOs. However, the similarity of strategic goals and fundamental principles of the EU and the EAEU suggests that, at a certain stage of integration, the EAEU countries will also face the need to harmonize NPO taxation. Having compared the EU and the EAEU in terms of their objectives, conditions of creation, their structures and directions of tax harmonization, we can distinguish three groups of factors that may affect the relevance of the harmonization of NPO taxation in the EAEU. The first group of factors was generated by the fundamental differences between the EU and the EAEU and consists of a difference in the general conditions for tax harmonization in these integration grouping. The second group of factors includes factors related to the role of NPOs in the communities of Member States. The third group of factors is due to the peculiarities of the non-profit sector itself. Despite the different levels of these factors, all of them are negative influences and limit the potential for harmonization of non-profit legislation, including its tax part.

28) The low volume of intraregional (intra-EAEU) non-profit activity leaves no hope for stimulating integration "from below"; and the lack of supranational competencies, the declaration of purely economic goals for the EAEU, and mistrust of national systems for regulation and control of NPOs make early harmonization even less likely. Nevertheless, in the longer term, when integration is reinforced by political, cultural and social elements, and the EAEU supranational bodies gain the necessary competence, the expansion of tax harmonization to the non-profit sector will be very possible.

In the long term, the relevance of tax harmonization of NPOs in the EAEU will depend, first of all, on whether the EAEU Member States, like the EU countries, recognize non-profit organizations as full-fledged market participants and users of the EAEU fundamental freedoms.

29) Summarizing all intermediate results of the study, we recommend for use in the EAEU the following approaches to harmonizing tax legislation in relation to NPOs:

a) Signing of bilateral/multilateral treaties, which, inter alia, may establish common rules for the contracting parties and taxation rules;
b) Adoption of model legal acts on the basis of which the countries of the EAEU can adopt their own legal acts;
c) Coordination of law-making activity, including joint discussion of adopted laws in the field of tax regimes of NPOs;
d) Making recommendations for the Member States to use in law-making activities;
e) Introduction of a Model Statute of NPO, which would include a single set of crucial requirements for NPOs accepted in all 5 Member States.

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53. ECJ, 30 Jan. 2007 C-150/04 *Commission v Denmark* [2007] ECR I-01163
54. ECJ, 3 Oct. 2006, C-290/04, FKP *Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* [2006] ECR I-09461
55. ECJ, 28 Oct. 1999, C-55/98, *Vestergaard* [1999] ECR I-07641

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57. ECJ, 16 July 1998, C-264/96 *ICI* [1998] ECR I-4695
58. ECJ, 13 Mar. 2008, C-248/06 *Commission v. Spain* [2008] ECR I-00047
59. ECJ, 3 Oct. 2002, C-136/00 *Danner* [2002] ECR I-8147
60. ECJ, 28 Jan. 1992, C-300/90 *Commission v Belgium*, [1992] ECR I-00305
61. ECJ, 27 June 1996, C-107/94 *Asscher* [1996] ECR I-308
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75. ECJ, 14 Feb. 1995, C-279/93 *Schumacker* [1995] ECR I-00225
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77. ECJ, 15 Mar. 2005, C-209/03 *Bidar* [2005] ECR I-02119
78. ECJ, 18 Nov. 2008, C-158/07 *Förster* [2008] ECR I-08507
79. ECJ, 7 Sept. 2004, C-319/02 *Manninen* [2004] ECR I-7477
80. ECJ, 26 Feb. 1991, C-198/89 *Commission v. Greece* [1991] ECR I-00727
81. ECJ, 13 Nov. 2003, C-153/02 *Neri* [2003] ECR I-13555
82. ECJ, 1 Dec. 2011, C-250/08 *Commission v. Belgium* [2011] ECR I-12341
83. ECJ, 1 Dec. 2011, C-253/09 *Commission v. Hungary* [2011] ECR I-12391
84. ECJ, 14 Nov. 1995, C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955
85. ECJ, 21 Nov. 2002, C-436/00 *X e Y* [2002] ECR I-10829

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87. ECJ, 27 Sept. 2007, C-184/05 *Twoh International* [2007] ECR I-7897
88. ECJ, 11 Oct. 2007, C-451/05 *ELISA* [2007] ECR I-08251
89. ECJ, 18 Dec. 2007, C-101/05 *Skatteverket v A* [2007] ECR I-11531
90. ECJ, 12 July 2005, C-403/03 *Schempp* [2005] ECR I-06421 and ECJ
91. ECJ, 21 Sept. 1999, C-307/97 *Saint-Gobain* [1999] ECR I-6163
92. ECJ, 19 Sept. 2000, C-156/98 Germany v Commission [2000] ECR I-06857
93. ECJ, 11 Sept. 2007, C-318/05 Commission v. Germany [2007] ECR I-6957
94. ECJ, 20 May 2010, C-56/09 *Zanotti* [2010] ECR I-6844
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96. ECJ, 18 June 2009, C-303/07 *Aberdeen* [2009] ECR I-5145

Annex A: List of universal and regional treaties for the right to freedom of association, various soft-law instruments and political undertakings regulating the NPOs

The principal underpinning for the operation of non-governmental organizations is to be found in guarantees established in universal and regional human rights treaties for the right to freedom of association. These guarantees are reinforced by various soft-law instruments and political undertakings by states. However, the treaty guarantees of the right to freedom of association provide protection only for non-governmental organizations that are membership-based and for their members. The position of non-membership-based non-governmental organizations is assured more by soft-law instruments and political undertakings than by treaties.

1) Treaty guarantees of freedom of association

Some of the treaty guarantees for the right to freedom of association are general in character, in the sense that they apply to everyone:

- Article 11 of the European Convention on Human Rights (CoE, 1950);
- Article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination (UN, 1965);
- Article 22 of the International Covenant on Civil and Political Rights (UN, 1966); and
- Article 12 of the Charter of Fundamental Rights of the European Union (2000).

These general guarantees of the right to freedom of association are reinforced and even extended by other treaty provisions that focus on particular interests such as culture and science or economic and social concerns or on particular sectors in a society, e.g., children; missing persons; environmental campaigners; human rights defenders; indigenous and tribal peoples; migrant workers; national or ethnic, religious, and linguistic minorities; non-citizens, persons with disabilities; refugees and displaced persons; stateless persons and women.

- Article 15 of the International Covenant on Economic, Social and Cultural Rights (UN, 1966);
- Article 6 of the Indigenous and Tribal Peoples Convention (ILO Convention No. 169) (1989);
- Article 5 of the European Social Charter (CoE, 1961) and of the European Social Charter (Revised) (CoE, 1996);
- Article 15 of the Convention on the Rights of the Child (UN, 1989);
- Article 24(7) of the International Convention for the Protection of All Persons from Enforced Disappearance (UN, 2006)[1393];
- Articles 2, 3, 4, 6, 7, 8 and 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, UN, 1998) and the Amendment to the Convention (adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005)[1394];
- Articles 26, 36 and 40 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN, 1990);
- Articles 3, 7, 8, 15, 17 and 18 of the Framework Convention for the Protection of National Minorities (UN, 1995);
- Articles 3 and 4 of the Convention on the Participation of Foreigners in Public Life at Local Level (CoE, 1992);
- Article 29 of the Convention on the Rights of Persons with Disabilities (UN, 2006);
- Article 15 of the Convention relating to the Status of Refugees (UN, 1950);
- Article 15 of the Convention relating to the Status of Stateless Persons (UN, 1960);
- Articles 7 and 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women (UN, 1979).

2) Other treaty obligations. One regional treaty embodies a commitment for states parties to recognize the legal personality of certain foreign non-governmental organizations that applies regardless of whether the organizations are membership-based:

- the European Convention on the Recognition of the Legal Personality of International

[1393] This treaty also covers non-governmental organizations that are not membership-based.
[1394] This treaty also covers non-governmental organizations that are not membership-based.

Non-Governmental Organisations (CoE, 1986);

- Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms.

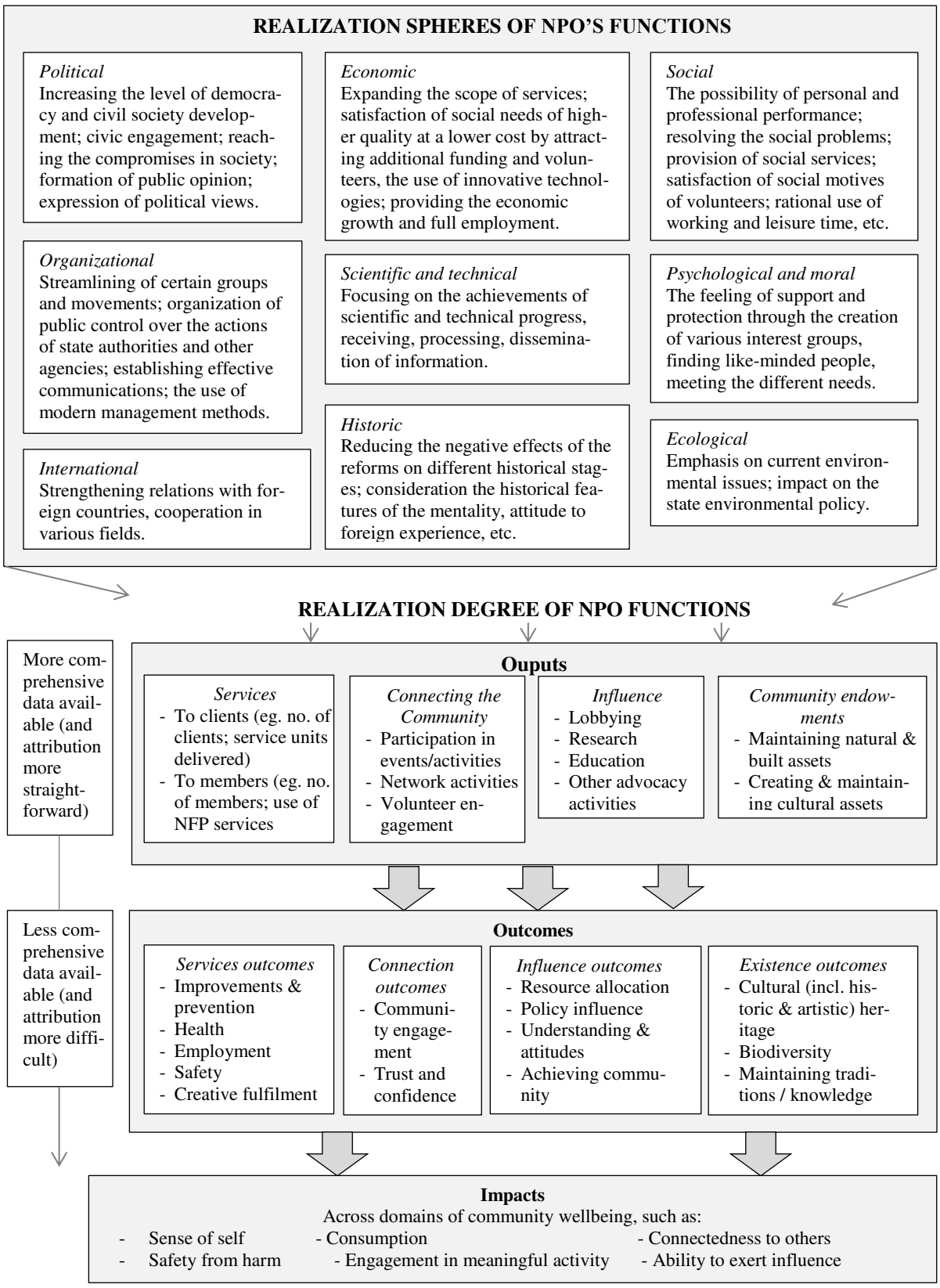
3) Soft law instruments and political undertakings. In addition to treaty guarantees, there are a number of soft-law instruments and political undertakings by states. Some are concerned only with organizations that are membership-based and in certain instances are focused only on certain sectors of society:

- Article 20 of the Universal Declaration of Human Rights (UN, 1948);
- Articles 5 and 15 of the United Nations General Assembly's Declaration on Social Progress and Development (UN, 1969);
- Article 6 (b) and (f) of the United Nations General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN, 1981);
- the UN Basic Principles on the Independence of the Judiciary (UN, 1985);
- Paragraphs 12, 13 and 26 of the Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989 (OSCE);
- Paragraphs 9 and 10 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990;
- Articles 23, 24 and 25 of the Basic Principles on the Role of Lawyers (CoE, 1991);
- Part IV of the Report of the CSCE Meeting of Experts on National Minorities, Geneva, 19 July 1991;
- Article 2 of the United Nations General Assembly's Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UN, 1992);
- the Concluding Document of Helsinki — The Fourth Follow-up Meeting, Helsinki, 10 July 1992 (OSCE);
- Recommendation No. R (94) 12 of the Committee of Ministers to Member States On Independence, Efficiency and Role of Judges (CoE, 1994);
- ICCPR General comment No. 23: The rights of minorities (Art. 27) (Fiftieth session, 1994) (UN)
- CEDAW General Recommendation No. 23: Women in Public Life (Chapter 1) (Sixteenth Session, 1997) (UN);
- the European Charter on the Statute for Judges (CoE, 1998);

Many apply to all non-governmental organisations:

- Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975 (OSCE);
- Paragraphs 30, 32 and 33 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990;
- the Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Paris, 21 November 1990 (OSCE);
- Paragraph 43 of the Document of the OSCE Moscow Meeting, 1991;
- the United Nations General Assembly's Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998);
- Paragraph 27 of the Istanbul Document, Istanbul, 19 November 1999 (OSCE);
- the Fundamental Principles on the Status of Non-Governmental Organisations in Europe (OSCE, 2002);
- Paragraph 36 of the Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003 (OSCE);
- the Council of Europe's Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe (CoE, 2007);
- the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities (2008).

Annex B[1395]: Horizontal and vertical analysis of NPOs functions



[1395] Compiled by the author on the basis of: Panasenko, S. The development of the non-profit sector in Russia (in Russian) / URL: http://observer.materik.ru/observer/N7_2006/7_06.HTM; Contribution of the Not-for-Profit Sector. Research Report of Australian Government's Productivity Commission / January 29, 2010 / URL: https://ssrn.com/abstract=1586630

Annex C: Data on the use by non-profit organizations of the TGE network

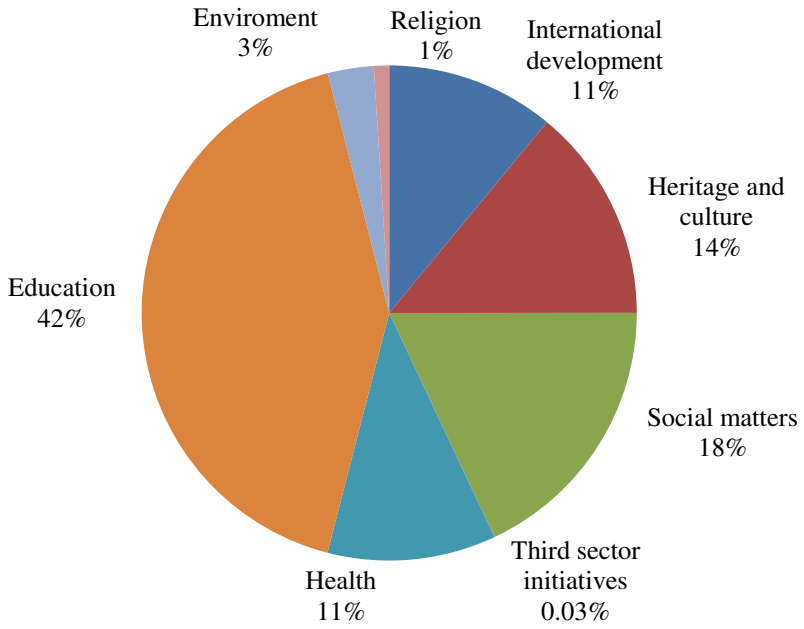


Figure 1[1396] – Distribution by sector of 2017 funds channeled through TGE

Table 1 – TGE-channeled funds 2010-2016

Year	Total amount of gifts in €	Gifts/donors (individual and corporate)	Beneficiaries
2010	4,164,751	6625	174
2011	4,855,991	6547	215
2012	7,170,561	3693	241
2013	8,767,454	5001	259
2014	12,055,641	5398	333
2015	7,906,892	4487	314
2016	6,380,054	5084	334
Source: Surmatz, H., Forrest, L. Boosting cross-border philanthropy in Europe. Towards a tax-effective environment / European Foundation Centre, AISBL. – 2017. – 25 p.			

[1396] Surmatz, H., Forrest, L. Boosting cross-border philanthropy in Europe. Towards a tax-effective environment / European Foundation Centre, AISBL. – 2017. – 25 p.

Annex D: Recently adopted regal restrictions on foreign funding of non-profit organizations in the EAEU countries

Type of Restriction	Country	Legal Measure	Status	World examples
Prohibitions and limitations against foreign funding	-	-	-	Ecuador, Venezuela, Kenya
Advance government approval	Belarus	Any foreign financing for NPOs is also subject to state registration. Registration of the grant is impossible without obtaining prior permission from the authorities.	The Law of the RB "On public associations"	Bangladesh, Pakistan, Turkmenistan
Burdensome procedural requirements	-	-	-	Azerbaijan, Israel
Restricted purposes and activities	Belarus	Amend in the Law "On public associations" prohibit Belarusian NPOs keep an account with banks or other financial institutions abroad.	Enacted 2011	Bolivia, Israel
Stigmatization of recipients of foreign funding	Russia	So-called Law on "Foreign Agents": NGOs receiving foreign funding and engaged in "political activities" must be registered as a "foreign agent"	Enacted 2012	Ukraine, USA
	Kyrgyzstan	Draft "Foreign Agent" Law: The draft law would require that NGOs wishing to conduct political activities register as foreign agents.	Drafted in 2013, but rejected in parliament	
Establishment penalty rate of taxes	-	-	-	Israel
Source: compiled by author on the base "A Mapping of Existing Initiatives to Address Legal Constraints on Foreign Funding of Civil Society / ICNL. – July 1, 2014" that was supplemented by the data from the EAEU countries).				