The European Foundation Proposal: an effective, efficient and feasible solution for tax issues related to cross border charitable giving and fundraising?

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Summary
This paper analyses whether the Proposal for a Council Regulation on the Statute for a European Foundation (*Fundatio Europaea*, in short FE) provides for an effective, efficient and feasible solution for the tax issues which are currently related to cross border charitable giving and fundraising within the European Union. The non-applicability of tax incentives is a barrier for cross border fundraising. A solution for this problem should not only solve it (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). The paper discusses several possible solutions which can be distinguished within the framework of the EU. Next, the application of tax incentives on cross border charitable donations and fundraising in the European Union is described. The solution of the ECJ and its place in the framework of solutions are discussed. The Proposal and its solution are analysed, starting with the historical background of the proposal, the problems and solutions considered by the European Commission and the European legal context of the proposal. The paper then briefly describes the legal features of the FE, the public benefit purposes included in the Regulation, the registration and supervision of the FE, the entry into force of the regulation and the tax treatment of the FE. Next, the Proposal's solution for the tax issues in the light of the solution framework is analysed. The paper concludes that the European Foundation is effective in removing tax barriesr for cross border charitable giving to and fundraising of charities that adopt the legal form of an FE. It is an efficient solution as well for those charities. For Member States that have to introduce a new supervisory framework it might be less efficient. It is questionable whether the FE is a feasible solution. This depends on the Member States' trust in each other's supervisory authorities. The current economic situation 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.

Key words
Charity, tax incentives, European Foundation, fundraising, European Tax Law, mutual recognition

1 Introduction

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).[2] 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 (hereinafter: EU).[3] 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 EU.[4] According to the Explanatory Memorandum, this should result in more funding being available for public benefit purposes, for

[1] This paper is part of the research programme *Fiscal autonomy and its boundaries* of the Erasmus School of Law.
[2] COM(2012) 35 final, 2012/0022 (APP).
[3] European Commission Press release 8 February 2012, IP/12/112.
[4] European Commission 2012, p. 3.

instance 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. To avoid misunderstanding I will use the term 'charities' for these bodies which might have other legal forms such as the UK company limited by guarantee.

The European Foundation or *Fundatio Europaea* (hereinafter: FE) would be a further expansion of the European legal forms. As of 8 October 2004 it is possible to establish a European Company (SE)[5] and on 18 August 2006 the European Cooperative Society (SCE) was introduced.[6] The main purpose of these statutes is to make it easier for companies to operate across European borders by enabling them to operate under the same corporate regime. The SE and SCE Regulation only concern company law. The SE and SCE Regulation explicitly state that these do not cover other areas of law such as taxation.[7] This is an important difference with the FE Proposal which does include a chapter on the tax treatment of the FE.[8]

In this paper I will analyze whether this proposal is an effective, efficient and feasible solution for the tax issues which are currently related to cross border charitable giving and fundraising within the European Union (hereinafter: EU).

First, I will briefly discuss the tax problems related to cross border charitable giving and the possible solutions which can be distinguished within the framework of the EU. Next, I will discuss the application of tax incentives on cross border charitable donations and fundraising in the EU. As the Court of Justice of the European Union (hereinafter: ECJ) has already dealt with cross border European giving and fundraising in four cases, I will discuss the solution of the ECJ and its place in the framework developed in the previous paragraph. Next, I will discuss the Proposal and its solution, starting with the historical background of the proposal, the problems and solutions considered by the European Commission and the European legal context of the proposal. I will then briefly describe the legal features of the FE, the public benefit purposes included in the Regulation, the registration and supervision of the FE, the entry into force of the regulation and the tax treatment of the FE. Then I will analyze the Proposal's solution for the tax issues in the light of the framework developed in the second paragraph. I will conclude this paper by answering the question whether the Proposal is an effective, efficient and feasible solution for the tax issues related to cross border charitable giving and fundraising in the European Union.

2 Problems related to cross border charitable giving and solutions within the EU framework

2.1 Non-applicability of tax incentives is a barrier for cross border fundraising and giving

Historically, countries only provided for tax incentives for charitable donations to resident charities. However, giving and fundraising does not stop at the border. Donors and charities are not limited to national borders. Charities raise funds across borders and donors do not want to limit themselves to charities in their country of residence. If gifts to foreign charities cannot benefit from tax incentives, such gifts are less attractive. Furthermore, if investments of foreign charities do not get the same beneficial tax treatment as investments of resident charities, such investments are effectively restricted. Disallowing tax benefits to non-resident charities results in a barrier to cross border fundraising. This might mean that cross border initiatives are less successful or might not even be

[5] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), hereinafter: SE Regulation.
[6] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), hereinafter: SCE Regulation.
[7] Preambule 20 SE Regulation and preambule 16 SCE Regulation.
[8] Chapter VIII.

initiated at all. Within the EU, limiting tax incentives to resident countries is an undesirable result from the point of view of a single European market for donations and fundraising.

2.2 Defining the terms 'effective', 'efficient' and 'feasible'

A solution for the problem that the non-applicability of tax incentives is a barrier for cross border fundraising and giving should be effective, efficient and feasible. In this respect, 'effective' means that a solution solves the problems related to cross border charitable giving, i.e. it makes it possible to apply tax incentives on cross border charitable giving and fundraising thus removing the tax barriers for cross border charitable giving an fundraising. 'Efficient' means that the solution effectively solves these problems whilst, compared to other solutions, requiring the least additional investments in resources such as time, money and labor. If a solution is very costly either for charities or governments it might be effective in theory, but it will not work in practice. Within the framework of the EU, a solution has to be acceptable to all Member States in order to effectively remove the tax barriers to cross border charitable giving and fundraising. The last requirement is, therefore, that a solution has to be feasible, which means that a solution is likely to be adopted by the EU Member States.

In short: 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).

2.3 Solutions within the framework of the EU

In 2009, I distinguished the following solutions for the problems related to cross border fundraising within the framework of the EU:[9]

1. Host-country control: foreign charities that meet the charity requirements of a Member State are eligible for the tax incentives for charitable giving of that Member State. The national authorities and courts determine whether the foreign charity meets such requirements.
2. Mutual recognition: charities meeting the requirements of one Member State are automatically recognised as charities in other Member States. The authorities and courts of the home country of the charity determine whether the charity meets the charity requirements, thus determining whether the foreign tax incentives apply (home-country control).
3. Harmonisation:
    a. of requirements, but not of supervision by a Directive requiring the applicability of tax incentives for charitable giving to charities resident in and established under the law of other Member States meeting the requirements laid down in the Directive. The national authorities of the Member State where the charity is resident determine whether the charity meets such requirements. However, the national courts and the European Commission can refer cases to the ECJ.
    b. of the requirements and supervision by a Regulation on a European Charity, including a European authority responsible for the supervision and registration of charities eligible for tax incentives in all member states. The European authority determines whether the foreign charity meets the requirements.

These solutions are all effective in solving tax issues related to cross border charitable giving and fundraising, but differ in grade of efficiency and assumed trust of Member States in each other's charity legislation and supervisory bodies (e.g. in feasibility). The host-country solution is not very

[9] Hemels (2009).

efficient as charities have to meet the specific requirements of each and every Member State, which can be burdensome, especially as these requirements differ between Member States and might even be in conflict. Member States do not have to trust each other's supervisory bodies, as each Member State uses its own requirements and supervisory system to determine whether the tax incentives apply. This is therefore a feasible, but not a very efficient solution.

Mutual recognition of charities is a very efficient solution from the point of view of charities. Charities only have to meet the requirements of their Member State of residence to enjoy the tax incentives for charitable giving in all Member States. However, for governments mutual recognition implies a transfer of sovereignty to other Member States and requires a high degree of trust in other Member States' requirements for and supervision of their resident charities. Furthermore, tax incentives must be granted to foreign charities, even if the Member State itself does not deem the activities of the charity charitable, but the resident country of the Member state does. This might result in a more favourable treatment of donations to foreign charities in comparison to donations to resident charities. An example is amateur sport which is not regarded charitable in the Netherlands, but is regarded charitable in Germany. A resident of the Dutch city of Maastricht would therefore not be able to deduct her gift to an amateur football club in Maastricht, but could deduct the gift to similar clubs in the nearby German Aachen. Furthermore, mutual recognition might lead to a 'race to the bottom'. Charities might choose their place of residence in the Member State with the broadest definition of charitable purposes and/or the lowest level of control. This makes this solution less feasible.

Harmonisation of requirements is efficient for charities as they only have to meet one set off requirements to get the charitable status in every Member State and only have to deal with one supervisory authority. This solution requires less trust of Member States in each other than the mutual recognition solution, as the requirements are harmonised. However, a high level of trust in each other's supervisory bodies is still needed if the supervision is at the level of the home country of the charity. This trust would not be needed if a European supervisory body would become responsible for the supervision, but this would lead to additional costs and Member States would still have to trust this European supervisory body. Both solutions might, therefore, be less feasible than the host-country control solution, but more feasible than the home country control solution.

3 Application of tax incentives on cross border charitable donations in the EU

Almost every[10] Member State provides for tax incentives for charitable giving, such as a gift deduction or refund at the level of the charity[11] and an exemption of gift and inheritance tax for charities.[12] Most Member States have always allowed domestic charities to engage in activities

[10] Slovakia does not have tax incentives for individual and corporate giving. (Heidebauer 2011, p. 53, EFC Legal and Fiscal Country Profiles: Introduction and Comparative Highlights (2011), http://www.efc.be/Legal/Documents/introduction.pdf). Until 2012 no gift deduction was possible in Sweden, but as of 2012 individuals can claim a tax reduction of 25% on the value of donations to certain charities (Arvidsson (2012)).

[11] For example, Gift Aid in the UK: charities (instead of the donors) can reclaim the basic rate tax on gifts they have received (HM Revenue & Customs (2012)). This is actually a mixed system as donors who pay a higher rate than the basic tax rate can claim extra relief on their donations themselves, which is similar to a conventional gift deduction.

[12] For an overview of tax incentives I refer to the country reports prepared for the EATLP 2012 conference on charities (http://www.eatlp.org/index.php?option=com_content&view=article&id=140:congress-documents&catid=34:this-yearcongress&Itemid=61), the comparative study in chapter 2 of Heidebauer (2011), and the Legal and fiscal country profiles of the European Foundation Centre http://www.efc.be/Legal/Pages/FoundationsLegalandFiscalCountryProfiles.aspx.

abroad without losing their charitable status.[13] To meet objective of the FE which was mentioned in the press release, to make it easier for foundations to support public benefit causes across the European Union, an FE would, therefore, not be necessary from a tax point of view. Most Member States have already met this objective unilaterally. Instead of introducing the FE, the European Commission could meet this objective in a more efficient way by referring the few countries that do not allow this to the ECJ. It seems that the press release is not accurate regarding the object of the FE. From a tax point of view, the problem is not cross border public benefit activities, but cross border fund raising, either by donations or investments. The objective in the Explanatory Memorandum to the Proposal is, from a tax point of view, not drafted accurately.

Historically, tax incentives for charitable giving and other fundraising activities were only available to resident charities. Donations to and investments by charities resident in other Member States could not benefit from these tax incentives. However, this has changed since the 2006 ECJ Stauffer decision.[14] Gradually, Member States have opened their tax incentives to donations and other forms of fundraising to charities established in other Member States (or, in several cases, in specific third countries). Only a few Member States have not changed their regime.[15] One would, however, suppose that is only a matter of time before these Member States will have changed their legislation, either on their own account or after a reminder of the European Commission or the ECJ.

Incentivized cross border charitable giving and fundraising has, therefore, become a fact within the EU. However, the Member States seem to apply the host-country control solution, which, as was discussed in the previous paragraph, is not very efficient from the point of view of charities that have to meet the specific requirements of each Member State where they want to raise funds. An important question is whether this solution is allowed based on the Treaty on the Functioning of the European Union (hereinafter: TFEU). In order to answer this question, the charity case law of the ECJ must be examined.

4 The solution of the ECJ: host country control

Up to now, the ECJ has delivered four decisions on charities and/or charitable giving. The first case was the 2006 Stauffer case.[16] This regarded an exemption in the German Corporate Income Tax Act which applied to a German resident charity, but not to a charity resident in another Member State. The second case was the 2009 Persche case.[17] This case was about the gift deduction in the German Income Tax Act which applied to gifts to German charities, but not to gifts to a charity resident in another Member State. The third case was the 2011 Heukelbach case.[18] Even though this was a Belgian case, it had a German angle to it as it regarded a German charity. The dispute was about a reduced inheritance tax rate which applied to all charities resident in Belgium, but only to charities resident in another Member State if the deceased had resided in or had his place of work in that Member State. The fourth case was the Commission v. Austria case (no German angle except for the

[13] Heidebauer 2011, p. 42, EFC Legal and Fiscal Country Profiles: Introduction and Comparative Highlights (2011), http://www.efc.be/Legal/Documents/introduction.pdf). De Crouy-Chanel (2012) paragraph VI.A, mentions that according to the French tax authorities guidelines, gifts to an entity which doesn't have at least a part of its activity in France are not eligible to the income tax deduction (gifts made to a French association organizing and controlling from France humanitarian action abroad are deductible).

[14] ECJ 14 September 2006, Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften.

[15] Heidebauer 2011, p. 88.

[16] ECJ 14 September 2006, Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften.

[17] ECJ 27 January 2009, Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid.

[18] ECJ 10 February 2011, Case C-025/10, Missionswerk Werner Heukelbach eV v. État belge.

German language).[19] This case focused on the Austrian gift deduction which, in fact, only applied to Austrian resident research and teaching institutions and not to similar institutions resident in other Member States. In all of these four cases the non-resident charity or its donor could not benefit from the tax incentives for charitable giving under the same conditions as a resident charity. In all cases the ECJ decided that this constituted an obstacle to the free movement of capital and payments (currently: article 63 TFEU) which could not be justified. Within the context of this paper, the important question is which of the solutions mentioned in paragraph 2 the ECJ chose to remove this obstacle.

In para 39 of the Stauffer-decision, the ECJ observed that it is not a requirement that Member States automatically confer the charitable status on foreign foundations recognised 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. In para 40 the ECJ continues that where a charity recognized as such by one Member State also satisfies the requirements of another Member State, the authorities of that other Member State cannot deny that charity the right to equal treatment solely on the ground that it is not established in its territory. This wording is repeated in para 49 of the Persche decision and para 32 of the Heukelbach decision. In para 50 of the Persche decision and para 33 of the Heukelbach decision the ECJ adds that a charity that is resident in one Member State but satisfies the requirements by another Member State is in a comparable situation with charities resident in that Member State. In para 34 of the Heukelbach decision the ECJ continues that where, apart from the residency requirement, the charity fulfils all conditions for charitable status in another Member State, a matter which it is for the national court to determine, the authorities of that Member State cannot refuse that charity the right to equal treatment on the ground of residency.

I conclude from these observations that the ECJ has chosen the host country control solution. Member States do not have to mutually recognize each other's charities (para 39 of the Stauffer decision), but have to apply the tax incentives for charitable giving to non-resident charities that meet their charity requirements (except for a residency requirement). The legislation of Member States applying this host-country solution is, therefore, in accordance with this case law of the ECJ. However, as was discussed before, this solution is not very efficient in supporting cross border charitable giving and fundraising. The next question is, therefore, which solution is included in the Proposal and whether that is a more efficient solution.

5 The FE Proposal and its solution

5.1 Historical background

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 harmonisation 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.

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 EU for company law. In its report of November 2002, the group observed that some form of harmonisation would be necessary to bring about a European Foundation. This group did not regard the European

[19] ECJ 16 June 2011, Case C-10/10, European Commission v. Republic of Austria.

Foundation as a priority in the short or medium term.[20] The group did, however, state that tax problems for foundations and their donors should be abolished to promote cross-border donations. Unfortunately, this group used the term 'foundations' instead of a more appropriate term such as non-profit organisations (as the INTERPHIL did) or charity. This might be explained by the fact that the French 'fondation' has to have a public benefit object.[21] However, in other countries, such as the Netherlands, a foundation does not necessarily have a public benefit purpose and in several countries other legal forms are used for charitable activities. Unfortunately, since this report the inaccurate term 'foundation' has been used in this context.

In 2004 the European Foundation Centre proposed a draft Regulation on a European Statute for Foundations.[22] It provided for the harmonisation of both requirements for charities and of their supervision. A European Registration Authority would become responsible for the supervision. 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.[23] The European Foundation Centre warned that this would lead to (then) 25 different ways of setting up European foundations. Furthermore, 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 EU. 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.

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[24] 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.[25] In 2007 the European Commission initiated a feasibility study on a European Foundation Statute.[26] This study, which was finalised 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 on the operational problems that foundations face when operating cross-border. In the press release on this consultation the Commission emphasised that it had not yet taken a decision as to the need for a European Foundation Statute or its content.[27] In November 2009, the European Commission published the results of the public consultation.[28] Unsurprisingly,

[20] High Level Group of Company Law Experts 2002, p. 24.
[21] Article 18 of LOI n° 87-571 du 23 juillet 1987 sur le développement du mécénat, NOR: ECOX8700096L: "La fondation est l'acte par lequel une ou plusieurs personnes physiques ou morales décident l'affectation irrévocable de biens, droits ou ressources a la réalisation d'une oeuvre d'intérêt général et à but non lucratif."
[22] European Foundation Centre 2005-2010.
[23] European Foundation Centre 2005-2010, pp. 27 and 29.
[24] COM(1991) 273, 1991/0386/COD, OJ C 99, 21 April 1992, p. 1.
[25] Official Journal C 064 , 17 March 2006, p. 0003-0010.
[26] Max Planck Institute & University of Heidelberg 2008.
[27] Press release IP/09/270.
[28] European Commission 2009.

the non-profit sector strongly supported the idea of a European Foundation. The 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 of the opinion of its member Mall Hellam (herself a director of an Estonian charity) which urged the European Commission to present a proposal for a Regulation on a European Foundation Statute.[29] 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.[30] 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.[31] 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.

5.2 The problems and solutions considered by the European Commission

The European Commission identified as the overall problem that the variety of national civil and tax rules make foundations' cross border operations costly and cumbersome.[32] This results in less cross border channeling 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 which I categorize based on their impact for the tax issues connected with cross border charitable giving: [33]

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 Foundation 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,

[29] European Economic and Social Committee 2010.
[30] European Commission 2012, p. 4.
[31] European Parliament 2011.
[32] European Commission 2012, p. 4.
[33] European Commission 2012, p. 4.

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 channeling of funds for public benefit purposes.[34]

5.3 The European legal context of the proposal

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 EU. In my opinion, a Regulation would not be necessary to solve the tax issues. A Directive might have been sufficient. However, 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.

The legal basis for the European Commission to propose this Regulation is article 352 of the Treaty on the Functioning of the European Union (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 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. In Case C-436/03, the European Parliament disputed this base[35] for the SCE.[36] The European Parliament sought annulment of the Council Regulation on the SCE, because it was of the opinion that, what is now, article 114 TFEU,[37] was the appropriate legal basis. Based on this article the European Parliament and the Council must, after consulting the Economic and Social Committee, adopt the measures for the approximation of the Member States' laws which have as their object the establishment and functioning of the internal market. The reason for the European Parliament to prefer the predecessor of article 114 TFEU was the legislative procedure under that article which is based on the principle of parity and, therefore, requires the Parliament's assent. Under the predecessor of article 352 TFEU the Council could adopt measures without involving the Parliament. This has changed since the Treaty of Lisbon entered into force. Now the consent of the Parliament is necessary under article 352 TFEU as well. Therefore, there would not be an incentive for the Parliament to challenge the legal basis for the FE Regulation. Furthermore, article 114 TFEU does not apply to fiscal provisions. As the Resolution on the SCE does not include tax measures, this was not an obstacle for the application of article 114 TFEU on that Regulation, but it would be an obstacle for the FE Regulation, as that Regulation does include tax measures. Furthermore, the ECJ decided that as the Regulation on the SCE left the already existing different national laws of the Member States unchanged, it could not be regarded as aiming to approximate the laws of the

[34] European Commission 2012, p. 5.
[35] Then, article Article 308 EC Treaty.
[36] ECJ, 2 May 2006, Case C-436/03, *European Parliament v. Council of the European Union*.
[37] Then: article 95 EC Treaty.

Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms. The ECJ did not deem it relevant that the regulation does not lay down exhaustively all of the rules applicable to SCE's and that, for certain matters, it refers to the law of the Member State in which the SCE has its registered office since the referral is of a subsidiary nature. Therefore, the ECJ came to the conclusion that the predecessor of article 114 TFEU could not constitute an appropriate legal basis for the adoption of the SCE Regulation and that it was correctly adopted on the basis of the predecessor of article 352 TFEU. This reasoning applies to the FE Regulation as well, for which reason article 352 TFEU is the correct legal basis for this regulation.

5.4 The legal features of the FE

An FE is a separately constituted entity for a public benefit purpose which must serve the public interest at large.[38] It must have its registered office and its central administration or principal place of activities in the EU.[39] 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.[40] The FE has legal personality and full legal capacity in all Member States and has the right of establishment in any Member State.[41] Furthermore, at the time of registration it must have activities or a statutory objective of carrying out activities in at least two Member States.[42] It may carry out activities in any third country.[43] The FE must be registered in one Member State[44] and its name must include the abbreviation FE.[45] No other legal entity may use this abbreviation unless these were registered in a Member State before the Regulation entered into force. [46]

The FE must have assets equivalent to at least EUR 25.000[47] and its liability is limited to its assets.[48] 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). This part of the Proposal should, in my view, be amended. Similarly, it is, in my view, 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.

The FE may engage in trading or economic activities provided that any profit is exclusively used in pursuance of its public benefit purpose(s).[49] Economic activities unrelated to the public benefit

[38] Article 5 FE Proposal.
[39] Article 36-37 FE Proposal.
[40] Article 34 FE Proposal.
[41] Article 10 FE Proposal.
[42] Article 6 FE Proposal.
[43] Article 10 FE Proposal.
[44] Article 21 FE Proposal.
[45] Article 25 FE Proposal.
[46] Article 25 FE Proposal.
[47] Article 7 FE Proposal.
[48] Article 8 FE Proposal.
[49] Article 11 FE Proposal.

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.[50]

An FE may be formed from scratch by a testamentary disposition of a natural person, by 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 of conversion of public benefit purpose entities legally established in a Member State.[51] 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 two years. [52] 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.[53] The Proposal contains several provisions on the formation by a merger and conversion[54] and on the dissolution of an FE[55] which will not be discussed in this paper.

The Proposal gives 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.[56] Within six months from the end of the financial year, the FE must draw up and forward annual accounts and an annual activity report to the national registry and the supervisory authority.[57] Six months is a short term as compared to, for example, the term in England which is currently 10 months.[58] Furthermore, unlike, for example, the English Charity Commission,[59] 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.[60] The annual activity report must contain at 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.

Furthermore, the proposal includes provisions for the involvement of employees and volunteers[61] which will not be discussed in this paper.

5.4.1 The statutes of the FE

[50] Article 11 FE Proposal.
[51] Article 12 FE Proposal.
[52] Article 12 FE Proposal.
[53] Article 13 FE Proposal.
[54] Article 14-18 FE Proposal.
[55] Article 40-44 FE Proposal.
[56] Article 27-33 FE Proposal.
[57] Article 34 FE Proposal.
[58] Charity Commission, What information must trustees send us this year? http://www.charity-commission.gov.uk/Charity_requirements_guidance/What_information_must_trustees_send_index.aspx, download 30 March 2012.
[59] Charity Commission, What information must trustees send us this year? http://www.charity-commission.gov.uk/Charity_requirements_guidance/What_information_must_trustees_send_index.aspx, download 30 March 2012.
[60] Article 4 and 34(5) FE Proposal.
[61] Article 38-39 FE Proposal.

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: [62]

(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
(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.[63]

5.5 Public benefit purposes of the FE

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;
(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;
(s) infrastructure support for public benefit purpose organisations.

[62] Article 19 FE Proposal.
[63] Article 20 FE Proposal.

The European Commission does not give any guidance on the interpretation of these categories. 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 European Commission creates uncertainty, both for charities and their donors and for tax authorities and supervisory authorities. More in general, the explanation of the European Commission is rather meager. 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.

5.5.1 Exclusion of religion

Interestingly, religion, philosophy and spirituality are not included in the exhaustive list. This is remarkable as religion is regarded a public benefit in all Member States of the EU.[64] The explanatory memorandum does not say why religion was excluded. One wonders why this purpose which 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. It might be that the European Commission based the list on the list of public benefit purposes which was included in the draft Regulation prepared by the European Foundation Centre.[65] This draft Regulation did not include religion either. A motivation for this exclusion was absent as well. It is possible that religion was not included because churches are not a member of the European Foundation Center. However, the choice on public benefit made by a group of European charities that do not represent religious organizations or their donors, should not be decisive for the definition of public benefit in the EU. The preferences of the inhabitants of the EU, as reflected in the national laws, should be more important. To exclude a purpose which is regarded to be for the public benefit in all Member States, is rather peculiar. It might be that the thought behind the exclusion of religion is that religious organizations often have a specific legal form. However, not all religious and spiritual organizations might need the specific national legal form for churches. Furthermore, churches might want to set up a separate entity for cross border fundraising in Europe. The Proposal makes this impossible for these organizations. In my view, there is no valid reason to exclude religion from the public benefit purposes, especially not as this is considered a public benefit in all Member States.

5.5.2 Exhaustive list

Another interesting fact is that the European Commission proposes an exhaustive list of public benefit activities. Member States differ in this respect. For example, Poland (Majdanska 2012) and Spain (Báez & Pedreira 2012) have an open list with examples of public benefit activities. In the UK the public benefit activities are prescribed, but the prescriptive criteria are somewhat mitigated by providing that it is enough that the purpose or activity is either analogous to or comes within the spirit of those of any of the prescribed activities listed (Bowler Smith 2012). In other countries, such

[64] This conclusion is based on the surveys included in European Foundation Centre (2011), the questionnaires for the 2012 EATLP conference on Charities (http://www.eatlp.org/index.php?option=com_content&view=article&id=140:congress-documents&catid=34:this-yearcongress&Itemid=61) and for Finland on Bater, Hondius & Kessler Lieber (2004), p. 166, for Latvia on Balodis (2007), p. 155-156, for Romania on Shea 2003 and for Slovenia on Sporar & Strojan (2010), p. 5. Hungary has not included religion in its list of non-profit activities, but churches, associations of churches and religious institutions are exempt from gift and inheritance tax (Erdös, Lakatos & Mihály (2012), p. 1-2 and 8.

[65] European Foundation Centre (2005-2010), article 2.

as Hungary (Erdös, Lakatos & Mihály 2012) and the Netherlands (Hemels 2012) 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 deem such activity to be for the public benefit: the Member States (unanimously?), the ECJ or national courts? If the Member States would have to decide on every charity with activities outside the list, this would be very impractical. The ECJ might be a better option. However, the Court has a work overload already. Furthermore, the 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 which should be answered in the political arena. These problems might be the reason that the European Commission decided to include an exhaustive list.

5.6 Registration of FEs

Each Member State must designate a registry for the purposes of the registration of FEs.[66] This registry is responsible for storing information about registered FEs.[67] Every year, before 31 March, it must notify the European Commission of the name, the address of the registered office, registration number 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.[68]

Applications for registration as FE must be accompanied by several documents and statements. However, Member States may not require any other documents or particulars than the ones listed in the Proposal:[69]

(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.

[66] Article 22 FE Proposal.
[67] Article 22(2) FE Proposal.
[68] Article 22(3) FE Proposal.
[69] Article 23 FE Proposal.

The application must be filed in the language required by the applicable national law.[70] 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 the applicant complies with the requirements of the Regulation. The registry must register a compliant FE within twelve weeks from the date of application. No further authorisation 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 amendement to the statutes the FE must submit the complete text of the statutes to the registry.[71]

5.7 Supervision of the FE

Each Member State must designate a supervisory authority to supervise FEs registered in that Member State.[72] 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:[73]

(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. It is not clear whether these powers go as far as the powers of the English Charity Commission that may appoint an interim manager to run the charity in place of the governing board.[74]
(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. Again, these powers remind of the powers of the English Charity Commission.[75]
(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

[70] Article 23 FE Proposal.
[71] Article 24 FE Proposal.
[72] Article 45 FE Proposal.
[73] Article 46 FE Proposal.
[74] Charity Commission, How we ensure charities comply with their legal requirements, http://www.charity-commission.gov.uk/Our_regulatory_activity/Compliance_work/default.aspx, download 30 March 2012.
[75] Charity Commission, Where we monitor charities, http://www.charity-commission.gov.uk/Our_regulatory_activity/Compliance_work/Where_we_monitor_charities_index.aspx download 30 March 2012.

information in the event of infringements or suspected infringements by the FE of its statutes, the Regulation or the applicable national law.[76] 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.[77] 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.

Furthermore, 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.[78] Furthermore, it must inform the authorities of the progress and outcome of such 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 UK resident would spontaneously donate to an FE registered in Malta with activities in Cyprus, the UK would not have any means to make sure that the gift is justly tax deductible. This would, in my view, be very undesirable and should be amended as it would open many ways for abuse of the gift deduction in Member States.

For some Member States it will be easy to comply with these requirements. For example, the English Charity Commission already has similar powers. For other Member States, such as the Netherlands, these conditions require the setting up of a new supervisory body with new powers. Furthermore, it is not clear from the Proposal whether it is allowed that the tax authorities are the supervisory body, as is, for example, currently the case in the Netherlands. 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.

5.8 Penalties

Member States must provide for rules on effective, proportionate and dissuasive penalties applicable to infringements of the provisions of the Regulation.[79] 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. The freedom regarding penalties increases the risk of abuse. Small and less wealthy Member States might not have the means and knowledge to design a full fledge system of penalties, let alone enforcing this. If most FEs in such Member States primarily make use of tax incentives of other EU Member States, enforcement of penalties will not be the main priority of those Member States (this is even without mentioning the risk that civil servants are bribed not to impose penalties on such FEs). For example, if 30.000 wealthy English residents all form

[76] Article 47 FE Proposal.
[77] Article 47 FE Proposal.
[78] Article 48 FE Proposal.
[79] Article 53 FE Proposal.

an FE in Lithuania to claim UK tax relief for gifts to those FEs, Lithuania will probably not have the means to supervise and penalize those FEs. The UK might have the means to supervise these FEs (in 2011 the Charity Commission supervised almost 180.000 charities in England and Wales alone),[80] but the UK is not allowed to supervise or penalize these Latvian FEs, even though these are primarily used to reduce the UK income tax burden. It is difficult to understand why the Proposal does not address these rather obvious risks of abuse.

5.9 Entry into force, effective application and review of the Regulation

As all Regulations the FE Regulation will be binding in its entirety and will be directly applicable in all Member States. However, it will not immediately apply. The Regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It is not yet clear as from when it will apply after its entry into force. The Proposal suggest - between brackets – that it will apply from two years from the entry into force.[81] Within that period Member States must make such provisions as is appropriate to ensure the effective application of the Regulation,[82] such as the establishment of a supervisory body.

Seven years after the entry into force of this Regulation, the Commission will evaluate the Regulation and will forward a report on the application of the Regulation and, where appropriate, proposals for amendments to the Council and the European Parliament.

5.10 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 its beneficiaries.[83] 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.[84] 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 (Hemels 2012). It seems that the Regulation does not oblige the Netherlands to grant this refund to the FE.

The equivalency principle applies to natural and legal persons donating to an FE within or across borders as well.[85] 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.

Finally, 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.

6 Effectiveness, efficiency and feasibility of the Proposal

[80] www.charitycommission.gov.uk/showcharity/registerofcharities/SectorData/SectorOverview.aspx.
[81] Article 55 FE Proposal.
[82] Article 52 FE Proposal.
[83] Chapter VII, articles 49-51 FE Proposal.
[84] Article 49 FE Proposal.
[85] Article 50 FE Proposal.

The solution of the Proposal is a mixture of the solutions discussed in paragraph 2. 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. The solution is, therefore, effective in solving the tax issues for cross border charitable giving to and fundraising of charities taking the legal form of an FE.

For charities able and willing to take the legal form of an FE, the FE Regulation will provide for an effective and efficient solution. Those charities will only have to meet the single set of requirements for the FE instead of the different requirements of the 27 Member States. Furthermore, they will only have to deal with one supervisory authority instead of with 27 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.

For charities that receive subsidies of governments and private bodies it is 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, this is only a next best solution from an efficiency point of view.

Furthermore, the Regulation only gives a solution for charities that have the legal form of an FE. The problems related to cross border fundraising will remain the same for charities with another legal status. 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.

From the point of view of the Member States the Proposal means that compared to the current host-country control solution of the ECJ they have to give up their supervisory authority over charities in other Member States. 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. Furthermore, 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 which 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.

As a matter of fact, even under the current host state control solution of the ECJ there is already a debate in the UK on whether the opening of tax relief to donations to charities based in other EU countries does not lead to tax avoidance. According to an article in the Guardian of April 2012, the UK treasury and the Revenue & Customs have complained that EU law is inhibiting their ability to regulate bogus charities, based in Member States, that are being used as vehicles to avoid paying tax.[86] In the same article, David Davis, a former chairman of the public accounts committee, gave the following comment on the plans of the government to cap tax relief for charitable giving: "If the government's aim is to prevent tax avoidance, it would be better to ensure donations are approved by the Charity Commission. Or if the charity is based abroad, it should be subject to review by [Revenue & Customs]. If the government's aim is simply to raise money from philanthropists, the government should say so." However, if the FE would be introduced, the UK Revenue & Customs would not have any possibility to review FEs resident in other EU Member States. Given the current debate on tax avoidance by the use of charities resident in other EU Member States, the UK government might not be too keen on introducing more possibilities to claim tax relief on donations to non-resident charities. Other EU Member States might have similar objections to having to grant tax relief for donations to foreign FEs without having the power to supervise these FEs.

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. This is an undesirable effect from the point of view of charities as well.

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

7 Conclusion

Many charities are not limiting their activities to their country of residence. Most EU Member States have always allowed charities to operate abroad. However, historically, tax benefits were available to resident charities only. This hindered cross border fundraising in Europe. Only recently and in reaction to case law of the ECJ, Member States have opened their tax incentives to (donations to) charities resident in other Member States. The status quo in the EU is host country control: 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.

The FE is, in a way, a partial solution for this efficiency problem. The FE provides for a charity which will be mutually recognized in all Member States and which 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 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. For charities that do not take the form of an FE, for example,

[86] Wintour (2012).

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 ccstly and cumbersome host country control solution of the ECJ. The FE is, therefore, definitely an efficient way forward in solving tax issues connected with cross border charitable giving and fundraising. However, it is only an intermediate solution and not an end solution.

If Member States adopt the FE Regulation and are willing to trust each other's supervision authorities for supervision of the FE, this might be a first 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 (although it is not very likely that Member States are willing to exclude religion from the public benefit activities). The FE might then get the important function of opening the way towards full mutual recognition of charities within the European Union, which would be the most efficient solution to remove all tax barriers to cross border charitable giving and fundraising.

The most important question is whether Member States have enough trust in each other to transfer the supervision of foreign charities to other Member States, knowing that they have to give tax benefits to these charities or their donors. 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. The Proposal does not address this issue.

Without trust in the supervisory systems of the other Member States, the provisions on the tax treatment of the FE cannot be enacted. An FE without a paragraph on tax treatment, would, in my view, not have an added value. The tax provisions are crucial for the FE to have any success. 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 EU. The economic crisis and the reports on the inability (or unwillingness) of the tax authorities of some Member States to collect taxes, will not have increased this trust. Furthermore, the crisis makes it even more important for Member States to combat abuse of their tax incentives. The Proposal makes it impossible for Member States to investigate and combat abuse which makes use of a foreign FE.

Furthermore, the fact that Member States have expressed reservations before on the need for an FE and that the introduction of this legal form and the requirements for the supervisory authority might lead to extra costs for some Member States, leads to the conclusion that not all Member States will readily embrace the Proposal.

The European Foundation would be effective in removing the tax barriers for cross border charitable giving to and fundraising of charities taking the legal form of an FE. For those charities it is an efficient solution as well. For Member States that have to introduce a new supervisory framework it might be less efficient. It is questionable whether the FE is a feasible solution. This depends on the Member States' trust in each other's supervisory authorities. The current economic situation 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.

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