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Edited by

Werner Haslehner
Georg Kofler
Alexander Rust

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Editors

Werner Haslehner, Professor of Tax Law, ATOZ Chair for European and International Taxation, University of Luxembourg.

George Kofler, Professor of Tax Law at Johannes Kepler University Linz, Austria and Chairman of the ECJ Task Force of the CFE.

Alexander Rust, Professor of Tax Law at the Wirtschaftsuniversität Vienna.

Contributors

Joachim Englisch, Professor of Public Law and Tax Law, Münster University, Germany.

F. Alfredo García-Prats, Professor of Financial and Tax Law at the University of Valencia, Spain.

Volker Heydt, Rechtsanwalt (Hamburg Bar), Tervuren (Belgium), former Head of unit of the European Commission, DG TAXUD.

Pasquale Pistone, Academic Chairman of the International Bureau of Fiscal Documentation. Jean Monnet ad Personam Professor of European Tax Law and Policy at the WU Vienna.

Stella Raventós, Partner in a Spanish law firm and member of the ECJ Task Force of the Confédération Fiscale Européenne.

Isabelle Richelle, Co-President of the Tax Institute of the University of Liège; Member of the Brussels Bar (Of Counsel, Liedekerke).

Kelly Stricklin-Coutinho, Barrister at Thirty Nine Essex Street and Visiting Lecturer at the Dickson Poon School of Law, King's College London.

Edoardo Traversa, Professor, UC Louvain, avocat Of Counsel, Liedekerke (Brussels).

Dennis Weber, Director of the Amsterdam Centre for Tax Law/Loyens & Loeff.

Anzhela Yevgenyeva, Research Fellow at the Oxford University Centre for Business Taxation.

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CHAPTER 11

The Taxation of Non-profit Organizations after *Stauffer*

Anzhela Yevgenyeva[*]

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 (hereafter CJEU or the Court).[1] In 2006, the Court delivered its first landmark judgment in *Stauffer*,[2] which was followed by *Persche*,[3] *Commission v. Spain*,[4] *Missionswerk*,[5] and *Commission v. Austria*.[6] In each of these rulings, the Luxembourg judges found a restriction of free movement by national tax laws and provided guidance on how Member States' discretion in relation to the tax treatment of non-profit organizations is shaped by European Union (EU) law. The European Commission (hereafter the Commission) has contributed to the enforcement of EU law in this area by investigating and successfully closing nearly thirty infringement cases against EU Member States.[7] These developments have led to the liberalization of

* Research Fellow at the Oxford University Centre for Business Taxation. The author is grateful to the participants of the conference 'Landmark Decisions in Direct Tax Jurisprudence' (23 Jan. 2014, Luxembourg) and, in particular, to the discussant of this paper, Christine Stix-Hackl, for valuable comments.

1. There is no uniform definition of 'non-profit organizations'. EU Member States use various terms and concepts; this also involves national variations in the tax regimes applicable to the 'non-profit' sector. This Chapter uses the term 'non-profit organization' as an umbrella term, which broadly covers bodies that do not generate profit and are established to pursue public benefit purposes.
2. *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568 (*Stauffer*).
3. *Persche*, C-318/07, EU:C:2009:33.
4. *Commission v. Spain*, C-153/08, EU:C:2009:618.
5. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65 (*Missionswerk*).
6. *Commission v. Austria*, C-10/10, EU:C:2011:399.
7. S. Heidenbauer et al., 'Cross-Border Charitable Giving and Its Tax Limitations', *Bulletin for International Taxation* 67 (2013): 611, 618.

regulation within the Internal Market, generating increased attention in academic publications[8] and debates.[9]

This Chapter aims at providing a detailed account of CJEU case law on the tax treatment of non-profit organizations and offering some reflections on the role of the Court, and negative harmonization more generally, in the elimination of fiscal obstacles in the Internal Market. It starts by introducing the background problems of the legal treatment that led to the *Stauffer* case (§11.01). Next, it analyses CJEU case law on the taxation of non-profit organizations, focusing on judicial reasoning and conclusions drawn (§§11.02 and 11.03). Following this analysis, the Chapter offers some broader comments on the implications of judicial intervention for non-profit organizations in the EU (§11.04), and then concludes with a summary of the whole discussion (§11.05).

§11.01 BACKGROUND

Non-profit organizations have become an inherent component of modern societies, creating added value in diverse areas such as art and culture, social and health services, and environmental protection and climate change. Historically, these organizations have been perceived as helping public authorities to fulfil some of their core functions; thus, a common trend developed to stimulate the activities of these organizations and donors by offering them beneficial tax treatment. The particularities of these tax regimes vary, reflecting domestic legal traditions and public policy considerations. As regards the income tax regime applied to non-profit organizations, the scale of regulatory choices ranges from the 'full exemption' model to the 'full tax' model; in most instances, however, countries choose to adopt the 'partial exemption' model that reduces the tax burden (either through a lower tax rate or by limiting the types of income included in the tax base), allowing them to strike their preferred balance.[10] The

8. F. Becker, '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* 44 (2007): 803; S.J.C. Hemels, 'The Implications of the *Walter Stauffer* Case for Charities, Donors and Governments', *European Taxation* 47 (2007): 19; T. Ecker, 'Taxation of Non-Profit Organizations with Multinational Activities – The *Stauffer* Aftermath and Tax Treaties', *Intertax* 35 (2007): 450; S.J.C. Hemels, 'Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe', *Intertax* 37 (2009): 424; T. Georgopoulos, 'Can Tax Authorities Scrutinise the Ideas of Foreign Charities? The ECJ's *Persche* Judgment and Lessons from US Tax Law', European Law Journal 16 (2010): 458; S. Heidenbauer, *Charity Crossing Borders: The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* (Alphen aan den Rijn: Kluwer Law International, 2011); L. Flynn, 'Freedom to Fund? The Effects of the Internal Market Rules, with Particular Emphasis on Free Movement of Capital' in *Social Services of General Interest in the EU*, eds U. Neergaard et al. (The Netherlands: Asser Press, 2013).
9. Most notably, the 2012 IFA Congress (Seminar H 'Cross-Border Charitable and Other Pro-Bono Contributions') and the 2012 EATLP Annual Congress in Rotterdam (Taxation of Charities).
10. For a more detailed overview, see, e.g., D. Gliksberg, 'Taxation of Non-Profit Organizations, General Report', *Cahier de Droit Fiscal International*, 53rd Congress of the International Fiscal Association, 84a: 19, 38–45; S. Heidenbauer, *Charity Crossing Borders: The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* (Alphen aan den Rijn: Kluwer Law International, 2011).

design of beneficial income tax regimes for donations also reflects policy considerations, with countries choosing the scope of benefits provided through tax deductions (or in more rare cases, a tax credit) for contributions made by donors to non-profit organizations.[11]

These beneficial tax regimes have evolved within state borders. It comes as no surprise that when it comes to expanding their operations internationally, non-profit organizations face fiscal obstacles. The difficulties occur at two levels: first, the income tax regime for non-profit organizations (as recipients and investors) and, second, the tax incentives for donors. Clear examples of this include the following scenarios: a foreign non-profit organization (acting as an investor) may be subject to stricter rules on the sources of income that count as exempt (e.g., rental income); a non-profit organization (acting as the recipient of a gift or legacy) in a cross-border context may be liable to pay tax, whereas an identical donation in a purely domestic situation would be exempt from taxes; and a donor who makes a contribution to a non-profit organization may find that an income tax deduction available in a purely domestic context is refused because the recipient is established abroad.

Although these and other problems relating to the tax treatment of non-profit organizations have been the subject of academic and policy debates for decades, progress in addressing them through legal mechanisms has remained limited, until recently.[12] Back in 1999, the International Fiscal Association reported that it was 'difficult to identify prevalent trends' in resolving fundamental issues of international taxation of non-profit activities.[13] National reports provided multiple examples of problems existing in EU Member States, such as Belgium, France, Germany, the Netherlands, Portugal, and the United Kingdom.[14] In the new set of reports published in 2012, however, the evaluation was different: '[i]n recent years, some countries, mainly in the European Union, have opened up their fiscal regimes', whereas 'the

11. For detailed consideration see D. Gliksberg, 'Taxation of Non-profit Organizations, General Report', *Cahier de Droit Fiscal International*, 53rd Congress of the International Fiscal Association, 84a: 19, 46–56; S. Heidenbauer, *Charity Crossing Borders: The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* (Alphen aan den Rijn: Kluwer Law International, 2011).
12. For instance, the 1969 International Fiscal Association Congress in Rotterdam (The Possibilities and Disadvantages of Extending National Tax Reduction Measures, if Any, to Foreign Scientific, Educational or Charitable Institutions); the 1971 International Standing Conference on Philanthropy (INTERPHIL), which proposed a Draft European Convention on the Tax Treatment in respect of certain Non-Profit Organizations to the Council of Europe (was not adopted). For historical insights see, *inter alia*, eds P. Bater et al., *The Tax Treatment of NGOs: Legal, Ethical and Fiscal Frameworks for Promoting NGOs and their Activities* (The Netherlands: Kluwer Law International, 2004); I.A. Koele, *International Taxation of Philanthropy* (The Netherlands: IBFD Publications, 2007).
13. The 1999 International Fiscal Association Congress in Eilat (Taxation of Non-profit Organizations); D. Gliksberg, 'Taxation of Non-profit Organizations, General Report', *Cahier de Droit Fiscal International*, 53rd Congress of the International Fiscal Association, 84a: 19, 56; P. Bater, 'International Tax Issues Relating to Non-Profit Organizations and Their Supporters', *Bulletin for International Taxation* 53 (1999): 452.
14. For the reports see 'Taxation of Non-Profit Organizations' (International Fiscal Association Cahiers 1999, Vol. 84a).

opposite trend of introducing more restrictions on cross-border giving' was noted in other countries, such as Australia.[15]

No legislative measures have been adopted at the EU level to introduce a common approach to the tax treatment of non-profit organizations within the Internal Market, which might be able to explain that observation.[16] Rather, these recent developments can be attributed to the effects of negative harmonization: equipped with the legal statement that 'although direct taxation falls under the competence of EU Member States, it must be exercised consistently with EU law',[17] the Court provides an authoritative interpretation of EU law that has triggered changes in tax treatment.

§11.02 *STAUFFER* AND SUBSEQUENT CASES

For the first time, the CJEU considered the application of EU law in relation to tax benefits granted to non-profit organizations in the seminal *Stauffer* case.[18] In *Stauffer*, the Court dealt with income tax regimes for non-profit organizations; it later applied the basic principles established in that case to the tax deductibility of donations in *Persche*.[19] Subsequent cases mirrored the *Stauffer-Persche* line of reasoning in variable tax settings, such as (i) income tax exemptions for lottery winnings that are organized by certain charitable entities (*Commission v. Spain*);[20] (ii) reduced rates of inheritance taxes for legacies that are left to non-profit organizations (*Missionswerk*);[21] and (iii) the tax deductibility of gifts made to research and educational institutions (*Commission v. Austria*).[22] This section introduces the facts and national laws that were challenged in each of these cases, and then presents an analysis of the Court's reasoning and selected issues of application.

[A] Income Tax Regime for Non-profit Organizations: *Stauffer*

In the *Stauffer* case,[23] a foundation with a charitable status under Italian law, the Centro di Musicologia Walter Stauffer, disputed its corporate tax liability for income received from the rental of commercial property in Germany. The foundation had neither premises in Germany for the purposes of pursuing its activities nor any

15. S. Heidenbauer et al., 'Cross-Border Charitable Giving and Its Tax Limitations', *Bulletin for International Taxation* 67 (2013): 611.
16. Note, however, the Commission's recent proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final (withdrawn).
17. See, *inter alia*, *Schumacker*, C-279/93, EU:C:1995:31, para. 21; *Royal Bank of Scotland*, C-311/97, EU:C:1999:216, para. 19.
18. Before 2004, attempts to ensure the proper application of EU law in this area had been limited to the sporadic efforts of a few domestic courts to extend the application of reduced tax rates granted to local charities so that these also encompass their foreign counterparts. For more details refer to S.S.J.C. Hemels, 'The Implications of the *Walter Stauffer* Case for Charities, Donors and Governments', *European Taxation* 47 (2007): 19, 20.
19. *Persche*, C-318/07, EU:C:2009:33.
20. *Commission v. Spain*, C-153/08, EU:C:2009:618.
21. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65.
22. *Commission v. Austria*, C-10/10, EU:C:2011:399.
23. *Stauffer*, C-386/04, EU:C:2006:568.

subsidiaries. The rental services were provided by a German property management agent. According to the German Law on Corporation Tax (KStG), charities, in principle, benefited from a tax exemption, which, however, did not apply to taxable persons with limited tax liability. Thus, in a purely domestic context, the foundation would have been exempt from corporation tax; yet, since its seat and management were in Italy, the rental income attributed to the immovable property it received in Germany was taxable. Following a request for preliminary ruling from the German Federal Finance Court, the CJEU considered whether the exclusion of foreign entities from the beneficial tax regime was compatible with EU law.

[B] Tax Treatment of Donations: *Persche*

In the *Persche* case,[24] the Court examined the tax treatment of donations to charities established in other Member States. A German tax adviser (Mr Persche) claimed a tax deduction for a donation of everyday consumer goods to a Portuguese charity (Centro Popular de Lagoa). Under the German Law on Income Tax (EStG), a taxpayer could deduct gifts that promote certain charitable purposes. The Regulations implementing Income Tax (EStDV) specified that such donations are deductible only if the recipient is a corporation, an unincorporated association, or a fund that is exempt from corporate tax – one that in terms of its statutes and in the way it actually conducts its operations pursues charitable, benevolent, or church purposes exclusively and directly. The exemption applied only to entities established in Germany (KStG). Accordingly, the deduction claimed by Mr Persche, who provided an original receipt for this donation and a confirmation of the charity's registration in Portugal, was refused by the German tax authorities on the grounds that the recipient was not established in Germany and the donation certificate was not provided 'in proper form'.[25]

Arguably, the outcome of *Persche* was clear in light of *Stauffer*, but the scale of the implication made this issue highly debatable in Germany.[26] The reference from the Federal Tax Court focused on the aspects that could potentially distinguish *Persche*
from the earlier case. The CJEU was requested to give a preliminary ruling on whether the free movement of capital is applicable to in kind gifts and whether it precludes a Member State from restricting tax deduction to gifts made in favour of charitable bodies established in that State, since tax authorities must be able to verify the taxpayer's declarations. Clarification was also sought on whether administrative assistance was to be found under the provisions of Directive 77/799/EEC (hereafter the Mutual Assistance Directive),[27] or whether the taxpayer himself was to bear the burden of proof in relation to facts that occurred in other Member States.

24. *Persche*, C-318/07, EU:C:2009:33.
25. *Persche*, C-318/07, EU:C:2009:33, para. 15.
26. S.J.C. Hemels, 'Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe', *Intertax* 37 (2009): 424, 427.
27. Council Directive 77/799/EEC of 19 Dec. 1977 concerning mutual assistance of tax authorities in the field of direct taxation and taxation of insurance premiums (1977) OJ L336/15 (repealed by Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation (2011) OJ L64/1).

[C] Tax Exemption for Lottery Winnings: *Commission v. Spain*

This case built upon *Stauffer* and *Persche*, as well as the CJEU cases on the tax treatment of lottery winnings.[28] In *Commission v. Spain*,[29] Spain granted an exemption from income tax to winnings from lotteries, games of chance, and betting organized by public bodies and certain entities pursuing social or charitable non-profit-making activities (i.e., the Spanish Red Cross and the Spanish National Association for the Blind), whereas winnings deriving from lotteries and games organized by similar foreign bodies were added to the taxable amount and subject to progressive rates of income tax. Acting upon the reference from the Commission, the Court examined whether this exemption was compatible with the freedom to provide services.

[D] Inheritance and Gift Taxes: *Missionswerk*

In the *Missionswerk* case,[30] the Court extended the application of *Stauffer* and *Persche* to Member States' inheritance tax legislation. It added a new twist to the principles flowing from other rulings on the obstacles created by inheritance and gift taxes.[31] In this case, a religious association with a seat in Germany (Missionswerk Werner Heukelbach) challenged the refusal of the Belgian tax authorities to apply a reduced rate of succession duty payable in respect of a legacy that it had received from a Belgian national. The Belgian Code of Succession Duties provided a reduction of succession duties and duty on the transfer of property *mortis causa* to seven percent (7%) for legacies left to non-profit organizations. As amended by the *décret-programme* of the Walloon Government of 18 December 2003, this reduced rate was only applicable to a body or institution that had its centre of operations either in Belgium or in any Member State in which the deceased actually resided or had a place of work (either at the time of death or previously). Accordingly, the claim made by Missionswerk was refused on the grounds that the person in question had never lived or worked in Germany.

[E] Tax Incentives for Research and Education: *Commission v. Austria*

The *Commission v. Austria* case[32] clarified the scope of discretion that Member States exercise in defining public interests that they wish to promote by granting tax advantages. This case is closely linked to other CJEU judgments on research and development tax incentives of a protectionist nature.[33] In a nutshell, the Commission challenged the Austrian rules that provided a tax deduction for gifts made to research and teaching institutions, which under Paragraph 4a(1)(a) to (d) of the Law on Income

28. Such as *Schindler*, C-275/92, EU:C:1994:119; *Lindman*, C-42/02, EU:C:2003:613.
29. *Commission v. Spain*, C-153/08, EU:C:2009:618.
30. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65.
31. Such as *Barbier*, C-364/01, EU:C:2003:665; *Geurts and Vogten*, C-464/05, EU:C:2007:631; *Jäger*, C-256/06, EU:C:2008:20; *Eckelkamp*, C-11/07, EU:C:2008:489; *Arens-Sikken*, C-43/07, EU:C:2008:490; *Mattner*, C-510/08, EU:C:2010:216.
32. *Commission v. Austria*, C-10/10, EU:C:2011:399.
33. E.g., *Laboratoires Fournier*, C-39/04, EU:C:2005:161.

Tax (EStG) was available in relation to entities established within Austria, but not granted to equivalent bodies in the EU and the European Economic Area (EEA). The Commission alleged the breach of Article 63 of the Treaty on the Functioning of the European Union (TFEU) and Article 40 of the EEA Agreement.

§11.03 ANALYSIS OF CJEU JURISPRUDENCE

The CJEU's reasoning is discussed as follows. The *Stauffer* case is taken as a starting point and references are made to subsequent cases in order to demonstrate the nuances of the application or certain alternative arguments put before the Court due to different factual circumstances. This analysis covers the key aspects of the judicial reasoning: (i) the application of fundamental freedoms to non-profit organizations; (ii) the restriction of free movement; (iii) the comparability of domestic and foreign non-profit organizations; and (iv) the effectiveness of fiscal supervision in the context of recipients and donors as a (potential) justification argument.

[A] Application of Fundamental Freedoms to Non-profit Organizations

In the first place, the Court was confronted with the question of which freedom to apply to the non-profit sector. 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.'[34] As is frequently the case, the Opinion of the Advocate General (hereafter AG) represents a more insightful debate when the issue at stake is controversial. 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.[35] 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.[36] The free movement of capital, the freedom of establishment, and the freedom to provide services were considered separately and weighed against each other.

[1] The Free Movement of Capital

The *Stauffer* case was decided by the Court under the free movement of capital. The reliance upon this freedom may appear surprising at first glance, but a closer analysis

34. O. Thömmes et al., 'AG Stix-Hackl Rules on German Tax Exemption for Non-Profit Organizations', *Intertax* 34 (2006): 172.
35. AG Stix Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, paras 17–19.
36. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, paras 22–24.

demonstrates that such an application results from the Court's established approach.[37] 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 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'.[38] Despite the criticism of this interpretative approach and the requests for more 'hallowed techniques',[39] it has been consistently followed.[40]

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.[41] The investment in real estate had been considered to constitute the movement of capital on a number of other occasions,[42] 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.[43] A similar approach was also taken in the subsequent cases. In *Persche*, 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.[44] Noting that Heading XI 'Personal capital movements' of Annex I to Council Directive 88/361/EEC refers to inheritances and legacies, 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

37. See e.g., J. Snell, 'Free Movement of Capital: Evolution as a Non-Linear Process' in *The Evolution of EU Law*, 2nd edn, eds P. Craig & G. de Burca (Oxford: Oxford University Press, 2010); L. Flynn, 'Coming of Age: The Free Movement of Capital Case-Law 1993–2002', *Common Market Law Review* 39 (2002): 773; M. Dahlberg, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* (The Hague: Kluwer Law International, 2005); S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (Oxford: Oxford University Press, 2009).
38. 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).
39. AG Colomer Opinion, *Commission v. Spain*, C-463/00, EU:C:2003:71 and *Commission v. United Kingdom*, C-98/01, EU:C:2003:273, para. 36.
40. *Trummer and Mayer*, C-222/97, EU:C:1999:143, para. 21; to this effect, see also Joined Cases *Reisch and Others*, C-515/99 and C-527/99 to C-540/99 and C-519/99 to C-524/99 and C-526/99, EU:C:2002:135, para. 30; *Van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, para. 39.
41. *Stauffer*, C-386/04, EU:C:2006:568, paras 21–24.
42. *Trummer and Mayer*, C-222/97, EU:C:1999:143, paras 22–24; *Konle*, C-302/97, EU:C:1999:271, para. 22; *Albore*, C-423/98, EU:C:2000:401, para. 14; *Stefan*, C-464/98, EU:C:2001:9, paras 5–6; *Reisch and Others*, C-515/99, EU:C:2002:135, para. 30; *Blanckaert*, C-512/03, EU:C:2005:516, para. 35; *D.*, C-376/03, EU:C:2005:424, para. 24.
43. *Stauffer*, C-386/04, EU:C:2006:568, para. 24.
44. *Persche*, C-318/07, EU:C:2009:33, paras 24–27; to this effect see *van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, para. 42; *Eckelkamp*, C-11/07, EU:C:2008:489, para. 39.

both in money and in kind.[45] In *Missionswerk*, the Court followed other cases in which inheritance taxes were considered under the free movement of capital,[46] 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.[47]

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 person of those involved'.[48] 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 non-profit-making bodies.[49] 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"'.[50] Strictly speaking, scholars' commentaries differ: whereas some consider that 'the Court assumes that a movement of capital within Article 63 to be economic',[51] others explain that 'there is no economical activeness requirement in the application of the free movement of capital'.[52] Despite different interpretations, these observations lead to a similar 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.[53] 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'.[54] The application of the free

45. *Persche*, C-318/07, EU:C:2009:33, para. 26.
46. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, paras 15–17; see, *inter alia*, *Barbier*, C-364/01, EU:C:2003:665, para. 58; *Van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, para. 39; *Eckelkamp*, C-11/07, EU:C:2008:489, para. 38; *Arens-Sikken*, C-43/07, EU:C:2008:490, para. 29; and *Mattner*, C-510/08, EU:C:2010:216, para. 19.
47. *Commission v. Austria*, C-10/10, EU:C:2011:399, para. 24.
48. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, paras 56–61.
49. *Persche*, C-318/07, EU:C:2009:33, para. 21.
50. C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: Oxford University Press, 2010), 564. See, *inter alia*, *Van Putten e o.*, C-578/10, EU:C:2012:246, paras 34–36.
51. C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: Oxford University Press, 2010), 564.
52. E. Traversa, 'The Impact of EU Law and ECJ Case Law on Fundamental Freedoms on Cross-Border Non-Profit Activities' (Jean Monnet Round Table, 13 Sep. 2013).
53. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, para. 59.
54. *Verkooijen*, C-35/98, EU:C:2000:294, paras 28–29.

movement of capital in relation to non-profit organizations should, thus, be considered as an inescapable consequence of this loose interpretation.

[2] The Freedom of Establishment

The free movement of capital and the freedom of establishment are closely connected and often 'apply in parallel'.[55] 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.[56] 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';[57] she concluded, however, that the activity of the property management agent does not amount to a fixed establishment.[58] Following this argument, the Court refused to apply the freedom of establishment in *Stauffer*.[59] 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.[60] The freedom of establishment was, thus, refused on a factual basis.

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.[61] It should be noted, though, that the requirement of 'economic activities' may exclude some non-profit organizations from the ambit of the freedom.[62]

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55. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, paras 35–36. To this effect, see *FII GL 1*, C-446/04, EU:C:2006:774 (parallel application); *Thin Cap GL*, C-524/04, EU:C:2007:161 (freedom of establishment). For discussion on differentiation between these two freedoms, see S. Hemels et al., 'Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority?', *EC Tax Review* 1 (2010): 19.
56. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, para. 39.
57. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, paras 44–49.
58. AG Stix-Hackl Opinion, *Stauffer*, C-386/04, EU:C:2005:785, paras 50–55; cf. *Commission v. Germany*, C-205/84, EU:C:1986:463.
59. *Stauffer*, C-386/04, EU:C:2006:568, paras 19–20.
60. *Stauffer*, C-386/04, EU:C:2006:568, paras 18–19; see, to that effect, *Reyners*, C-2/74, EU:C:1974:68, para. 21; *Gebhard*, C-55/94, EU:C:1995:411, para. 25.
61. No. 2008/4577, IP/10/1252.
62. For a scholarly debate on this issue, see, e.g., T. Ecker, 'Taxation of Non-profit Organizations with Multinational Activities – The *Stauffer* Aftermath and Tax Treaties', *Intertax* 35 (2007): 450,

[3] The Freedom to Provide Services

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. 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).[63] Even though the Court has indicated its move towards the 'centre of gravity' approach,[64] it has not been entirely consistent.[65] 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.[66] This aspect was not discussed by the Court in detail, as it 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'.[67] 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 Court's position. In this respect, it is worth noting that, in response to a similar suggestion by AG Stix-Hackl in *Fidium Finanz*[68] (decided almost simultaneously with *Stauffer*), the Grand Chamber concluded that the Treaty does not impose any order of priority on the freedoms.[69] This debate, however, is largely of an academic nature in circumstances like those in *Stauffer*.

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.[70] Although there is no condition in this regard for the person providing the service to be seeking to make a profit, the activity must not be provided for nothing.[71] 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.[72] Discussing the personal scope of the freedom in that

452–453; S. Lombardo, 'Some Reflections on Freedom of Establishment of Non-profit Entities in the European Union', *European Business Organisation Law* 14 (2013): 225.

63. *Gebhard*, C-55/94, EU:C:1995:411, para. 22.
64. *Fidium Finanz*, C-452/04, EU:C:2006:631, paras 32–34 and 49; see also *Tankreederei I*, C-287/10, EU:C:2010:827, para. 35.
65. *Attanasio Group*, C-384/08, EU:C:2010:133, para. 39.
66. AG Stix-Hackl Opinion, *Stauffer*, para. 32.
67. *Stauffer*, C-386/04, EU:C:2006:568, para. 24.
68. AG Stix-Hackl Opinion, *Fidium Finanz*, C-452/04, EU:C:2006:182, para. 70.
69. *Fidium Finanz*, C-452/04, EU:C:2006:631, para. 32.
70. See, e.g., *Grogan*, C-159/90, EU:C:1991:378.
71. *Smits and Peerbooms*. C-157/99, EU:C:2001:404, paras 47–59; *Jundt*, C-281/06, EU:C:2007:816, paras 28–34.
72. *Commission v. Spain*, C-153/08, EU:C:2009:618, para. 29.

case, the Court followed other judgments in which lottery winnings were considered under Article 56 TFEU,[73] pointing out that the freedom to provide services benefits both providers and recipients.[74] 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.

[4] Free Movement of Goods and Persons

The *Stauffer-Persche* line of cases also illustrates doubtful prospects for invoking the free movement of goods and the free movement of persons. 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.[75] Following its settled case law, the Court considered the purpose of the legislation concerned in order to determine the freedom applicable in this context.[76] 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.[77] In *Missionswerk*, the Court refused to apply the free movement of persons on the grounds that it was irrelevant to succession duties.[78] 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'.[79]

[B] The Restriction of Free Movement

The comparability of foundations established in Germany and Italy was one of the core issues disputed by the parties in *Stauffer*.[80] The AG, however, did not address this question at the early stage of analysis, but started with a broader restriction-based conclusion that the exercise of the freedom was made less attractive (i.e., 'the

73. *Schindler*, C-275/92, EU:C:1994:119, paras 16–37; *Lindman*, C-42/02, EU:C:2003:613, paras 28–29.
74. See also *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, para. 51 and the cases cited therein.
75. *Persche*, C-318/07, EU:C:2009:33, paras 28–29.
76. *Holböck*, C-157/05, EU:C:2007:297, para. 22 and the case-law cited.
77. *Persche*, C-318/07, EU:C:2009:33, para. 29.
78. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, para. 14.
79. No 2005/2281, IP/06/964.
80. AG Stix-Hackl Opinion, *Stauffer*, paras 62–67.

legislation in question worsens the environment for investment by foreign investors').[81] The Court agreed and referred to the 'disadvantaged position' of charitable foundations established in other Member States, which can obscure the free movement of capital.[82] In *Persche*, the Court also supported the view of the AG that the tax deduction and the organization's location may have a considerable impact on the German taxpayers' willingness to make a donation.[83] Having considered this, the Court concluded that German legislation created an obstacle to the free movement of capital.[84] In *Missionswerk*, the Court relied upon its earlier cases that found a restriction when the value of the inheritance is reduced in a cross-border context.[85] The Court, thus, had no difficulties in establishing a restriction in a situation in which Belgian legislation refused to provide a reduced rate for succession duties.[86] A similar approach can be found in *Commission v. Austria*.[87]

With the exception of *Commission v. Spain* (in which a different freedom was at stake),[88] 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. 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. 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*) or can be justified by overriding reasons in the general interest (*Bachmann*).[89] Although this approach makes '[t]he inclusion of the exception in the Treaty … superfluous',[90] it allows a more coherent interpretation of the Treaty provisions. These two elements are considered in turn.

81. AG Stix-Hackl Opinion, *Stauffer*, para. 80. For an analysis of different approaches taken by the Court at this stage, see, e.g., K. Banks, 'The Application of the Fundamental Freedoms to Member State Tax Measures: Guarding against Protectionism or Second-Guessing National Policy Choices?', *European Law Review* 33 (2008): 482.
82. *Stauffer*, C-386/04, EU:C:2006:568, paras 26–28.
83. *Persche*, C-318/07, EU:C:2009:33, para. 38.
84. *Persche*, C-318/07, EU:C:2009:33, para. 39.
85. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, para. 22; to that effect see *van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, para. 44 and the case-law cited.
86. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, paras 23–24; to that effect see *van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, para. 44 and the case-law cited.
87. *Commission v. Austria*, C-10/10, EU:C:2011:399, paras 26–27.
88. *Commission v. Spain*, C-153/08, EU:C:2009:618, paras 28–35.
89. *Schumacker*, C-279/93, EU:C:1995:31; *Bachmann*, C-204/90, EU:C:1991:340; see AG Stix-Hackl Opinion, *Stauffer*, para. 72.
90. S. Peers, 'Free Movement of Capital: Learning Lessons or Slipping on Spilt Milk' in *The Law of the Single European Market*, eds C. Barnard & J. Scott (Oxford: Hart Publishing, 2002), 348–349.

[C] The Comparability of Domestic and Foreign Non-profit Organizations

It was argued before the Court that domestic and foreign non-profit organizations are not objectively comparable: neither functionally nor from a legal perspective. The former relates to a special social function performed by domestic non-profit organizations and the latter to the difference in the legal definition of non-profit organizations and activities among Member States.[91]

[1] Special Social Function of Non-profit Organizations

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*.[92] On the basis of the referring court's submission,[93] 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.[94] 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'.[95] 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'.[96]

91. *Stauffer*, C-386/04, EU:C:2006:568, paras 33–36.
92. *Stauffer*, C-386/04, EU:C:2006:568, para. 37.
93. Such interpretation was disputed in the academic literature, see, e.g., F. Becker, 'Case C-386/04 *Stauffer v. Finanzamt München für Körperschaften*, Judgment of the Court (Third Chamber) of 14 September 2006', *Common Market Law Review* 44 (2007): 803, 812.
94. *Stauffer*, C-386/04, EU:C:2006:568, para. 38.
95. The AG Stix-Hackl's Opinion, however, indicated that '[t]he recognition of the Member States' fundamental discretion in recognising charitable status combined with the need for effective supervision of the organs and the activity of an institution … generally require recognition of an institution's charitable status to be based on a sufficiently clear domestic connection. It would therefore be compatible with Community law in principle to refuse to recognise the charitable status of such an institution where its activities have no such domestic connection'. AG Stix-Hackl Opinion, *Stauffer*, para. 96.
96. *Stauffer*, C-386/04, EU:C:2006:568, paras 39–40.

The notion of a 'sufficiently close link' reflects the Court's implicit recognition of the special social function of charities. The public-benefit subsidy theory, which was propounded by Germany, considers non-profit organizations as important media for states' redistribution systems.[97] This interpretation may somewhat explain an ostensible connection between this legal formula and CJEU jurisprudence on social welfare. Although this aspect was not acknowledged in *Stauffer*, the notion of 'a sufficiently close link' resembles the approach taken in the case law on social benefits, where the Court admitted the freedom of Member States to condition the eligibility for a benefit by requiring a certain degree of 'integration'[98] or 'connection'[99] between the Member State concerned and the recipient of such a benefit. In *Tankreederei I* (which concerned a tax credit for investments conditioned by the physical use of the investments on national territory), the Court directly linked paragraph 39 of *Stauffer* with the case law on social benefits (such as *Gottwald)*, treating them as two sides of the same coin.[100]

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.[101] 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;[102] 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.[103]

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. From the outset, it should be noted that the similarities between these two types of cases may be misleading, as there are obvious differences in context. Unlike the system of social benefits, the relationship between the State and those potentially benefiting from favourable tax treatment is non-linear and de-personalized. Arguably, this difference should allow the Court to integrate solidarity concerns to a higher degree than in the context of social benefit cases.[104] Therefore, the possibility to require 'a sufficiently

97. T. Georgopoulos, 'Can Tax Authorities Scrutinise the Ideas of Foreign Charities? The ECJ's *Persche* Judgment and Lessons from US Tax Law', *European Law Journal* 16 (2010): 458, 461–463 and the sources cited therein.
98. *Bidar*, C-209/03, EU:C:2005:169, paras 56–63; *Förster*, C-158/07, EU:C:2008:630, paras 47–54.
99. *D'Hoop*, C-224/98, EU:C:2002:432, paras 38–39; *Tas-Hagen and Tas*, C-192/05, EU:C:2006:676, paras 34–40; *Nerkowska*, C-499/06, EU:C:2008:300, paras 37–47; *Gottwald*, C-103/08, EU:C:2009:597, paras 31–41.
100. *Tankreederei I*, C-287/10, EU:C:2010:827, paras 30–32 and cases cited.
101. See, e.g., *Thiele Meneses* C-220/12, EU:C:2013:683, paras 33–41.
102. *Bidar*, C-209/03, EU:C:2005:169.
103. *Förster*, C-158/07, EU:C:2008:630.
104. For an analysis of recent developments involving social benefits and EU citizenship, see, e.g., F. de Witte, 'Who Funds the Mobile Student? Shedding Some Light on the Normative Assumptions Underlying EU Free Movement Law: *Commission v. Netherlands*' *Common Market Law Review* 50 (2013): 203; C. O'Brien, 'I Trade, therefore I Am: Legal Personhood in the European Union' *Common Market Law Review* 50 (2013): 1643.

close link' in practice might be expected to be of limited use in these types of cases; the subsequent cases that tested the ambiguous nature of that clause confirm this conclusion.

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 charities' contribution towards certain objectives that would otherwise have to be undertaken by public authorities at their budgetary expense.[105] Quite predictably, the Court re-confirmed, 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.'[106] 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.[107]

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.[108] The Court noted that the centre of operations cannot easily be seen as a criterion for establishing a close link with the Belgian community at large.[109] 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'.[110]

In *Commission v. Austria*, the Court clarified the scope of Member States' discretion to restrict tax benefits to bodies pursuing certain public interest objectives.[111] 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:

> 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.[112]

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

105. *Persche*, C-318/07, EU:C:2009:33, para. 42.
106. *Persche*, C-318/07, EU:C:2009:33, para. 44.
107. *Persche*, C-318/07, EU:C:2009:33, para. 46; see, to that effect, *Manninen*, C-319/02, EU:C:2004:484, para. 49; *Stauffer*, C-386/04, EU:C:2006:568, para. 59 and other cases cited therein.
108. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, para. 27.
109. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, para. 36.
110. *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, para. 35.
111. *Commission v. Austria*, C-10/10, EU:C:2011:399.
112. AG Trstenjak Opinion, *Commission v. Austria*, C-10/10, ECLI:EU:C:2011:126, para. 53.

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.[113] 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'.[114] 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).[115]

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'[116] 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',[117] 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 differentiation on the basis of residence (*Commission v. Austria*).

[2] 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, EU law does not impose an obligation on a Member State to automatically recognize the charitable status of foreign charities.[118] However, where a foreign charity satisfies the requirements envisaged by the law of another Member State and pursues 'the very same interests of the general public', the Member State may not refuse to grant the benefit.[119] According to the referring court, the Centro di

113. AG Trstenjak Opinion, *Commission v. Austria*, C-10/10, ECLI:EU:C:2011:126, para. 55.
114. AG Trstenjak Opinion, *Commission v. Austria*, C-10/10, ECLI:EU:C:2011:126, para. 56.
115. *Commission v. Austria*, C-10/10, EU:C:2011:399, paras 33–35.
116. *Stauffer*, C-386/04, EU:C:2006:568, para. 37.
117. *Stauffer*, C-386/04, EU:C:2006:568, para. 57.
118. *Stauffer*, C-386/04, EU:C:2006:568, para. 39; to that effect, see *Kinderopvang Enschede*, C-415/04, EU:C:2006:95, para. 23.
119. *Stauffer*, C-386/04, EU:C:2006:568, para. 40.

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.[120] The rationale for the 'equal treatment' approach resembles some earlier VAT cases.[121]

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.[122] 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.

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 critical comments largely illustrate the limits of negative harmonization as such, rather than defects in the judicial approach taken to these particular cases.

120. *Commission v. Spain*, C-153/08, EU:C:2009:618, para. 33.
121. See, e.g., *Kingscrest Associates and Montecello*, C-498/03, EU:C:2005:322, paras 48–55.
122. *Persche*, C-318/07, EU:C:2009:33, para. 42.

[D] Effectiveness of Fiscal Supervision over Recipients and Donors

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. A central role in the Court's analysis was played by the effectiveness of fiscal supervision, which 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.

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, and (b) to monitor its operation through, for instance, annual reporting.[123] Difficulties associated with such verification was found to be a 'purely administrative' matter that could not justify the limitation of freedom,[124] as tax authorities could ask the taxpayer to provide 'relevant supporting evidence' and also rely upon the Mutual Assistance Directive to obtain the necessary information.[125]

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.[126] 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'.[127] 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.[128]

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'.[129] 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

123. *Stauffer*, C-386/04, EU:C:2006:568, para. 48.
124. *Stauffer*, C-386/04, EU:C:2006:568, para. 48.
125. *Stauffer*, C-386/04, EU:C:2006:568, paras 49–50; to that effect see also *Vestergaard*, C-55/98, EU:C:1999:533, para. 26, and *Skandia and Ramstedt*, C-422/01, EU:C:2003:380, para. 42.
126. *Persche*, C-318/07, EU:C:2009:33, paras 33–34.
127. *Persche*, C-318/07, EU:C:2009:33, paras 55–56.
128. *Persche*, C-318/07, EU:C:2009:33, para. 54; see, to that effect, *Danner*, C-136/00, EU:C:2002:558, para. 50, and *Skandia and Ramstedt*, C-422/01, EU:C:2003:380, para. 43.
129. *Persche*, C-318/07, EU:C:2009:33, paras 51, 53 and 60; *Baxter and Others*, C-254/97, EU:C:1999:368, para. 20, and *Laboratoires Fournier*, C-39/04, EU:C:2005:161, para. 25.

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'.[130] 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.[131]

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.[132] That possibility should be considered by the tax authorities as a right to be exercised where deemed appropriate.[133] 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.[134] 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.[135] 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.[136] 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.[137] In view of the above consideration, the Court then concluded that the need to verify the information supplied by the taxpayer does not constrain the tax authorities of the donor's Member State to the extent that can amount to a breach of the principle of proportionality.[138]

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.[139] This Court's decisions put taxpayers in a fully dependent

130. *Persche*, C-318/07, EU:C:2009:33, para. 57.
131. *Persche*, C-318/07, EU:C:2009:33, para. 59.
132. *Persche*, C-318/07, EU:C:2009:33, paras 61–62.
133. *Persche*, C-318/07, EU:C:2009:33, paras 64–65.
134. *Persche*, C-318/07, EU:C:2009:33, para. 69.
135. *Persche*, C-318/07, EU:C:2009:33, para. 69; see, to that effect, *Bachmann*, C-204/90, EU:C:1992:35, para. 20; *ELISA*, C-451/05, EU:C:2007:594, para. 95; and *A*, C-101/05, EU:C:2007:804, para. 58.
136. See, *inter alia*, *Haribo Lakritzen Hans Riegel*, C-436/08, EU:C:2011:61, paras 119–120.
137. *Persche*, C-318/07, EU:C:2009:33, para. 70.
138. *Persche*, C-318/07, EU:C:2009:33, para. 71.
139. AG Mengozzi Opinion, *Persche*, C-318/07, EU:C:2008:561, para. 110.

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.

The reverse side of this process encompasses the difficulties that Member States' authorities may encounter in verifying information. As illustrated above, in order to rely upon the principle of equal treatment, a foreign charity should be deemed to be one that satisfies the requirements envisaged by the law of another Member State and promotes the very same interests. In order to comply with this line of cases, the lowest possible denominator requires tax authorities to come to the conclusion that each organization 'would be likely to be recognised as having charitable status' in their country and then to match 'the same tax exemption' with 'the same kind' of organization.[140] 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.[141] This factor, however, should not play any role in the assessment. At the same time, 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.[142] 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.

§11.04 NEGATIVE VERSUS POSITIVE MODES OF HARMONIZATION

Due to the complexity of EU regulatory structures, any evaluation of the actions of the Court should take into consideration other accompanying developments, such as enforcement actions, coordination, and legislative initiatives. Such analysis allows assessing the actual impact of the Court's *Stauffer-Persche* line of cases, as well as evaluating the Court's intervention against other feasible alternatives.

[A] Enforcement Actions Carried Out by the Commission

Although voluntary compliance plays a central role in the architecture of the EU legal system, it is supplemented by enforcement actions brought by the Commission on the basis of Articles 258 and 260 TFEU. The tax treatment of charities was declared by the Commission to be one of the key priority areas for enforcement actions in

140. *Persche*, C-318/07, EU:C:2009:33, paras 49 and 55.
141. OECD, 'Report on Abuse of Charities for Money-Laundering and Tax Evasion' (2009) < http://www.oecd.org/tax/exchange-of-tax-information/42232037.pdf> accessed 8 Jan. 2014.
142. OECD, 'Report on Abuse of Charities for Money-Laundering and Tax Evasion' (2009) < http://www.oecd.org/tax/exchange-of-tax-information/42232037.pdf> accessed 8 Jan. 2014.

2008–2012,[143] and this category of cases has become one of the most actively pursued. By 2013, a total of 28 infringement cases had been successfully closed while five cases remained under consideration.[144] In addition, the Commission initiated a dialogue with EU Member States with respect to the *Stauffer-Pesche* line of cases and potential ways to mitigate the risks of fraud.[145]

The infringement cases pursued by the Commission can be divided into several categories:

(a) *Income tax regime for non-profit organizations*. These cases closely followed *Stauffer*: the Commission requested EU Member States to respect the principles of equal treatment in relation to the taxation of income received by foreign charities. For instance, the infringement case against the Netherlands[146] concerned tax rules that exempted domestic charities and church organizations (which do not run an enterprise) from taxation on income from real estate in the Netherlands, whereas such income was taxed when received by foreign charities or church organizations.

(b) *Tax incentives for donations*. This type of case is closely associated with *Persche*, dealing with situations where EU Member States refuse certain tax benefits for donations to non-profit organizations established in other Member States. The infringement case against Belgium,[147] which resembled *Persche* and *Missionswerk*, was registered in 2001 – even before a similar question had been referred to the Court. A large number of cases in this category were initiated in 2005–2007. Some of them (e.g., against Belgium,[148] Ireland,[149] Estonia,[150] Poland,[151] and the United Kingdom[152]) have been closed following changes in national laws; however, a few cases are still pending (e.g., the Netherlands[153] and France[154]). The Dutch case was referred

143. Commission, '26th Annual Report on Monitoring the Application of Community Law (2008)' COM(2009) 675 final; Commission, '27th Annual Report on Monitoring the Application of EU Law (2009)' COM(2010) 538 final; Commission, '28th Annual Report on Monitoring the Application of EU Law (2010)' COM(2011) 588 final; Commission, '29th Annual Report on Monitoring the Application of EU law (2011)' COM(2012) 714 final; Commission, '30th Annual Report on Monitoring the Application of EU law (2012)' (Report) COM(2013) 726 final.
144. S. Heidenbauer et al., 'Cross-Border Charitable Giving and Its Tax Limitations' *Bulletin for International Taxation* 67 (2013): 611, 618. Although the access to infringement dossiers is restricted, since 2005 DG TAXUD regularly publishes a press release ('IP' or, more recently, 'MEMO') on each case that reached the stage of a reasoned opinion. This brief overview is based upon the findings of the author's doctoral thesis 'Direct Taxation and the Internal Market: Assessing Possibilities for a More Balanced Integration' (University of Oxford, 2013), which is currently being turned into a monograph.
145. I.A. Koele, 'How Will International Philanthropy Be Freed from Landlocked Tax Barriers?' *European Taxation* 50 (2010): 9.
146. No. 2008/4577, IP/10/1252.
147. No. 2001/4881, IP/05/936.
148. No. 2005/5062, IP/06/1879.
149. No. 2005/2430, IP/06/1408.
150. No. 2007/2103, IP/08/1818.
151. No. 2005/2410, IP/06/1408.
152. No. 2005/2281, IP/06/964.
153. No. 2005/2301, IP/10/300 and IP/11/429.
154. No. 2006/5003, 2007/4203 and 2007/4823, IP/09/1764.

to the Court in 2011, but the decision has not been carried out.[155] Some cases in this category are quite recent: for instance, the reasoned opinion to Austria was sent in 2012.[156]

(c) *Taxation of foreign lottery winnings*. The infringement cases challenging a higher tax on winnings from foreign lotteries represented a follow-up to the previous CJEU case law on this matter.[157] The Commission announced three cases in this category over the years (Spain,[158] Poland,[159] and Portugal[160]). All of these cases were closed following the amendments of national laws. The Portuguese case, similar to *Commission v. Spain*,[161] involved an entity carrying out activities in the interests of society (Santa Casa da Misericórdia de Lisboa).

(d) *Inheritance taxes*. The tax treatment of inheritance and gifts was among the Commission's key priorities in 2010–2012.[162] The cases on charities, which followed a line familiar from *Missionswerk*, were considered alongside other cases dealing with the discriminatory application of inheritance and gift tax rules in a broader range of circumstances.[163] In addition, the Commission published a package of non-binding coordination measures (2011).[164] The Staff Working Document on non-discriminatory inheritance tax systems aimed to stimulate voluntary compliance by explaining the application of principles drawn from EU case law (this includes *Missionswerk*). The Commission Recommendation 2011/856/EU, however, concerned relief from the double taxation of inheritances and did not address the problem of specific tax obstacles faced by non-profit organizations in a cross-border context.

(e) *Tax incentives for research and education*. The Commission has not publicized any cases identical to *Commission v. Austria*, but this case can be linked to other R&D infringement cases where tax benefits are limited to the activities

155. DG TAXUD, 'CJEU Cases in the Area of, or Particular Interest for, Direct Taxation' < http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_direct_taxation_en.pdf> last accessed 6 Mar. 2015.
156. No. 2009/2335, MEMO/12/708.
157. *Schindler*, C-275/92, EU:C:1994:119; *Lindman*, C-42/02, EU:C:2003:613.
158. No. 2005/2431, IP/07/1030.
159. No. 2005/2426, IP/06/1360.
160. No. 2007/2138, IP/08/1355 and IP/09/567.
161. *Commission v. Spain*, C-153/08, EU:C:2009:618.
162. Commission, '28th Annual Report on Monitoring the Application of EU Law (2010)' COM(2011) 588 final; Commission, '29th Annual Report on Monitoring the Application of EU law (2011)' COM(2012) 714 final; Commission, '30th Annual Report on Monitoring the Application of EU law (2012)' (Report) COM(2013) 726 final.
163. No. 2006/2431, No. 2008/4566, and No. 2008/4749, IP/11/425 and IP/10/1253; see also MEMO/13/1005, IP/15/4674.
164. Commission, 'Tackling Cross-Border Inheritance Tax Obstacles within the EU' (Communication) COM(2011) 864 final; Commission Recommendation 2011/856/EU of 15 Dec. 2011 regarding relief for double taxation of inheritances [2011] OJ L336/81; Commission, 'Non-Discriminatory Inheritance Tax Systems: Principles Drawn from EU Case-Law' (Staff Working Paper) SEC(2011) 1488 final.

carried out domestically (e.g., Ireland,[165] Spain,[166] and Hungary[167]). This type of case was a particular priority in 2005 and 2007.[168]

The requirements of EU law added further complexity to the cost-benefit analysis of tax incentives for the non-profit sector. Confronted with the Commission's request, countries have been responding quite reluctantly. Non-profit organizations are sensitive to tax conditions: their funds depend on the exemption of their earnings from income tax and the tax incentives associated with donations. Any restrictions, thus, may cause negative social effects that are hard to mitigate, whereas any extension of preferential tax treatment unavoidably raises the question of whether the anticipated benefits of tax incentives in this field could potentially be achieved at a lower cost. In Poland, for instance, following the Commission's request for changes, the government initially sought to abolish tax incentives for donations to public benefit organizations, but public pressure reversed that process.[169] According to the Commission's records, in the vast majority of infringement cases, the Member States have chosen to open up the availability of tax incentives to foreign bodies rather than abolish the preferential tax treatment of domestic non-profit activities.[170]

[B] Legislative Initiatives Designed to Harmonize Member State Law

As seen above, negative harmonization has been used as an instrument for forcing change in the tax laws of EU Member States.[171] Both institutions, the Court and the Commission, have relied upon the principle of equal treatment to achieve the elimination of barriers that hinder the freedom of cross-border movement. The example of non-profit organizations takes us back to a wider discussion on the role of negative harmonization in the field of direct taxation. Its far-reaching implications are often criticized for violating the fiscal sovereignty of Member States and forcing suboptimal policy solutions.[172] However, the interventionist nature of the Court's jurisprudence

165. No. 2005/2427, IP/07/408.
166. No. 2003/2245, IP/05/933.
167. No. 2007/2017, IP/08/512.
168. Commission, '23rd Annual Report on Monitoring the Application of Community Law (2005)' COM(2006) 416 final; Commission, '25th Annual Report on the Application of EU Law (2007)' COM(2008) 777 final.
169. N. Dube, 'Creating a Tax-effective Philanthropic Market in the EU' (2007) *Effect: Foundations in Europe Together* < http://www.efc.be/programmes_services/resources/Documents/EFFECTspring2007.pdf> accessed 8 Jan. 2014.
170. S. Heidenbauer et al., 'Cross-Border Charitable Giving and Its Tax Limitations' *Bulletin for International Taxation* 67 (2013): 611, 618.
171. The discussion on the 'law-making' role of the Court of Justice has long roots in EU law scholarship; see, e.g., H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: Martinus Nijhoff Publishers, 1986); K.J. Alter, *The European Court's Political Power: Selected Essays* (Oxford: Oxford University Press, 2009).
172. See, e.g., M.J. Graetz and A.C. Warren, 'Income Tax Discrimination and the Political and Economic Integration of Europe' *Yale Law Journal* 115 (2006): 1186, 1254; cf. M. Isenbaert, *EC Law and the Sovereignty of the Member States in Direct Taxation* (The Netherlands: IBFD Publications, 2010).

can hardly be found surprising. As Barav rightly pointed out, '[j]udges have everywhere changed, improved and created the law, even though this has usually been presented as the outcome of a faithful, albeit constructive, interpretation of the law'.[173]

Although the reliance on negative harmonization can be justified, its limitations should be well understood. The Court is equipped with limited tools (basically, only with the definition of a restriction), so it cannot accommodate many important policy considerations (e.g., administration, revenues, and consequences).[174] Making critical decisions in the field of direct taxation, the Court depends on external actors: on the one hand and as discussed above, to ensure that the 'deregulation' messages are properly enforced and, on the other hand, to design policy solutions that balance any negative externalities. In order to achieve 'a true common market', the case law almost inevitably should be supplemented by 're-regulatory' measures.[175] In this respect the Commission has been less successful than in the field of enforcement. The Commission's efforts to introduce harmonizing measures have, so far, failed.[176]

In its most recent attempt, the Commission proposed a new European legal entity (a European Foundation) to facilitate organizations' operations in the cross-border context.[177] The draft Statute for a European Foundation required Member States to recognize these entities as being equivalent to domestic public benefit purpose foundations. 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 was seeking to alter the existing situation in two major ways. First, the bodies with the status of a European Foundation would rely upon the principle of 'mutual recognition' rather than 'equal treatment' alone. This would further weaken the possibilities for control exercised by tax authorities over bodies established elsewhere in the EU. 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

173. A. Barav, 'Omnipotent Courts', in *Institutional Dynamic of European Integration: Essays in Honour of Henry G Schermers*, eds D. Curtin & T. Heukels (The Netherlands: Kluwer Academic Publishers, 1994), 265.
174. Some particularly critical comments on tax policy choices made by the Court of Justice can be found in, e.g., M.J. Graetz and A.C. Warren, 'Income Tax Discrimination and the Political and Economic Integration of Europe', *Yale Law Journal* 115 (2006): 1186; M.J. Graetz & A.C. Warren, 'Dividend Taxation in Europe: When the ECJ Makes Tax Policy', *Common Market Law Review* 44 (2007): 1577.
175. For further reflections on this matter see P. Craig, 'The Evolution of the Single Market', in *The Law of the Single European Market: Unpacking the Premises*, eds C. Barnard & J. Scott (Oxford: Hart Publishing 2002), 1, 3.
176. Several proposals have been considered, most notably: in 1985, the Commission approved a draft Resolution of the Council and of the Ministers responsible for Cultural Affairs meeting within the Council concerning the adoption of tax measures in the cultural sector COM(85) 194 (not adopted); in 1992, the Commission proposed a Draft Statute for a European Association (withdrawn due to the lack of progress); and, more recently, the Commission put forward a proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final (withdrawn).
177. Commission proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final.

available to it: either the definition developed by national laws, or its EU alternative.[178] These and several other contentious features of this proposal made the prospects of its adoption highly uncertain.[179] The automatic application of equal tax treatment was questioned by the Council[180] and little progress had been achieved by the Council's working party.[181] In December 2014, the Commission withdrew the European Foundation proposal from the EU legislative agenda, as there was no 'realistic hope of securing unanimous support in the Council'.[182] Hence, the criticism against the Court can be partially turned against the legislators who fail to act.[183]

§11.05 CONCLUSION

In the *Stauffer* case, the Court set the foundations for protection 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. One of the most debatable issues at stake in *Stauffer* was to what extent the fundamental freedoms apply to the non-profit sector. 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. 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.

The principles that have been established by the Court in relation to the *Stauffer-Persche* line of cases may be narrowed down to two fundamental points of law. First, the free movement of capital precludes a Member State that otherwise provides certain tax benefits to non-profit organizations established in that Member State from refusing to grant the same treatment with respect to similar income to a non-profit

178. For more details, see K.J. Hopt et al., *The European Foundation, A New Legal Approach* (Cambridge: Cambridge University Press, 2006); S.J.C. Hemels & S.A. Stevens, 'The European Foundation Proposal: A Shift in the EU Tax Treatment of Charities?', *EC Tax Review* 6 (2012): 293; J.J.A.M. Korving & L.W.D. Wijtvliet, 'A Consideration of the European Foundation: Alle Menschen werden Spender', *Bulletin for International Taxation* 67 (2013): 491.
179. Note that the proposal was based on Art. 352 TFEU, which requires unanimous approval by the Council and the consent of the European Parliament.
180. European Parliament Resolution of 2 Jul. 2013 on the proposal for a Council regulation on the Statute for a European Foundation (FE) (COM(2012)0035 – 2012/0022(APP)).
181. The letter of 12 Jun. 2013 of the UK Minister for Civil Society at the Cabinet Office < http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-viii/8307.htm> accessed 12 Jan. 2014.
182. House of Commons European Scrutiny Committee, 'Thirty-third Report of Session 2014–15' (11 Feb. 2015).
183. Find broader comments on this point in A. Easson, 'Legal Approaches to European Integration: The Role of Court and Legislator in the Completion of the European Common Market' *Journal of European Integration* 12 (1989): 101, 119.

organization established in another Member State on grounds that come down to (directly or indirectly) the location criteria. 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. The demarcation ambiguously lies 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.

Second, the limitation of tax benefits with no possibility for a taxpayer to show that a non-profit organization established in another Member State satisfies the requirements imposed by national laws is in breach of EU law and cannot be justified by the need to ensure the effectiveness of fiscal supervision (this may differ in situations involving third countries). The principle of 'equal treatment' adopted by the Court neither requires EU Member States to grant tax benefits automatically without additional verification nor requires them to rely upon the legal definition of non-profit organizations adopted by another Member State. The burden of proof falls primarily upon the taxpayer, be that the non-profit organization or the donor. Furthermore, the Court allows tax authorities to presume that a foreign entity does not qualify; if the information provided to them is insufficient to verify the conditions imposed by national laws, the tax benefit in question may be refused.

In practical terms, 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 from the perspective of all major stakeholders (i.e., non-profit organizations, donors, and tax authorities). However, the solutions proposed by the Commission through legislative mechanisms have generated even wider disagreement and resistance. This lack of political agreement outweighs the deficiencies of negative harmonization. CJEU jurisprudence in relation to the tax treatment of non-profit organizations provides one of those examples in the field of direct taxation where the 'halfway' solution of 'equal treatment' proposed pursuant to negative harmonization and horizontally enforced by the Commission offers an acceptable – even though not fully satisfactory – balance.

The *Stauffer-Persche* line of cases raises some fundamental issues concerning the welfare integration process in the EU. It has generated a regulatory regime that better reflects the post-Maastricht stage and, even more so, the post-Lisbon stage, in the history of EU integration. The Internal Market is slowly turning into a union of EU citizens who, under Article 12 of the EU Charter of Fundamental Rights, enjoy the freedom of association at all levels and, according to the White Paper on European Governance, are encouraged to promote their interest through EU civil society.[184] The case law discussed in this Chapter illustrates how the Court, equipped with the 'economic' freedoms, promotes the fundamental values of solidarity among Member States and contributes to the shared vision and pursuit of public interests in the EU.

184. Commission, 'White Paper on European Governance' (Communication) COM(2001) 428 final, 14.

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