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**Corporate donations to charities. Comparison between
Finnish and Swedish tax legislation and the compatibility with
the EU law.**

by

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Summary

The growing role of charitable organizations is influenced by many different factors. The rise in the living standards has led to the more important role of the leisure time in people's life and increased the interest in association activities. In addition, internationalization and unemployment both have an impact on association activities.¹ At the global level, the environmental issues, malnutrition and development cooperation have affected the increasing role of the third sector².

The Government can support the non-profit sector, for instance by granting direct Government subsidies. In addition to this, the State may provide tax subsidies such as tax deductions, tax exemptions and lower tax rates.³ The price for the State to share the responsibility of the welfare services with the private actors by providing the tax incentives is a reduction in the tax base⁴. The national legislation of each Member State of the European Union grants different tax exemptions for non-profit organizations⁵. The Member States may independently determine which entities are granted tax benefits, under what conditions and to what extent these exemptions are granted. Nonetheless, in the tax regulations for non-profit organizations, various principles of the EU law must be taken into account, as well as in other areas of taxation.⁶ Thus, there is no common definition of a non-profit organization at EU level and no consensus on how these entities can be supported by taxation.

CC(C)TB proposals have included the provisions of donation deduction from the corporate income tax⁷. In addition, the European Commission proposal regarding European Foundations (FE) has been one of the undertakings for a more harmonized treatment of foundations in the European Union. However, the FE proposal was withdrawn and the next step towards a common corporate tax base in the European Union

¹ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 13.

² Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 431.

³ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 20.

⁴ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 431.

⁵ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p.51.

⁶ Similä, Jenni, *Beskattningen av allmännyttiga samfund*, Justitieministeriets publikation 27/2016, p. 12.

⁷ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS) and European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

is still on hold⁸. Current non-harmonized treatment of corporate donations in the European Union is neither ideal for charitable organizations nor for the donors. The variation in handling of corporate donations between the Member States results in both the donors and the non-profit organizations receiving different treatment depending on which Member State they are located in.

This paper will compare tax legislations regarding a right to deduct donations to charities in corporate taxation in Sweden and Finland. In Finland, according to article 57 of the Finnish Income Tax Act, companies may get a deduction of their donations to a charity in the area of European Union⁹. The Swedish tax law does not provide the right to deduct corporate donations to charities. Common regulation regarding the corporate donations in the Member States might result in more equal treatment between different Member States but in addition, in each Member State by clarifying the national legislation. For instance, in both of the above-mentioned countries the donations might be deductible if the costs are considered as business-related costs. The line between donations and deductible business expenses is not always clear¹⁰.

Preface

I would like to thank Cécile Brokelind, Marta Papis-Almansa and all our guest lecturers. I gratefully acknowledge comments from my supervisor Sigrid Hemels. I also wish to thank Tim Kopka and Meghan Young for your comments and suggestions.

⁸ European Commission Proposal for a Council Regulation on the Statute for a European Foundation (FE) COM/2012/035 final - 2012/0022 (APP) and European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

⁹ Article 57 of the Finnish Income Tax Act (TVL, 1535/1992).

¹⁰ Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki*: WSOYpro., 2000. Online version, Alma Talent Pro Fokus, chap. 8.

Abbreviation list

BEPS	OECD/G20 Base Erosion and Profit Shifting project
CBT	Common-base taxation
CCCTB	Common Consolidated Corporate Tax Base
CCTB	Common Corporate Tax Base
CFC	Controlled foreign corporation
CJEU	Court of Justice of the European Union
Commission	Commission of the European Union
CSO	Civil Society Organisation
EC	European Community, European Communities
ECJ	European Court of Justice, Court of Justice of the European Union
EEA	European Economic Area
FE	<i>Fundatio Europaea</i> (European Foundation)
EU	European Union
EU Court	Court of the European Union
EU law	Law of the European Union
EU tax law	Tax law of the European Union
EVL	<i>Elinkeinoverolaki</i> (Finnish Business Tax Act)
KHO	<i>Korkein hallinto-oikeus</i> (Supreme Administrative Court of Finland)
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union (Treaty of Lisbon of 13 December 2007 entered into force on 1 December 2009)
TFEU	Treaty on the Functioning of the European Union
TVL	<i>Tuloverolaki</i> (Finnish Tax Act)
VAT	Value Added Tax

1 Introduction

1.1 Background

Nordic welfare states have been built relying on the public sector which has taken care of the social welfare, health and education¹¹. Those services have been financed by taxes¹². The number of different associations is large, and their activities cover almost all areas of life, such as leisure and culture activities as well as having political influence¹³. The non-profit organization sector therefore has a significant economic and intellectual impact on the societies¹⁴.

Both in Finland and in Sweden, the Government has an important role providing the welfare services¹⁵. Nevertheless, different organizations can support tasks of a public sector. Many private actors such as non-profit associations and foundations may be able to perform their activities with more flexibility and efficiency than the public sector¹⁶. As a current example, many foundations have provided their help during the coronavirus crisis by supporting artists¹⁷ or making donations for the corona tests¹⁸. Therefore, it should not be concluded that the role of the charitable organizations would not be important in these countries, even if the role of the charities is smaller compared to many other Member States.

Direct taxation is not harmonized in the Member States¹⁹. Based on the settled case-law, even if direct taxation falls within the competence of the Member States, exercise of that competence must be in accordance with Union law²⁰. In practice this freedom means that

¹¹ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 13.

¹² Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 13.

¹³ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 429.

¹⁴ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 429.

¹⁵ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 13.

¹⁶ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 431.

¹⁷ Jonni Aromaa, "Analyysi: suomalainen taiteilija on köyhä kuin kirkonrotta, ja säätiöt yrittävät antaa tekoengitystä", Yle uutiset, 7 April 2020. <https://yle.fi/uutiset/3-11291827> Accessed 7 April 2020 and Jonni Aromaa, "Säätiöt ottivat työkkärin roolin ja ryhtyivät auttamaan taiteilijoita – sarjakuvantekijä Kati Rapia on yksi tuhansista tuen hakijoista", Yle uutiset, 7 April 2020. <https://yle.fi/uutiset/3-11285145> Accessed 7 April 2020.

¹⁸ "Wallenbergs stiftelse skänker 50 miljoner för fler coronatester", Dagens Industri, 22 March 2020, Available at: <https://www.di.se/nyheter/wallenbergs-stiftelse-skänker-50-miljoner-for-fler-coronatester/> Accessed 7 April 2020.

¹⁹ Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, International / European Union / Australia / Austria / Netherlands / United States – Cross Border Charitable Giving and Its Tax Limitations. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013. Chap. 3.2.

²⁰ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, par. 15.

the Member States have right to decide how they treat the charities in the taxation, although taking into consideration the Union law. In many cases, this means that Member States treat the taxation of corporate donations to the charities very different ways²¹. Many Member States support charitable giving by granting deductions and exceptions in taxation²². Nevertheless, it should be noted that a tax deduction for the corporates donating to the charitable organisations is not the only way the Government can support the charities. The financing of the charities can also be organized through direct Government subsidies for instance. However, that kind of structure of financing has its own problems regarding selectivity and abuse for instance²³.

1.2 Aim and the research question

The aim of this paper is to examine the corporate donation tax treatment in the Finnish and in the Swedish legislations. The main purpose is to have a view of the tax legislation in the above-mentioned countries regarding the tax treatment of the corporates making donations to the charities. The Member States are obliged to apply such tax legislation which is in accordance with the EU law. Therefore, the issues related to corporate donations in national legislation of above-mentioned countries will be also looked in the light of the European Union law.

The question of donations to the non-profit organization is the deduction right of the taxation of the donor and on the other hand, what is the tax liability of the donations in the receiving organization²⁴. This paper examines the companies' deduction right of the donations in Sweden and Finland. Sweden and Finland have different legislation regarding the tax treatment of the corporate donations to charities²⁵. Comparison of the legislation of these Member States shows not only two different outcomes of the tax treatment in these above-mentioned countries, but in addition, that non-harmonized tax treatment of corporate donations leads to different outcomes in the Union in general. Different Member States treat corporate donations various ways for tax purposes and

²¹ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 411.

²² Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 2.

²³ Välimäki, Mikko, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768 p. 767.

²⁴ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 295.

²⁵ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 417.

therefore the issues raised in this paper of the different tax treatment also apply to other Member States.²⁶

1.3 Method

The research method in this paper is the traditional legal doctrine approach²⁷. The author analyzes primary and secondary law sources. The main approach in this paper is the comparability analyses of Finnish and the Swedish national legislation regarding donations, as well as the European Union law. The material used in this paper includes case law of the CJEU, primary and secondary EU legislation, the CJEU case law, Finnish national tax legislation, Swedish national tax legislation and academic articles.

For the sake of clarity, this paper provides some definitions used in the national legislation in the original language. Regarding the Swedish legislation, there are some definitions provided in Swedish. Furthermore, some definitions used in the Finnish legislation are provided both in Finnish and (Finnish-)Swedish. It should be noted that the Finnish and Swedish legislation are not harmonized which means that same terminology does not always refer to the same legal form. Moreover, the Swedish language terminology may differ in Finland and Sweden even if the legal form would mainly be the same.

1.4 Delimitation

Associations and foundations are typical legal forms of non-profit organizations in Finland and in Sweden. However, it should be noted that associations and foundations are not automatically regarded as non-profit public benefit purpose entities²⁸. This paper examines the corporate donations to the charitable organizations as the organizations have been determined to be charitable according to the national legislation.

This paper does not examine the tax liability of non-profit organizations. It also does not consider whether an organization should or should not be regarded as a charitable organization regarding the right for the donation deduction. When referring to the

²⁶ Heidenbauer, Sabine, Hemels, Sigrud, Muehlmann, Brigitte W., Stewart, Miranda, Thömmes, Otmar and Tukić, Tina, *International / European Union / Australia / Austria / Netherlands / United States – Cross Border Charitable Giving and Its Tax Limitations*. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013, p. 7.

²⁷ Douma, Sjoerd, *Legal Research in International and EU Tax Law*, Kluwer, 2014, p. 17.

²⁸ Article 22 of Finnish Income Tax Act (TVL, 1535/1992) and Kap.7 Inkomstskattelag (1999:1229) (Sweden).

donation deduction in this paper, it is assumed that the recipient has been regarded as a charitable organization and the deduction right has been granted in accordance with the national legislation.

Based on the Finnish²⁹ and Swedish³⁰ legislation the private persons can get a tax deduction of their donations to the charities. This deduction right can be considered as encouragement for individuals to donate money to charitable organizations, and therefore support public benefit purpose activities. Nonetheless, this paper does not examine the tax deduction right of the private persons.

1.5 Outline

This paper proceeds in five chapters. Chapter 2 identifies a concept of charitable organizations. The term charitable organization has different meaning in different Member States and therefore it is necessary to clarify the term in this paper. Chapter 3 examines the tax deduction of corporate donations in Finland and Sweden. In Chapter 4 this paper discusses the EU regulation. Chapter 4 examines CJEU case law and its consequences in the tax legislation of the Member States. In addition, in Chapter 4 notes the CCC(C)TB and FE proposals and their possible impact on the treatment of the corporate donations in case the proposals were implemented in the Union. Chapter 5 concludes the findings of this paper.

²⁹ Article 98a of the Finnish Income Tax Act (TVL, 1535/1992).

³⁰ Proposition 2018/19:92 Återinförd skattereduktion för gåvor till ideell verksamhet.

2 Charitable organizations

2.1 Introduction

Charities have very different role in different Member States. In some Member States charitable organisations may have a role as an independent entity regarding the financing of their activity³¹ whilst in others direct subsidies from the Government are a significant source of income for the charities. In addition to this, religious communities have a significant role in the development of the non-profit sector globally³². This has been the case particularly in countries without a State Church³³. In Finland, the Evangelical Lutheran Church of Finland and the Finnish Orthodox Church still have their status as State Churches. Nevertheless, in Sweden, the Swedish State Church became independent in 2000³⁴. In the recent years, the role of the non-profit organisations has also increased in Finland and Sweden. This is a result of limited resources, as well as efficiency and cost problems in the public sector³⁵.

A charity can be a non-profit organisation, a charitable foundation or a charitable trust. This chapter examines a role of the charitable organizations and a definition of charitable organization in Finnish and Swedish tax legislation. Moreover, this chapter includes discussion on funding of charitable organizations.

2.2 Definition in the Finnish legislation

In Finland, neither associations (Swedish: *föreningar*, Finnish: *yhdistykset*) nor foundations (Swedish: *stiftelser*, Finnish: *säätiöt*) are necessarily regarded as charitable organizations. However, in practice, foundations are usually regarded as non-profit organizations³⁶. Tax exemption has been granted for the non-profit organization

³¹ Sigrid Hemels & Stan A. Stevens, *The European Foundation Proposal: A Shift in the EU Tax Treatment of Charities?*, EC Tax Review, Vol. 21 Issue 6, p. 293-308, 16p. Kluwer Law International 2012, p. 296.

³² Matti Virén, *Yleishyödylliset yhteisöt Suomessa: Verot, lahjoitukset ja avustukset tutkimuksen kohteena*, Forskningsrapporter från Svenska handelshögskolan, Hanken School of Economics Research Reports 74 Edita Prima Ltd, Helsinki 2014, p. 10.

³³ Matti Virén, *Yleishyödylliset yhteisöt Suomessa: Verot, lahjoitukset ja avustukset tutkimuksen kohteena*, Forskningsrapporter från Svenska handelshögskolan, Hanken School of Economics Research Reports 74 Edita Prima Ltd, Helsinki 2014, p. 10.

³⁴ Förster, Sarah, *Philanthropic Foundations and Social Welfare: A Comparative Study of Germany, Sweden and the United Kingdom (England)*. Springer Fachmedien Wiesbaden. 1st ed. 2020, p. 102.

³⁵ Matti Virén, *Yleishyödylliset yhteisöt Suomessa: Verot, lahjoitukset ja avustukset tutkimuksen kohteena*, Forskningsrapporter från Svenska handelshögskolan, Hanken School of Economics Research Reports 74 Edita Prima Ltd, Helsinki 2014, p. 16.

³⁶ Matti Virén, *Yleishyödylliset yhteisöt Suomessa: Verot, lahjoitukset ja avustukset tutkimuksen kohteena*, Forskningsrapporter från Svenska handelshögskolan, Hanken School of Economics Research Reports 74 Edita Prima Ltd, Helsinki 2014, p. 8.

(Swedish: *allmännyttiga samfund*, Finnish: *yleishyödylliset yhteisöt*) by the law of the tax exemptions for the certain organisations³⁷. The criteria of the public benefit entities are defined in the Article 22 of the Income Tax Act. The entity in the public benefit interest should meet the following requirements: Firstly, it acts exclusively and immediately for the public good in a material, mental, moral or social sense. Secondly, its activities are not limited to a limited number of persons. Thirdly, it does not provide an economic advantage to the participants in its activities. According to the Article 22, examples of a non-profit organization include a trade union, a labour market organization or a youth or sports club.

2.3 Definition in the Swedish legislation

A charity can be a non-profit organisation, a charitable foundation or a charitable trust for instance. The term “foundation” does not always refer to a charitable foundation or a foundation which need to have a public benefit purpose³⁸. In Sweden, typical non-profit organisation forms are associations (Swedish: *föreningar*) and foundations (Swedish: *stiftelser*). However, neither those terms automatically refer to a public benefit purpose entity. For example, a housing association (Swedish: *bostadsrättsförening*) is a typical economical association (Swedish: *ekonomisk förening*) in Sweden³⁹.

Furthermore, not all the foundations are non-profit organizations⁴⁰. A foundation must also meet certain requirements in order to be considered as a charitable organization / organization for the public good. Chapter 7 of Swedish Income Tax Act handles certain foundations and association in taxation⁴¹. In order to be regarded as non-profit organization, a foundation or an association should have one or more aims of public benefit purpose. Those aims can related to supporting of sport, culture, political or

³⁷ Lag om skattelättnader för vissa allmännyttiga samfund 13.8.1976/680 (Finland).

³⁸ Sigrid Hemels & Stan A. Stevens, *The European Foundation Proposal: A Shift in the EU Tax Treatment of Charities?*, EC Tax Review, Vol. 21 Issue 6, p. 293-308, 16p. Kluwer Law International 2012, p. 293.

³⁹ Skatteverkets hemsida, Ekonomisk förening eller bostadsrättsförening. Available at: <https://www.skatteverket.se/foretagochorganisationer/foreningar/ekonomiskforeningellerbostadsrattsforening.4.18e1b10334ebe8bc80004705.html>.

⁴⁰ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p.546.

⁴¹ 7. kap. IL, Inkomstskattelag (1999:1229) (Sweden).

religion activity⁴². In addition, European political parties as well as foundations are regarded as non-profit organizations (Swedish: *Ideella föreningar*)⁴³.

Charitable associations (Swedish: *allmännyttiga ideella föreningar*) and charitable foundations (Swedish: *allmännyttiga stiftelser*) have different position in the tax liability compared with non-charitable organizations both in direct⁴⁴ and in indirect⁴⁵ taxation. In order to get the tax-exempt status in Sweden the organization should be regarded as a charitable organization or belong in the category of the “Catalogue” which contains for instance tax-exempted Nobel Foundation⁴⁶.

2.4 Funding of charitable organizations

Non-profit organizations enjoy a special status in taxation in the Member States⁴⁷. One option for supporting charitable organizations in Society is direct Government subsidies. Another option is a funding from private actors which Government may encourage for instance by providing tax incentives for the donors. One possibility for the economical encouragement for private sector to make donations to the charitable organizations, is a properly targeted tax deduction option. Granting a donation deduction in taxation may encourage companies to make donations to charitable organizations and in that way support the public benefit entities which in the best scenario share the responsibility of the welfare services with the State.

In Finland and in Sweden many of the non-profit organizations benefit from direct Government subsidies⁴⁸. The problem with direct Government subsidies is that they are more selective compared to tax subsidies⁴⁹. Direct subsidies might also involve more bureaucracy and abuse⁵⁰. The direct subsidies might be problematic in the light of the EU

⁴² 7 kap. 4 § IL, Inkomstskattelag (1999:1229) (Sweden).

⁴³ 2. kap. 4 c § IL, Inkomstskattelag (1999:1229) (Sweden).

⁴⁴ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p.546.

⁴⁵ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p.559

⁴⁶ *Understanding European Research Foundations: Findings from the FOREMAP project*. Alliance Publishing Trust 2009, p. 100.

⁴⁷ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015.

⁴⁸ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 411.

⁴⁹ Mikko Välimäki, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768, p. 767.

⁵⁰ Mikko Välimäki, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768, p. 767.

law, in the case that mainly domestic organizations can benefit from incentives. It should be also noted that the direct Government subsidies would most likely favour the domestic charities or a least certain kind of charitable organizations. In comparison to this, tax deduction in corporate income taxation would, at least idealistically, benefit all the companies donating money to charitable organizations equally. From that point of view, the direct subsidies are in fact more selective than tax subsidies⁵¹.

The critic against the tax deductions of the donations argues that the deductions complicate the taxation system and increase bureaucracy⁵². Nevertheless, in the longer term, the broad deduction right of the corporate donations could shift Society from a Government subsidy-based system to a more donation-based regime. In addition, a Government subsidy-based system has its own problems as well. For instance, the case of the Finnish housing foundation *Nuorisosäätiö* showed problems related to political connections. The problems arise when non-profit organizations seek to have a social impact and subsidy distributors are political actors. Even if there is no direct link between the politician and the foundation, the corruption connection risk does exist.⁵³ Furthermore, the direct Government subsidies might raise a question of selectivity⁵⁴. However, there may also be problems related to donations from the private sector. A risk of a private donation-based funding is, for instance, that donations change activity of the charitable organization to suit better with the preferences of a donor⁵⁵.

⁵¹ Mikko Välimäki, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768, p. 767.

⁵² Välimäki, Mikko, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768 p. 767.

⁵³ Virén, Matti, *Yleishyödylliset yhteisöt Suomessa: Verot, lahjoitukset ja avustukset tutkimuksen kohteena*, Forskningsrapporter från Svenska handelshögskolan, Hanken School of Economics Research Reports 74 Edita Prima Ltd, Helsinki 2014, p. 74.

⁵⁴ Välimäki, Mikko, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768 p. 767.

⁵⁵ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 416.

3 Tax deduction of the corporate donations to charities

3.1 Introduction

This section investigates right to deduct donations to charitable organizations in Finland and Sweden. A corporate donation deduction can be regarded as an efficient way to support third sector because it encourages private sector donors to make donations to charitable organizations⁵⁶. Tax incentives for charitable giving are common in many Member States⁵⁷. Usually, the donation deduction right has been limited to donations to religious, scientific and charitable purposes⁵⁸. The most common system is one in which donations are deductible up to a certain maximum amount in corporate income taxation⁵⁹.

3.2 Corporate donations in the Finnish legislation

In Finland, non-profit organizations receive Government subsidies as well as benefitting from tax exemptions⁶⁰. In addition, Finnish tax legislation provides a donation deduction of corporate income tax. The purpose of the donation deduction is to financially encourage the corporates to make donations which might otherwise not be made at all⁶¹. This will, ideally, result in the private sector making more donations to public benefit entities, and thus the public sector may share funding of public benefit entities with the private sector's donors.

Corporate entity is a legal form of a company or an organization in the Finnish legislation. Corporate entities, including for example limited liability companies (Swedish: *aktiebolag*, Finnish: *osakeyhtiöt*), associations (Swedish: *föreningar*, Finnish: *yhdistykset*), foundations (Swedish: *stiftelser*, Finnish: *säätiöt*), and housing associations (Swedish: *bostadsaktiebolag*, Finnish: *asunto-osakeyhtiöt*) are subject to corporate income tax. Corporate income tax rate in Finland is 20%.⁶²

⁵⁶ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 415.

⁵⁷ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 2.

⁵⁸ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 411

⁵⁹ Virén, Matti, *Yleishyödylliset yhteisöt Suomessa: Verot, lahjoitukset ja avustukset tutkimuksen kohteena*, Forskningsrapporter från Svenska handelshögskolan, Hanken School of Economics Research Reports 74 Edita Prima Ltd, Helsinki 2014, p. 48.

⁶⁰ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 20.

⁶¹ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd.

⁶² Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki: WSOYpro.*, 2000. Online version, Alma Talent Pro Fokus, chap. 5.

According to the article 7 of the Finnish Business Tax Act (EVL), expenses and losses arising from the acquisition or retention of income in business activities are deductible (*”Avdragbara inom näringsverksamheten äro utgifter för inkomstens förvärvande och bibehållande samt därav härrörande förluster”*). Other expenses are not, in principle, deductible in taxation. Therefore, as donations to the charitable organizations are not related to the acquisition or retention of business income, the cost are not tax deductible as business costs. The donations are not considered to promote the business⁶³.

However, based on the donation deduction, certain corporate donations are deductible for tax purposes. In the Finnish tax legislation, the corporate donation deduction has been granted according to the Finnish Tax Act (TVL) instead of the Business Tax Act (EVL) where most of the other business-related deductions are listed. According to article 57 of the Finnish Tax Act, a corporate entity shall receive a deduction of a donation made for the purpose of supporting science, art or preservation of Finnish cultural heritage to a state or a university/collage receiving public funding in the European Economic Area (EEA). The donation shall be not less than EUR 850 and not more than EUR 250,000. Furthermore, a donation for the purpose of promoting science, art or the preservation of Finnish cultural heritage to an association, foundation or fund located in the EEA whose main purpose is to support science or art or preservation of Finnish cultural heritage, is entitled to a tax deduction. That applies to a donation of not less than EUR 850 and not more than EUR 50,000⁶⁴.

When the recipient of the donation is an association, foundation or fund is established in the EEA, the recipient must apply a confirmation from the Finnish Tax Administration to be regarded as a “recipients of donations appointed by the Tax Administration”. The Finnish Tax Administration has published the list of all those charities and foundations in their webpage. The list includes around 200 organizations⁶⁵. Only monetary donations are deductible, i.e. donations made as non-monetary assets are not deductible. The right to deduct donations only applies to corporates, i.e. partnerships (Swedish: *sammanslutning*, Finnish: *yhtymä*), for example, are not entitled to deduction⁶⁶. The Finnish Tax Administration could also name an association or foundation in another

⁶³ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 409.

⁶⁴ Article 57 of the Finnish Income Tax Act (TVL, 1535/1992).

⁶⁵List of the recipients of donations appointed by the Finnish Tax Administration. *Föreningar som Skatteförvaltningen namngivit (donationsavdrag, 57 § i inkomstskattelagen)*, updated 27 January 2020.

⁶⁶ Note that a partnership is not an independent taxpayer in the Finnish tax legislation.

Member State or a fund operating in connection with the above as the recipient of a deductible donation, the main purpose of which is to support the preservation of science, art or Finnish cultural heritage. Nevertheless, to become named by the Finnish Tax Administration, it would require that a foreign association or foundation is comparable to a domestic association or foundation.⁶⁷

In addition, the corporates may deduct the monetary or non-monetary donations up to EUR 850 per recipient of a local or business-related non-profit organization. However, a donation for political purposes is not deductible. In fact, donations for anything other than local or business-related non-profit organizations are not deductible, because those donations are regarded to be made primarily for the charitable purposes and not for promoting the business activities. Those donations for the purpose of supporting the science, art or Finnish cultural heritage may be deductible under the Article 57 of the Finnish Income Tax Act as described above. The Business Income Tax Act does not contain provisions on the small donations made for the local or business-related organizations, but those expenses are deductible as marketing expenses according to the Tax Administration's guidelines⁶⁸.

One question is related to the line between donations, marketing gifts and representation gifts. According to the Article 8 of the Business Income Tax Act, the marketing gifts are regarded as business costs and therefore they are fully deductible for tax purposes⁶⁹. In case the expenses would be considered as representation, half of the representation gifts are deductible under the Article 8 of the Business Income Tax Act⁷⁰. Sometimes the question may even be between deductible marketing expenses and non-deductible donation or hobby expenses⁷¹. However, the intention of the Article 57 of the Finnish Income Tax Act is not to extend or reduce the right to deduct a donation made in business-purposes⁷². Companies may even be a member of one or several non-profit associations and pay membership fees mainly for charitable purposes⁷³. Such membership fees are not

⁶⁷ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 14.

⁶⁸ Skatteförvaltningens anvisning för harmonisering av beskattningen för 2019, diarienummer VH/2814/00.01.00/2019

⁶⁹ Article 8, Finnish Business Tax Act (EVL, 360/1968).

⁷⁰ Article 8, Finnish Business Tax Act (EVL, 360/1968).

⁷¹ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 296

⁷² Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki: WSOYpro.*, 2000. Online version, Alma Talent Pro Fokus, chap. 8.

⁷³ Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki: WSOYpro.*, 2000. Online version, Alma Talent Pro Fokus, chap. 8.

usually regarded as deductible business-related costs⁷⁴. However, small and reasonable membership fees may be considered business-related marketing costs as explained above⁷⁵.

3.3 Corporate donations in the Swedish legislation

Charitable foundations have a growing part of Swedish Society⁷⁶. In Sweden the corporate income tax (Swedish: *bolagsskatt*) rate is 21,4 %⁷⁷. The main principle is the Swedish income tax legislation is that expenditure on acquiring and maintaining income should be deducted as an expense (“*utgifter för att förvärva och bibehålla inkomster ska dras av som kostnad*”)⁷⁸. A deduction of corporate donations to charities does not exist in the Swedish legislation. The gifts are not deductible⁷⁹.

In Sweden, the corporates have a deduction of sponsoring⁸⁰. Sponsoring expenses are deductible according to the Article 16 chapter 1 of the Swedish Income Tax Act. However, under the Article 9 chapter 2 of the Swedish Income Tax Act, the expenses are not deductible if they are considered as gifts. The expenses may also be regarded as representation, personal costs or research and development expenses. Research contributions are also deductible⁸¹.

A concept “sponsorship” does not exist in the Swedish Income Tax Act⁸². This term is generally understood to be financial support from companies to sports, culture or other non-profit activities⁸³. In addition, it should be noted that in taxation there is an assumption that sponsorship expenses constitute expenses for the acquisition or retention of income. In other words, in order for the expenses to be deductible, sponsorship expenses are expected to increase or retain the business income.

⁷⁴ Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki*: WSOYpro., 2000. Online version, Alma Talent Pro Fokus, chap. 8.

⁷⁵ Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki*: WSOYpro., 2000. Online version, Alma Talent Pro Fokus, chap. 8.

⁷⁶ Filip Wijkström & Stefan Einarsson, *Comparing Swedish Foundations: A Carefully Negotiated Space of Existence*, American Behavioral Scientist 2018, Vol. 62(13) 1889–1918. SAGE Publications, p. 1897

⁷⁷ Sweden will reduce the corporate income tax rate till 20,6 % from on 2021.

⁷⁸ 16 kap. 1 § IL, Inkomstskattelag (1999:1229)

⁷⁹ 9 kap. 2 § IL, Inkomstskattelag (1999:1229)

⁸⁰ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p. 558.

⁸¹ Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p. 558.

⁸² Påhlsson, Robert, *Avdrag för sponsring*, Skattenytt 2000, p. 630-638, p. 630.

⁸³ RÅ 2000 ref. 31 I

Sponsoring can be regarded as a part of marketing as it can improve a company's image⁸⁴. Particularly for big companies, sponsoring is often not just about corporate social responsibility, but also their status and desire to be seen in a good light by society⁸⁵. The right to the sponsoring deduction requires that the expenses are not regarded as gifts. Basically, it means a direct compensation⁸⁶. However, in practice, the value of the compensation is difficult to determine⁸⁷.

3.4 Comparison between Finnish and Swedish deduction right

Both in Finland and in Sweden a right to deduct donations to charitable organizations in corporate income taxation is limited. Corporate donations to charities are deductible under certain circumstances under the Article 57 of the Finnish Income Tax Act⁸⁸. However, a right to deduct donations in corporate income taxation is very limited in practice⁸⁹. Donations are not usually regarded as deductible expenses but in certain situations can they be deductible as business-related costs⁹⁰. Swedish tax legislation does not provide a right to deduct donations to charitable organizations in corporate income taxation⁹¹. However, business-related expenses such as sponsoring expenses are deductible⁹².

A problem with the Finnish deduction right is selectivity⁹³. Even if a foundation or an association would have been considered as a non-profit organization in its own taxation, it does not mean that the corporate would be granted a tax deduction when donating money to that organization. Relevant question is whether a tax deductibility should be granted to all entities that are regarded as non-profit organizations⁹⁴. A right to deduct corporate donations applies to donations made those non-profit organizations whose main

⁸⁴ Bjuvberg, Jan, *Avdrag för utgifter för sponsring m.m. – igen*, Skattenytt 2007, p. 101-111, p. 104.

⁸⁵ Bjuvberg, Jan, *Avdrag för utgifter för sponsring m.m. – igen*, Skattenytt 2007, p. 101-111, p. 104.

⁸⁶ Bjuvberg, Jan, *Avdrag för utgifter för sponsring m.m. – igen*, Skattenytt 2007, p. 101-111, p. 106

⁸⁷ Bjuvberg, Jan, *Avdrag för utgifter för sponsring m.m. – igen*, Skattenytt 2007, p. 101-111, p. 106

⁸⁸ Article 57 of the Finnish Income Tax Act (TVL, 1535/1992).

⁸⁹ Kontro, Minna, *Hyväntekevääisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 410.

⁹⁰ Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki: WSOYpro.*, 2000. Online version, Alma Talent Pro Fokus, chap. 8.

⁹¹ 9 kap. 2 § IL, Inkomstskattelag (1999:1229).

⁹² Vanistendael, Frans (ed.) et al., *Taxation of Charities*, Volume 11 in the EATLP International Tax Series, 2015, p. 558.

⁹³ Mikko Välimäki, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768, p. 765.

⁹⁴ Mikko Välimäki, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768, p. 765.

purpose is to support science or art, or to preserve the Finnish cultural heritage⁹⁵. Nonetheless, it should be noted that not all the foundations are considered to supporting science or arts⁹⁶. For instance, in the Finnish Court case KHO 1999:76 the Court stated that the foundation, whose activities consisted mainly of the development of the status, training and co-operation of staff in the fields of education and training, was not considered to be a foundation whose main purpose is to support science and the arts. Therefore, the Court took a view that the foundation had not to be named as the recipient of income tax-deductible donations⁹⁷.

In both legislation, one interesting question is related to a line between non-deductible expenses and deductible business-related expenses. In Finland, there is also a problem with a right to deduct donations only to recipient of a local or business-related non-profit organization. In fact, not all the non-profit organizations have a possibility to benefit from the sponsoring agreements where some others cannot benefit from those due to the nature of their activities⁹⁸. One question regarding the relation between business costs and donations is related to the marketing. Donation to a charitable organization can be made for a good purpose but also in order to improve the visibility in a good light⁹⁹. For example, in Finland by donating to Christmas Spirit campaign (Finnish: *Hyvä Joulumieli-kampanja*), the company could get its name to the webpage as well as visibility in the Social Media¹⁰⁰. The organization provides gift vouchers to families with children in need due to illness, low income or other kind of crisis or problems. The relevant question is whether any gift can be gratuitous. In addition, does for instance a sponsoring agreement in that kind of situation effect the determination of the deductibility of the expenses¹⁰¹.

A donation deduction right should be also considered critically. In case that the deduction right is very limited, it will not encourage the companies to put effort into charitable giving and therefore will not achieve the desired outcome. For example, the current deduction right in Finland may result in unequal position between the charitable bodies. The impact of the very limited list of the recipient may be that the donor prefers to change the recipients of the donation to another which is included in the list of the Finnish Tax

⁹⁵ Viitala, Tomi., Tikka, Kari S., Nykänen, Olli & Juusela, Janne. *Yritysverotus I-II Helsinki*: WSOYpro., 2000. Online version, Alma Talent Pro Fokus, chap. 8.

⁹⁶ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 298.

⁹⁷ KHO 1999:76.

⁹⁸ Similä, Jenni, *Beskattningen av allmännyttiga samfund*, Justitieministeriets publikation 27/2016, p. 26.

⁹⁹ Bjuvberg, Jan, *Avdrag för utgifter för sponsring m.m. – igen*, Skattenytt 2007, p. 101-111, p. 104.

¹⁰⁰ The Christmas Spirit campaign “Hyvä Joulumieli” <https://hyvajoulumieli.fi/en/corporate-donations/>.

¹⁰¹ Bjuvberg, Jan, *Avdrag för utgifter för sponsring m.m. – igen*, Skattenytt 2007, p. 101-111, p. 109.

Administration¹⁰². The companies also might not choose to use this deduction right in case the same expenses would be fully deductible as business-related costs.

One question is, how much and in which way the Government should encourage corporates to act in solidarity. A lack of broad deduction right in these countries indicates the presumption that society is still organized based on the Government subsidies even if in fact the responsibility of the welfare services is increasingly transferred to non-profit organizations¹⁰³.

¹⁰² Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 410.

¹⁰³ Mikko Välimäki, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropolitiikkaa*, Lakimies 5/2006 p. 750–768, p. 767.

4 EU regulation

4.1 Introduction

This chapter will examine the EU regulation, including settled CJEU case law as well as European Foundation and CC(C)TB proposals which included provisions related to a definition of a charitable organization and a right to deduct corporate donations to charitable bodies. This chapter also examines their effect on national legislation of the Member States.

4.2 Background of the EU regulation

The direct taxation is not harmonized in the Member States¹⁰⁴. The Member States do not apply common rules regarding the tax treatment of the charities and donations to the charitable organizations. In practice the different Member States are allowed to treat charities in very different ways. Member States can provide tax subsidies are granted to the companies making donations to charities in different ways or cannot grant any deductions. Based on the settled case law¹⁰⁵, the Court does not require a common recognition of charities in the Member States¹⁰⁶. However, based on the European Foundation proposal, it can be inferred that there has been a cautious intention to find more coherent tax treatment of the charities in the Union¹⁰⁷.

Even if the treatment of charitable organizations and their donors in direct taxation falls within the competence of the national legislation of the Member States, the national legislation is obliged to be in accordance with the Union law¹⁰⁸. According to the Article 56 of the EC Treaty all restrictions on the movement of capital between Member States are prohibited. In practice this means, for instance, that the non-domestic charities must be treated similar way as similar domestic charities¹⁰⁹. Based on the settled case law,

¹⁰⁴ Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: *Bulletin for International Taxation*, 2013 Volume 67, No. 11. IBFD 2013. Chap. 3.2

¹⁰⁵ Judgement of the Court of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33 & Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568.

¹⁰⁶ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). *Intertax*, Vol. 8-9, pp. 424-435, 2009.

¹⁰⁷ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). *Intertax*, Vol. 8-9, pp. 424-435, 2009, p. 16.

¹⁰⁸ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, par. 15

¹⁰⁹ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). *Intertax*, Vol. 8-9, pp. 424-435, 2009, p. 4.

European Union countries should allow for a tax deduction of contributions in cross-border situations, i.e. paid to a foreign charity¹¹⁰.

4.3 CJEU Case Law

In the case *Walter Stauffer* C-386/04 the question was about “whether the provisions of the EC Treaty relating to the right of establishment, the freedom to provide services and/or the free movement of capital preclude a Member State, which exempts from corporation tax rental income received in its territory by charitable foundations with, in principle, unlimited liability to tax if they are established in that Member State, from refusing to grant the same exemption to a charitable foundation governed by private law in respect of similar income on the basis that, as it is established in another Member State, it has only limited liability to tax in its territory”¹¹¹. In the case *Walter Stauffer* C-386/04 the Court stated that both resident and non-resident charities should be treated similar way in taxation¹¹². In other words, non-domestic charities which meet the same conditions as domestic charities are to be treated similarly in taxation and the same tax exceptions shall be granted¹¹³. Furthermore, in the case *Walter Stauffer* C-386/04 the Court took into a consideration the risk that criminal organizations may use the legal status of a foundation for money laundry and other illegal transfers between the Member States¹¹⁴. However, the Court took a view that precluding the tax exemption for the non-domestic foundation because of the risk of the abuse goes beyond what is necessary to combat crime¹¹⁵.

The case *Persche* C-318/07¹¹⁶ handled the everyday consumer goods as a gift and a tax deduction right. Firstly, the Court stated that not just the monetary gifts but also gifts

¹¹⁰ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 2.

¹¹¹ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, par. 14

¹¹² Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013. Chap. 3.2.

¹¹³ Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013. Chap. 3.2.

¹¹⁴ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, par. 60.

¹¹⁵ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, par. 61.

¹¹⁶ Judgement of the Court of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33.

“made in kind in the form of everyday consumer goods” for the charitable organizations fall under the provisions of the free movement of capital of the Treaty¹¹⁷. Secondly, the Court stated that the national legislation which does not grant the gift deduction for the charities located in another Member State without possibility for the taxpayer to show that the non-domestic charity meets the requirements of a national legislation to be regarded as a charitable organisation, is not in accordance with the Union law¹¹⁸. Regarding the third countries, the Court stated that Member States have right to deny the deduction right of the donations to non-member country organizations because the non-member countries do not have any international obligations to provide the necessary information¹¹⁹.

In the case *Missionswerk Werner Heukelbach* C-25/10¹²⁰ the question was about inheritance tax. The Court held that Article 63 TFEU precludes such national legislation which allows a reduced rate of inheritance tax to be applied only to charitable organizations established in that Member State or in the Member State where the deceased resided or had his/her place of work at the time of death or previously¹²¹.

In the case *Commission v Austria* C-10/10 the Court held that Austria had failed its obligations provided in the Article 56 EC and Article 40 of the EEA Agreement when in its legislation did not grant a tax deduction of the gifts to research and teaching institutions located in a country other than Austria¹²².

4.4 European Foundation (FE) proposal

The European Commission presented “Proposal for a Council Regulation on the Statute for a European Foundation” in 2012¹²³. The European Foundation, or *Fundatio Europaea* (FE), is a legal entity which was offered a solution for inefficient and costly treatment of

¹¹⁷ Judgement of the Court of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, par. 30.

¹¹⁸ Judgement of the Court of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, par. 72.

¹¹⁹ Judgement of the Court of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, par. 70.

¹²⁰ Judgement of the Court of 10 February 2011, *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65.

¹²¹ Judgement of the Court of 10 February 2011, *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, par. 37.

¹²² Judgement of the Court of 16 June 2011, *Commission v Austria*, C-10/10, EU:C:2011:399.

¹²³ Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: *Bulletin for International Taxation*, 2013 Volume 67, No. 11. IBFD 2013. Chap. 6.2.1.

public benefit entities in the cross-border operations¹²⁴. However, the proposal was withdrawn in 2015. In the explanatory memorandum of the proposal the Commission motivated the important role of the foundations by contributing the fundamental values and objectives of the European Union, including “respect for human rights, the protection of minorities, employment and social progress, protection and improvement of the environment or the promotion of scientific and technological advances”¹²⁵.

The non-resident charities may face practical issues regarding their right to the same treatment in taxation as charities in resident. The charities and their donors hold “the burden of proof”, and are therefore required to prove that they fulfil the definition for the public benefit purpose in the domestic legislation and therefore they should be regarded as a donation which meets the same conditions as the similar domestic charities.¹²⁶ The FE proposal would have made sure that charitable organizations and their donors do not have to face these problems because the FE would have been equivalent to the domestic public benefit purpose entities¹²⁷.

4.5 CC(C)TB proposals

Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)¹²⁸ is a corporate tax reform element which intends is to harmonize corporate tax systems and internal markets and prevent tax avoidance¹²⁹. In the current situation, the Member States can compete by providing tax incentives¹³⁰. This can result in distortions in the functioning of the internal market which CC(C)TB aims to decrease¹³¹.

¹²⁴ Sigrid Hemels & Stan A. Stevens, *The European Foundation Proposal: A Shift in the EU Tax Treatment of Charities?*, EC Tax Review, Vol. 21 Issue 6, p. 293-308, 16p. Kluwer Law International 2012, p. 293

¹²⁵ European Commission Proposal for a Council Regulation on the Statute for a European Foundation (FE) COM/2012/035 final - 2012/0022 (APP), chap. 1.1.

¹²⁶ Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013. Chap. 6.1.*

¹²⁷ Sigrid Hemels & Stan A. Stevens, *The European Foundation Proposal: A Shift in the EU Tax Treatment of Charities?*, EC Tax Review, Vol. 21 Issue 6, p. 293-308, 16p. Kluwer Law International 2012, p. 301

¹²⁸ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS) and European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS)

¹²⁹ Mäki-Lohiluoma, Juho, *The CCCTB Initiative as a Possible Solution to the Conflict Between the Internal Market and National Tax Autonomy*, Helsinki Law Review, 1/2019, pp. 150–179, p. 151

¹³⁰ Mäki-Lohiluoma, Juho, *The CCCTB Initiative as a Possible Solution to the Conflict Between the Internal Market and National Tax Autonomy*, Helsinki Law Review, 1/2019, pp. 150–179, p. 169

¹³¹ Mäki-Lohiluoma, Juho, *The CCCTB Initiative as a Possible Solution to the Conflict Between the Internal Market and National Tax Autonomy*, Helsinki Law Review, 1/2019, pp. 150–179, p. 169

The first CCCTB proposal 2011 was withdrawn but in 2016 the Commission re-launched the project building on the 2011 proposal and comments received from the Council. The latest version includes two steps. The first action, CCTB, means that the Member States are obliged to follow the common rules in calculation of the taxable profit. In practice that would lead to a situation where the taxable corporate income profit would be calculated in a same way in every Member State. Nevertheless, CCTB does not determine a common corporate tax rate, and instead each Member State is still able to follow its own tax policies regarding the corporate income tax rate. Common Consolidated Corporate Tax Base (CCCTB) is a second step further which means that the total profits of the consolidated corporations operating in different Member States are to be harmonized between those Member States¹³². After that each Member State would tax its own part according to the national legislation. In the second part of the corporate tax reform, CCCTB, the tax base would be consolidated at the group level.¹³³

The CCCTB proposal 2011 was specific regarding charities and the corporate donations to the charitable bodies.¹³⁴ Firstly, the definition for charitable bodies was provided in the Article 16. Accordingly, the organisation can be regarded as charitable if it meets certain conditions. First, the legal person should have been recognised as a charity under the national legislation of the Member State in which the charity is established. The second condition provided in the Article 16(b) is that “its sole or main purpose and activity is one of public benefit; an educational, social, medical, cultural, scientific, philanthropic, religious, environmental or sportive purpose shall be considered to be of public benefit provided that it is of general interest”¹³⁵. Thirdly, the assets of the charity should be “irrevocably dedicated to the furtherance of its purpose”. The fourth condition is that the charity should be required for the disclosure of information of its accounts and activities. Last, the charity shall not be a political party in the Member State in which it is located.¹³⁶

Secondly, the CCCTB proposal 2011 included more specific article regarding the deductible expenses of the gifts to the charities. Article 12 of the proposal provided the

¹³² Mäki-Lohiluoma, Juho, *The CCCTB Initiative as a Possible Solution to the Conflict Between the Internal Market and National Tax Autonomy*, Helsinki Law Review, 1/2019, pp. 150–179, p. 151.

¹³³ European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

¹³⁴ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS).

¹³⁵ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS).

¹³⁶ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS).

following provision regarding the deductible expenses: “Deductible expenses shall include all costs of sales and expenses net of deductible value added tax incurred by the taxpayer with a view to obtaining or securing income, including costs of research and development and costs incurred in raising equity or debt for the purposes of the business”¹³⁷.

Deductible expenses shall also include gifts to charitable bodies as defined in Article 16 which are established in a Member State or in a third country which applies an agreement on the exchange of information on request comparable to the provisions of Directive 2011/16/EU. The maximum deductible expense for monetary gifts or donations to charitable bodies shall be 0.5% of revenues in the tax year.”¹³⁸ In practice, the CCCTB proposal 2011 would have determined the maximum deductible amount of the corporate donations to the charities.

Thirdly, according to the in the Article 14(1)(h) of the CCCTB proposal 2011, “monetary gifts and donations other than those made to charitable bodies as defined in Article 16” shall be treated as non-deductible expenses.¹³⁹ It is clear that in case the CCCTB 2011 had approved, it would have clarified and standardized the treatment of the corporate donations to the charities in the taxation.

The CC(C)TB proposal 2016 does not include as specific articles regarding the deduction of the corporate donations to the charities. The Chapter II, Articles 6-14, of the CC(C)TB proposal 2016 handles calculation of the tax base. According to the Article 9(4) of the deductible expenses, “Member States may provide for the deduction of gifts and donations to charitable bodies”.¹⁴⁰ This means that the new version of the proposal does not include any definition for the charitable organizations, neither determine the maximum deductible amount. of the corporate donations.

There has been an intention to further harmonize taxation of charities and their donors in the EU. The FE proposal and the CC(C)TB proposal have both provided more coherent treatment in the Member States. However, the latest version of the CC(C)TB from 2016

¹³⁷ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS).

¹³⁸ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS).

¹³⁹ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS).

¹⁴⁰ European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

is not likely to provide a solution for the advantage the Finnish charities and donors compared with the Swedish because it does not oblige the Member States to grant the corporate donation deduction in their national legislation. The CC(C)TB 2016 proposal only allows the Member States provide for the deduction of the donations to the charitable organizations but it does not require that¹⁴¹.

CC(C)TB proposal does not include proposals regarding the line between business-related costs and donations. According to the Article 9 of the CC(C)TB proposal 2016, “expenses shall be deductible only to the extent that they are incurred in the direct business interest of the taxpayer”. In the same Article, the costs for research and development are also noted under the deductible expenses. In practice, the CC(C)TB proposal does not provide a solution to determine the line between the deductible business-related costs and donation costs, which each Member State have right to determine whether the donations are deductible under the national legislation or not¹⁴². It means that the Member States can continue to define the criteria for charitable organizations in their national legislation. Furthermore, the Member States are free to decide whether, and in which way, they grant tax incentives in their national legislation regarding the donations to the charitable bodies. Nonetheless, domestic and cross-border treatment should not be different unless the situations are not objectively comparable.

4.6 Impact on national legislations

The case *Walter Stauffer* C-386/04¹⁴³ may partly explain why the broad deduction right of the corporate donations has not gained ground in the Member States. Lack of control over the receiving organization is seen as a risk for illegal transfers¹⁴⁴ and loss of tax revenues. On the other hand, the harmonized rules regarding the corporate donations to charities as well as a common definition for charitable bodies in the Union could ideally ensure that the status of charitable organizations is not used for the criminal purposes.

¹⁴¹ European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS), Art. 9(4).

¹⁴² European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

¹⁴³ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, par. 60.

¹⁴⁴ Sabine Heidenbauer, Sigrid Hemels, Brigitte W. Muehlmann, Miranda Stewart, Otmar Thömmes and Tina Tukić, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: *Bulletin for International Taxation*, 2013 Volume 67, No. 11. IBFD 2013. Chap. 1.

After case *Walter Stauffer* C-386/04¹⁴⁵ many Member States were obliged to change their legislation regarding the right to deduct donations to the charities in taxation¹⁴⁶. Sweden does not provide a right to deduct donations to charities in corporate taxation. Thus, case *Walter Stauffer* C-386/04 did not change the current legislation regarding corporate donations. In Finland, in the Government proposal 2007 the current legislation was founded problematic from the point of view of Community law because only donations to the domestic entities were deductible¹⁴⁷. However, donations to similar entities in the EEA were not deductible. In the Government proposal of the donation deduction, it was also noted that the current donation deduction applied only to domestic donors. The donations were deductible only if the donation was given to the Finnish state or to a domestic university. In addition, the Finnish Tax Administration could only name domestic associations, institutions and foundations as the recipients of a deductible donation. This provision was found problematic from the point of view of the EU law, as donations to corresponding bodies in the other Member States were not deductible.¹⁴⁸ It was proposed to extend the scope of the provision to gift recipients elsewhere in the EEA. The donation could therefore also be given to another State or a publicly funded university or college located in the EEA¹⁴⁹.

The registration of the Finnish Tax Administration for non-domestic charity would require that the foreign association or foundation is comparable to a domestic association or foundation. As it is clear from the tax legislation, both resident and non-resident foundation should be treated in the same way. If that was not the case, it would raise a compatibility problem with the Union law. The compatibility issue would concern both donors and recipients. From a donor's side, in the case of a monetary donation made by a Finnish company for a foundation located in another EEA country, should the deduction not be granted, the company would be in a worse position compared with a company that has made the similar donation for a domestic foundation because of a higher tax burden.¹⁵⁰

¹⁴⁵ Judgement of the Court of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568

¹⁴⁶ Hemels, Sigrid, *The Implications of the Walter Stauffer Case for Charities, Donors and Governments*, European Taxation, January 2007, p. 19-24, p. 24

¹⁴⁷ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 7

¹⁴⁸ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 7

¹⁴⁹ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 7

¹⁵⁰ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 7

Accordingly, from the perspective of a recipient, an organization located in Finland would have better possibility to get donations compared with an organization located in other Member State if the corporate donation deduction was granted only in case the donation was made to a domestic foundation or association. Thus, it would be favorable for the companies to make donations to the resident organizations.¹⁵¹

The issue can be viewed from the perspective of either the donor or the recipient. A company that has made a monetary donation to, for example, a science foundation in another EEA country is in a worse position than a company that has made a similar donation to a domestic science foundation because the company that donated to another EEA country has a higher tax burden. Correspondingly, a foundation located in another state belonging to the EEA does not have a similar opportunity to obtain capital from a Finnish company as a domestic foundation, because it is cheaper for a Finnish company to support a domestic foundation if the monetary donations to it are tax deductible.¹⁵²

In Finland and in Sweden, corporate donations to charitable organizations are not regarded as business-related costs and therefore they are not deductible in principle. The CC(C)TB proposal does not determine a line between the deductible business-related costs and donation costs¹⁵³ which means that it does not clarify the current situation of national legislation in above mentioned countries. The FE proposal was withdrawn¹⁵⁴ so it did not provide a solution for non-harmonization in the Union regarding the foundations and their tax treatment. This means that these proposals did not make a big difference to a current situation regarding the corporate donations to charitable organizations and tax deductibility of the donations.

¹⁵¹ Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 7.

¹⁵² Regeringens proposition till Riksdagen med förslag till lag om inkomstskatteskalen för 2008 och till vissa andra ändringar av inkomstskattegrunderna RP 57/2007 rd (Finland), p. 7.

¹⁵³ European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

¹⁵⁴ European Commission proposal for a Council directive on a Common Consolidated Corporate Tax Base COM(2011) 121/4 2011/0058 (CNS) and European Commission 25 October 2016 proposal for a Council directive on a Common Corporate Tax Base COM(2016) 685 final 2016/0337 (CNS).

5 Conclusions

Findings of this paper are following: Firstly, it shows that the current legislation of a right to deduct donations to charities in corporate income taxation is not very broad neither in Finland nor in Sweden. Even if the role of non-profit organizations in providing welfare services is increasing, the current legislations seem to have based on presumption that the Society is mainly taking care of those services¹⁵⁵.

The second finding in this paper is that there is no one internal market for charities. Each Member States can determine whether or not it provides a right to deduct donations to charitable bodies in corporate income taxation which results in different treatment of charitable organizations in different Member States. The settled case law should, at least in theory, ensure that non-domestic charities and their donors are not treated less favourably than domestic charities in the national legislation. Nevertheless, impact on different national legislation between the Member States may result in charitable organizations and their donors receiving the advantage of the broad deduction right granted in one Member State, compared with another Member State without any right to deduct donations to charitable organizations.

A properly targeted tax deduction option is a possibility to encourage for the companies for charitable giving. In the best scenario, the deduction right encourages the companies to make donations which they might not have made at all without a possibility to get a right to deduct a made donation in corporate income taxation. The special tax status of the non-profit organizations can be justified by considering them to increase the overall well-being in the society more than the harm caused by the loss of the tax revenues.

Both in Finland and in Sweden, the role of the Government providing the welfare services has been significant¹⁵⁶. A relevant question may be, should these societies shift some of the tasks from the Government to actors of third sector¹⁵⁷. In Sweden, the legislation does not provide a deduction right to the companies that made donations to the charitable organizations. In Finland, the companies have a deduction right under certain conditions. Nevertheless, in practice, the list of the recipients and the possibility to use this deduction right is very limited¹⁵⁸. In the both above-mentioned countries the practical issue with the

¹⁵⁵ Välimäki, Mikko, *Lahjoitukset yleishyödyllisen yhteisön varainhankintakeinona – rahankeräyssääntelyä ja veropoliittikkaa*, Lakimies 5/2006 p. 750–768 p. 767.

¹⁵⁶ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 13.

¹⁵⁷ Myrsky, Matti, *Yhdistysten ja säätiöiden verotus*. Lakimiesliiton kustannus 2014, p. 432.

¹⁵⁸ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 410.

deduction right is related to the line between gifts and fully deductible business-related expenses.

Based on the above, similar deductions are not granted for the corporate donations to charities for Swedish companies in Sweden compared to Finnish donors located in Finland. From that point of view, the Finnish companies and charities get an advantage by the legislation which encourages the companies to make monetary donations to the charitable organizations. However, different tax laws are in accordance with the Union law as far as a different treatment it is not based on nationality for instance but a result of divergences existing between the legislation of the various Member States¹⁵⁹.

A harmonization regarding the donations to charities in the European Union has not yet been founded. Limitations and coverage of a right to deduct corporate donations to charitable bodies vary in different Member States¹⁶⁰. So far, Member States are unlikely to readily agree on a common recognition of charities in the Union¹⁶¹. A lack of fiscal control over the recipient organization has been regarded as a reason behind the restrictions of the tax deductions of the donations¹⁶². One reason might be a fear of loss of the national sovereignty¹⁶³. In addition, one of the positive impacts of the broad deduction right is the possibility to shift from the Government subsidy-based financing to the private financing which will be lost in case the donations are made to non-domestic charities¹⁶⁴. The Member States might also see a risk that the charities will consider the Member State with the broadest definition for charitable purposes and lower level of control when choosing their place of residence¹⁶⁵.

¹⁵⁹ See for instance Judgement of the Court of 9 September 2003, *Milk Marque and National Farmers' Union*, C-137/00, EU:C:2003:429, par. 124 and Judgement of the Court of 12 July 2005, *Schempp*, C-403/03, EU:C:2005:446, par. 34.

¹⁶⁰ Kontro, Minna, *Hyväntekeväisyyttä verottajan kustannuksella*, Verotus 4/2011, p. 409-419, p. 411.

¹⁶¹ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 11.

¹⁶² Heidenbauer, Sabine, Hemels, Sigrid, Muehlmann, Brigitte W., Stewart, Miranda, Thömmes, Otmar and Tukić, Tina, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013. Chap. 1.

¹⁶³ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 10.

¹⁶⁴ Heidenbauer, Sabine, Hemels, Sigrid, Muehlmann, Brigitte W., Stewart, Miranda, Thömmes, Otmar and Tukić, Tina, *International / European Union / Australia / Austria / Netherlands / United States - Cross-Border Charitable Giving and Its Tax Limitations*. Issue: Bulletin for International Taxation, 2013 Volume 67, No. 11. IBFD 2013. Chap. 1.

¹⁶⁵ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 10.

The CC(C)TB proposal 2016 includes neither a definition for charitable organizations, nor specific rules regarding the deduction of corporate donations. The CCCTB proposal 2011 included the maximum amount of the deductible donations. For instance, in the FE proposal the intention of the common European legal form had seen providing efficiency for the foundations to operate in the cross-border operations¹⁶⁶. The lower costs for foundations might result in more available funding for the public benefit purpose entities which has a positive impact not only on the citizens' public good but also the economy in the EU¹⁶⁷. In addition, a common recognition of charities would ensure that an entity regarded as a charitable organization in one Member State would be automatically recognized as a charity in all the other Member State¹⁶⁸.

Some harmonization regarding the taxation of charities and their donors would be needed between the Member States¹⁶⁹. The common rules in the Union could make cross-border operation flexible and more efficient for the charitable organizations. In addition, common regulation regarding donations to charitable organizations would, ideally, encourage the companies to make donations not just for the organizations located in the same Member State but also to organizations residing in other Member States.

¹⁶⁶ European Commission Proposal for a Council Regulation on the Statute for a European Foundation (FE) COM/2012/035 final - 2012/0022 (APP), chap. 1.2.

¹⁶⁷ European Commission Proposal for a Council Regulation on the Statute for a European Foundation (FE) COM/2012/035 final - 2012/0022 (APP), chap. 1.2.

¹⁶⁸ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 10.

¹⁶⁹ Hemels, Sigrid, *Are We in Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe* (May 8, 2009). Intertax, Vol. 8-9, pp. 424-435, 2009, p. 18.

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