SOLUTIONS TO CROSS-BORDER CHARITABLE GIVING IN PRACTICE

The perspective of arts organisations

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1 Introduction

An entity must typically meet a number of requirements in order to be considered a philanthropic organisation. In general, it must (i) be ‘not-for-profit’, (ii) have a ‘philanthropic purpose’, and (iii) exist for ‘public benefit’. Besides, the entity must meet a range of administrative and oversight requirements. Common categories considered of ‘philanthropic purpose’ are welfare, education, scientific research, healthcare, culture, environmental support, and disaster relief (OECD, 2020). Despite the large consistency in domestic incentives for charitable giving (OECD, 2020; Quick et al., 2014), tax benefits on cross-border gifts are far less common. This is remarkable, especially considering the role cross-border philanthropy could play in tackling global challenges (OECD, 2020), as well as the willingness of donors to contribute to foreign philanthropic organisations. According to estimates in the *Global Philanthropy Tracker 2020*, the philanthropic outflow¹ in 2018 across the 47 countries included in the report totalled \$68 billion (Indiana University Lilly Family School of Philanthropy, 2020).

Currently, there are few solutions that allow philanthropic organisations to work with foreign donors and ensure a tax benefit to them. Limited measures exist to overcome the tax barrier to international fundraising. Philanthropic organisations can, for example, set up a philanthropic entity for fundraising purposes in a foreign country – a foreign friends’ organisation. This solution allows donors to give to a philanthropic organisation in their country of residence and obtain a tax benefit. The philanthropic organisation in the donor’s country regrants the gift to the foreign philanthropic organisation that the donor intends to support. Other solutions rely on a giving intermediary or legislation that enables tax-efficient giving. Examples of the latter are the four fundamental freedoms in European Union (EU) Law,² tax treaties, or legislation in the donor’s country that allows for tax benefits on donations to foreign philanthropic organisations. Legislation that allows for tax benefits on cross-border philanthropy is not widespread (OECD, 2020). The tax provision on qualifying philanthropic organisations typically limits the geographical scope of the tax incentive. Furthermore, some countries impose restrictions on the foreign spending of philanthropic gifts, which limits the use of a foreign friends’ organisation or a giving intermediary as a solution for tax-efficient cross-border giving.

The significant inapplicability of tax incentives on cross-border donations makes it less attractive for donors to give to a foreign philanthropic organisation. A cross-border gift becomes more expensive compared with a domestic charitable gift. For philanthropic organisations, attracting gifts from abroad can therefore be more challenging, as they are in a disadvantageous position in comparison with domestic philanthropic organisations. A level playing field, where both domestic and foreign philanthropic organisations are eligible to receive gifts with corresponding tax benefits, is preferred from a fundraising perspective. The European philanthropic sector even advocates for a ‘single market for philanthropy’, in which philanthropic organisations across EU Member States are treated equally, as is set out in the *Philanthropy Manifesto* (Donors and Foundations Networks in Europe and European Foundation Centre, 2019). To improve the environment for global philanthropy, the 2018 *Global Philanthropy Environment Index* also, amongst others, calls for the unification of a legal framework for cross-border philanthropy and tax incentives for gifts made directly to foreign philanthropic organisations (Indiana University Lilly Family School of Philanthropy, 2018).

This chapter evaluates optimal solutions from within the existing ones (which are briefly outlined in Section 2), more specifically in the context of arts organisations, to overcome the tax barriers of cross-border giving. The knowledge among fundraising professionals on tax incentives for cross-border gifts is discussed in Section 3B. The focus is on donations by individuals and the tax benefits that could facilitate these gifts.

Throughout this chapter, I refer to philanthropic organisations. These are organisations that make contributions towards public benefit and have a special tax status in their country of residence that makes them eligible to receive gifts in return for a tax benefit to the donor. These could be in the form of a tax deduction, tax credit, or any other type of incentive. In this chapter, arts organisations are used as a specific subtype of philanthropic organisations. The arts – more broadly, culture – are considered philanthropic causes in many countries, although not in all. In Argentina, Indonesia, and Malta, for example, culture is not considered a philanthropic purpose, and arts organisations do not qualify for a favourable tax status (OECD, 2020, p. 45). Whenever arts organisations are mentioned in this chapter, however, they are considered to have the same favourable tax status as other philanthropic organisations in their country of residence.

To assess the most optimal existing solution from a philanthropic perspective, arts organisations’ experiences with different solutions are elaborated on in Sections 3C–3E. The methodology according to which this information is gathered is presented in Section 3A. The giving intermediary is perceived as the current best option in many cross-border situations (Section 4A). However, it has its disadvantages, which can be overcome with an optimal solution from the perspective of philanthropic organisations (Section 4B).

2 Solutions enabling tax-efficient cross-border giving

In most countries, the tax incentive for donations is limited to donations made to philanthropic organisations that are incorporated in the country that grants the tax incentives or they conduct (at least part of) their activities in the country that offers the tax incentive (Jochum and Savvaïdou, 2015, pp. 69–70). If a donor wishes to give to a foreign philanthropic organisation, a tax incentive often does not apply. Depending on the tax law in the donor’s country, it might be possible to obtain a tax benefit on a cross-border donation based on solutions at different legal levels.

At the national level, countries can partially or entirely remove geographical restrictions from tax incentives for gifts. By doing so, they allow donors to contribute to foreign philanthropic

organisations with a tax benefit. I refer to this method of obtaining a tax incentive on a cross-border donation as the 'unilateral solution'.

In accordance with the four fundamental freedoms in EU law, EU Member States may not discriminate against equivalent philanthropic organisations located in other EU Member States.³ Therefore, most EU Member States have modified their domestic legislation. Luxembourg, for example, allows Luxembourg taxpayers to contribute to qualifying organisations in Luxembourg as well as qualifying organisations in other Member States of the EU and those of the European Free Trade Association.⁴ Dutch taxpayers can deduct their gifts to qualifying charities located in the Kingdom of the Netherlands, another EU Member State, or state designated by the Ministry of Finance from taxable income.⁵

For a foreign philanthropic organisation to qualify as a recipient of gifts with a corresponding tax benefit, the philanthropic organisation will have to meet the conditions of a qualifying organisation in the donor's country. This differs across countries. By imposing requirements on qualifying philanthropic organisations, governments target their tax benefits towards specific policy goals. Furthermore, the requirements help governments exercise control over the qualifying recipient philanthropic organisations and avoid abuse.

In the Netherlands, for example, foreign philanthropic organisations must be recognised as a Public Benefit Pursuing Entity (*Algemeen Nut Beogende Instelling*) by the Dutch tax authorities. To qualify as such, the organisation must meet a set of requirements. The foreign organisation must be located in the Kingdom of the Netherlands, another EU Member State, or a state designated by the Ministry of Finance. Most importantly, it must exclusively or almost exclusively (at least 90%) contribute to public benefit. It has to comply with a set of oversight rules and administrative requirements. These include, for example, a requirement to publish an annual report, policy plan, and other documents online.⁶

In the case of the Netherlands, the foreign philanthropic organisation must meet the Dutch requirements. This is what is referred to as host country control. Countries can also rely on supervision over the philanthropic organisation in the country of residence of the philanthropic organisation. This is referred to as home country control (Hemels, 2009). Luxembourg partially relies on home country control. In Luxembourg, the foreign philanthropic organisation must be a similar entity to a qualifying Luxembourg organisation. To establish that the organisation is similar to a qualifying Luxembourg organisation, the donor has to demonstrate that the foreign philanthropic organisation (i) 'pursues one or more non-lucrative aims' including art, education, philanthropy, worship/religion, science, social, sports, tourism, and/or development cooperation and (ii) is eligible to receive gifts with a tax benefit under the laws of its country of residence and that it is exempt from income tax and wealth tax.⁷

At the international level, countries can conclude tax treaties in which they bilaterally agree to apply their tax incentives to cross-border donations.⁸ Since a tax treaty, in principle, decides which law is applicable and does not actually shape laws; the tax treaty solely regulates that the tax incentive available in the domestic situation applies in the specific cross-border situation and details the type of control exercised over the recipient charity – whether home country control, host country control, or a combination of the two. Most tax treaties are based on the model tax treaties of either the United Nations or the Organisation for Economic Co-operation and Development (OECD). These model tax treaties do not include a provision that enables tax-efficient charitable giving between the contracting states.⁹ This is a possible reason for the existence of a limited amount of treaties that facilitate tax benefits on cross-border donations.

The United States has concluded tax treaties with Canada, Israel, and Mexico in which cross-border donations to philanthropic organisations qualify for a tax benefit. The deductibility

of donations to philanthropic organisations in the other contracting state is, however, limited to the income derived from that country.¹⁰

At the supranational level, countries can overcome the inapplicability of tax incentives by (i) recognising equivalent philanthropic organisations in states with which they have concluded a supranational agreement or (ii) through the introduction of a common philanthropic status with the same tax preferences for organisations with a domestic philanthropic status. This requires countries to (partially) give up their sovereignty over their tax system. EU Member States, for example, must – in accordance with the four fundamental freedoms in EU law and specifically the free movement of capital¹¹ – apply the domestically available tax incentive to gifts to comparable philanthropic organisations located in other EU Member States. This was enforced by the European Court of Justice (ECJ) in the *Persche* case.¹² Thus, when a donor tax resident in EU Member State A donates to a philanthropic organisation in Member State B and the donation qualifies for a tax benefit in Member State A, the donor must also receive a tax benefit in the cross-border situation between Member States A and B. Discrimination on the basis of the country of residence of the philanthropic organisation is not allowed within the EU. Since 2005, the EC has instituted infringement procedures to ensure non-discrimination of philanthropic organisations and their benefactors in the EU. Nonetheless, Croatia, Portugal, Romania, and Spain do not apply the domestically available tax incentive in a comparable cross-border situation with other EU Member States.¹³ The EC has ongoing infringement procedures against Spain.¹⁴

Countries could also supranationally agree to use a common philanthropic status. In 2012, the European Commission presented the Proposal for a Council Regulation on the Statute for a European Foundation. This proposal aimed to provide for a European uniform and supranational legal form for philanthropic organisations. This proposal, however, was withdrawn in 2015.¹⁵

These solutions at three different legal levels are initiated by governments and enable donors to overcome tax barriers across borders. Philanthropic organisations can also facilitate foreign donors with a tax benefit by circumventing the cross-border situation. This is done by facilitating the donor to donate to a domestic philanthropic organisation, which then spends the donation abroad. Philanthropic organisations can, for example, establish a separate entity with the specific purpose of raising funds in the donor's country, which I refer to as a 'foreign friends' organisation'. Donations are made to this legal entity with a philanthropic status in the donor's country of residence and they receive a tax benefit. The foreign friends' organisation then transfers the funds to the philanthropic organisation located abroad. The foreign friends' organisation offers tax authorities a certain degree of supervision over the philanthropic organisation while offering an option to facilitate tax-efficient cross-border charitable giving.

As an alternative to a foreign friends' organisation, which is typically dedicated to one philanthropic organisation, philanthropic organisations and their donors could also make use of a giving intermediary (also referred to as an intermediary organisation). This giving intermediary fulfils a similar role as the foreign friends' organisation. However, it serves multiple foreign causes in exchange for a limited fee. The giving intermediary has philanthropic status in the donor's country of residence. By donating to the giving intermediary, the donor obtains a tax benefit. The giving intermediary transfers the donation to the foreign philanthropic organisation. The fee, which can vary between 0.5% and 5% is usually deducted from the gift. To avoid infringement of domestic tax laws, the giving intermediary must ensure that the recipient charity spends the donations in line with the philanthropic status of the giving intermediary. Therefore, the giving intermediary must vet the foreign charitable organisation.

Usually, a giving intermediary attracts funds from donors in one country and enables them to contribute to philanthropic organisations in one or more foreign countries. There are also networks of giving intermediaries – entities with philanthropic status in multiple countries that allow donors from multiple countries to give to philanthropic organisations in other countries. The philanthropic organisation would, however, have to deal with entities in the different countries to ensure they act in line with the legislation in the donor's country.

Whether it is possible to obtain a tax benefit by donating to a giving intermediary depends on the legislation in the donor's country. Some countries, like the Netherlands, might perceive the giving intermediary as a fiscally transparent entity and, therefore, might consider the final beneficiary of the gift when deciding on the eligibility for a tax benefit. Other countries impose strict limitations on foreign spending of donations received, like Australia in the past (Silver and Buijze, 2020, pp. 123–128).

Solutions like the foreign friends' organisation, the giving intermediary, and other solutions cannot be used in every cross-border situation. This again is dependent on the legislation in the donor's country of residence.

3 Experiences with solutions to tax-efficient, cross-border philanthropy

A Methodology

To assess which of the existing solutions is optimal from the perspective of philanthropic organisations aiming to facilitate tax incentives for foreign donors, I used a qualitative case study design (Bryman, 2008, pp. 52–58; Yin, 2003, pp. 1–9).¹⁶ In these qualitative case studies, I particularly focused on arts organisations as a specific group of philanthropic organisations. Amongst this group, some organisations are geographically bound to their physical location (like museums), whereas others can travel to foreign locations (like performing arts companies).

Semi-structured interviews were held with 47 employees of arts organisations responsible for international fundraising. These included managing directors, heads of development or heads of funding, coordinators of international friends circles, and the like. For clarity, I refer to these persons as 'fundraisers'. Furthermore, interviews were held with 25 tax and philanthropy experts, including tax and philanthropy advisors, employees of giving intermediaries, philanthropists, policy makers, and tax inspectors. Documents of arts organisations were analysed, including annual reports, websites, and media coverage on these organisations, and the gifts received and efforts made to attract funds from abroad were also examined. The cases were selected through a non-probability sampling strategy to ensure that a variety of organisations was included. All organisations have philanthropic status in their country of residence and are of some international relevance. They have either received donations from abroad or made a serious attempt to raise funds abroad. The results included 36 case studies on cross-border fundraising by arts organisations active across different disciplines and located in Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, the United Kingdom, and the United States.¹⁷ More importantly, these arts organisations had international fundraising experience in various countries, as these were the resident countries of the donors. These countries stipulated whether a tax incentive was available in a cross-border situation and also which solutions should be used to obtain that incentive. The sample arts organisations received cross-border gifts from Belgium, Bermuda, Hong Kong, India, Italy, Mexico, Montenegro, the Netherlands, Peru, Poland, Russia, Sweden, Turkey, the United Arab Emirates, the United Kingdom, the United States, and Switzerland.

The interviewees were, amongst others, asked about their foreign fundraising and specifically their efforts to assist a foreign donor in obtaining a tax incentive on a donation, knowledge about tax incentives, experiences with the existing solutions, and preferences concerning these solutions.¹⁸ The data gathered provide insight into the practice of cross-border philanthropy. They demonstrate what challenges an arts organisation faces when trying to facilitate a foreign donor with a tax benefit.

B The use of tax incentives for cross-border gifts

All arts organisations included in the research advertised tax incentives in the information for domestic donors. The interviewees seemed to be aware of the applicable domestic incentives and requirements involved. Those organisations that proactively raise funds abroad also address the possibility of obtaining a tax benefit on a cross-border donation in their brochures and on their websites. Fundraisers explain that they do so because the tax benefit persuades donors – although it is not the main motive behind giving. Arts organisations 13 and 35, for example, had foreign donors who contribute without receiving a tax benefit. It is not always known whether a donor utilises a tax incentive. Among the fundraisers interviewed, there was a general presumption that, when available, donors do use tax incentives. Arts organisations 1, 3, and 24 all had a donor for whom receiving a tax incentive was a prerequisite for giving. Arts organisation 3 used a giving intermediary to facilitate this gift, while arts organisation 24 even set up an American friends' organisation to provide the donor with a tax benefit. As fundraiser 24 says: 'Actually, it was he who said "I would like to support that exhibition. . . . I would like to support this exhibition with my American company, but I can only do so if you have a 501(c)3"'. Arts organisation 1 had to conclude that it was unable to facilitate the foreign donor with a tax benefit, after which the donor renounced his gift.

The fundraisers were, to some extent, familiar with the unilateral solution, foreign friends' organisation, or giving intermediaries. Some of them had experience with one or a few of these solutions. The best-known solutions were the foreign friends' organisation and the giving intermediary. Fundraisers had little to no experience with tax treaties and the fundamental freedoms in the EU. Not being aware of all the solutions does not seem to pose a problem for them. Fundraiser 9 mentioned the following when asked whether he wanted to know more about tax incentives for cross-border giving:

Given that I know how [giving intermediary] works, I do know that it is feasible, and it will not take very long before it is arranged. So, if [arts organisation 9 receives a cross-border gift] we can still [provide a tax benefit via the giving intermediary].

C Experiences with foreign friends' organisations

For arts organisation 24, for example, the core reason for setting up a foreign friends' organisation was to facilitate their foreign benefactors with a tax incentive. Among the 36 arts organisations included in the research, 11 had, or used to have, a foreign friends' organisation. Setting up a foreign friends' organisation seemed to be of interest for arts organisations with a strong connection to one or a few foreign countries and a large support base in those countries that provides a steady stream of income. Fundraisers 26 and 35 stressed that having a foreign friends' organisation has positive ramifications, such as the ability to create a community abroad and a strong international network.

Experiences with foreign friends' organisations were not solely positive. Interviewees complained about the costs involved in setting up such an entity and the extensive and detailed administrative requirements that had to be met for the organisation to be recognised as a philanthropic organisation for tax purposes. Furthermore, the maintenance of a foreign friends' organisation – managing the entity and ensuring the entity continued to meet the general and administrative requirements of a philanthropic organisation (such as annual audits and board meetings) – imposed a large burden on the main organisation. For arts organisation 7, this was a reason to give up its American friends' organisation:

The [board of the] American friends had the view that it was a big administrative burden, it was costly and took up too much of their time, which they would rather invest in meeting other people. Thus, they decided that nowadays this can be arranged in a much easier and different manner.

It was clear that voluntary efforts of dedicated individuals residing in the country where the foreign friends' organisation was established were key. As director 23 put it: 'Without the right people to pull the organisation, it is not a realistic option [to set up a foreign friends' organisation]'. For arts organisations, this means that they have to try to attract these persons and get them motivated to help the organisation, as well as keeping them aligned with the views of the arts organisation. Larger arts organisations even had staff at the main organisation to ensure smooth collaboration with the foreign friends' organisation. In fact, the experiences of several arts organisations demonstrated that active management of the foreign friends' organisations was necessary to ensure the foreign entity flourished and avoided any potential damage to the reputation of the main organisation.

D Experiences with giving intermediaries

Another well-known and widely used solution among arts fundraisers is the giving intermediary. All informants were familiar with this solution, and most of them had experience using it. The fact that the giving intermediary ensures the applicable legal and administrative requirements are met for the donor to obtain a tax benefit on a cross-border gift is a big relief for arts organisations. First, the arts organisation does not have to hire tax and legal experts in the donor's country to inform them. Second, the arts organisation does not have to meet specific provisions and detailed administrative requirements to be recognised as an eligible recipient according to a foreign legislation, in addition to the legislation in the arts organisation's country of residence.

Although a fee is charged by the giving intermediary, arts organisations do not perceive that as an obstacle. Compared with the costs involved for a foreign friends' organisation, the fee is perceived as reasonable. Fundraiser 10A explains:

It is a very deliberate choice not to apply for charitable status, the 501(c)3 status, in the United States because then you need to have a board, take care of the administration, and you need an office. These costs are just too high in comparison to [the fee of a giving intermediary]. They cost us a minimum fee, as they are not for profit. So, in comparison, the [giving intermediary] is the cheapest option.

The fact that there are no other costs for legal advice or official translations of articles of association and other documents makes the giving intermediary relatively inexpensive. Most arts organisations pay the fee themselves. It is rather exceptional for a donor to pay this fee.

When making use of a giving intermediary, philanthropic organisations are usually vetted to ensure the giving intermediary does not put its own philanthropic status at risk by supporting the foreign organisation. For this procedure, the philanthropic organisation must submit several documents to the giving intermediary, such as annual reports, articles of association, and a policy plan. This was not considered an obstacle by the interviewees, as the vetting procedure was perceived as uncomplicated in comparison to the procedure of obtaining philanthropic status abroad for the arts organisation. Furthermore, once vetted, the arts organisation can actively inform foreign potential donors of the option to make a donation to the organisation with a tax benefit. If the organisation receives donations from multiple countries, however, the philanthropic organisation must deal with multiple giving intermediaries by whom it must be vetted. For organisations that only receive philanthropic gifts on an incidental basis, the giving intermediary proves to be an interesting solution.

E Experiences with the unilateral solution

A few arts organisations included in the research are familiar with the unilateral solution and have actual experience with it. The organisations that did rely on the unilateral solution have mixed experiences.

Arts organisation 20, an Italian cultural heritage organisation, hired tax advisors from the United Kingdom to help them obtain charitable status in the country. They tried twice but failed in both attempts.¹⁹ According to the rejection letter, the articles of association of the arts organisation did not meet the exact requirements for recognition as a philanthropic organisation under United Kingdom law. First, the philanthropic aim of the organisation was defined too broadly. Where the articles of association referred to ‘the defence of the environment and artistic and monumental heritage’, according to the Charities Act 2006, they should have instead referred to ‘the advancement of the arts, culture, and heritage’ and ‘the advancement of environmental protection or improvement’. Second, the dissolution clause stated that the organisation’s remaining assets would be donated to other organisations ‘with objectives of public utility’. ‘Public utility’ was considered too indefinite to ensure the funds would be distributed to ‘charitable purposes’. Her Majesty’s Revenue and Customs (HMRC) applied the Charities Act, 2006, in a strict and narrow manner. Despite the essence of the articles of association being in line with the Charities Act, 2006, the exact wording was lacking. Anecdotal evidence shared by the interviewed tax advisors suggests that not all supervising authorities are as stringent as the HMRC. France, for example, has a more lenient way of testing equivalence.

The example of arts organisation 20 illustrates that despite being similar, in the case of host country control, it can be impossible for philanthropic organisations to obtain philanthropic status in their country of residence, as well as in that of their foreign benefactors’. Conflicting requirements concerning the articles of association prohibit this.

Since arts organisation 20 wanted to maintain its philanthropic status in Italy, it could not change its articles of association, as it would then run the risk of not meeting the Italian requirements for philanthropic organisations. In this specific situation, applying for philanthropic status in the United Kingdom was a waste of resources, as the fundraisers had hired tax experts and official translators, as well as investing time themselves.

Other arts organisations were more successful. Belgian arts organisation 18 had an in-house tax lawyer, who applied for philanthropic status in four EU Member States. She reported that this process was relatively easy in two countries. In these countries, arts organisation 18 received philanthropic status. In the other two countries, the application procedure was complex and lengthy. Arts organisation 18 had to resubmit documents in one country and was still waiting

for a response after one year from the other country. Tax lawyers also experienced these lengthy procedures when trying to register their clients as an equivalent philanthropic organisation in another EU Member State. In some EU Member States, the philanthropic status must be renewed after a certain period, which further increases the administrative burden (Hippel, 2014). For arts organisation 18, obtaining philanthropic status without having to establish or use the services of a separate legal entity proved advantageous.

4 Assessing the solutions to tax-efficient, cross-border giving

A Why is the giving intermediary currently the best option?

The optimal solution to facilitate a foreign donor with a tax benefit from the perspective of philanthropic organisations depends on the specific cross-border situation. Dutch donors, for example, can use a tax deduction when giving to philanthropic organisations located around the world as long as these organisations have Public Benefit Pursuing Entity (PBPE) status in the Netherlands. Arts organisations 33 and 34, both American arts organisations, are registered as a PBPEs in the Netherlands. Dutch donors, however, cannot use the giving intermediary to obtain a tax deduction on cross-border giving. American donors, on the other hand, can rely on the giving intermediary but not on domestic tax law to give to a foreign charity.

The optimal solution also depends on the specific context of the philanthropic organisation. Does it receive a steady stream of income from one specific country? Under these circumstances, it might be worthwhile to invest in a solution, like a foreign friends' organisation that facilitates a tax benefit for donors in the specific country. However, if international gifts are incidental and foreign donors are scattered across different countries, this might not be worthwhile.

Fundraisers included in this research who know and/or have experience using a giving intermediary are positive about this solution. The majority prefer the giving intermediary over other existing solutions, as they do not have to worry about legal and administrative requirements, and costs are limited. From their perspective, it is the optimal solution in many cross-border situations. Their knowledge on other solutions seemed to be limited. Therefore, the experiences of tax and philanthropy advisers are considered when assessing the solutions to cross-border, tax-efficient giving. When taking these views into account, the intermediary charity scores high as well.

An advantage of the intermediary charity over the foreign friends' organisation, unilateral solution, tax treaty, and supranational agreement is that it does not require much tax or legal knowledge. In the interviews, the fundraisers, for example, demonstrated that they were not familiar with tax treaties as a possible method to overcome the tax barrier to cross-border philanthropic giving. The following quote from fundraiser 28 of an American arts organisation that could potentially make use of a tax treaty to facilitate their Mexican, Canadian, and Israeli donors with a tax benefit illustrates that gathering the relevant knowledge is not their priority: 'it requires time, energy, and expertise to research this and so far we have not had enough staff, or we have not deemed it a big enough pay-off to invest in doing the research on this'. The frequent changes in tax laws further complicate the issue for arts organisations who have to keep up with legislation regarding charitable organisations in multiple countries. This itself is not surprising, as fundraisers are not tax experts. The arts organisations, however, must hire a tax adviser who is familiar with international tax law and the legislation in the donor's country.

Another advantage of the giving intermediary is that no separate legal entity needs to be established to facilitate foreign donors with a tax benefit. This is not the case in the option involving a foreign friends' organisation. Although setting up a legal entity abroad can have

benefits when a philanthropic organisation wants to strengthen its relationship with a foreign country, setting it up solely for fundraising purposes is perceived as a rather costly and complex option that requires continuous attention and time. Besides the cost of setting up an entity and its maintenance, it is considered a rather time-consuming effort. As fundraiser 1 explains: '[The foreign friends' organisation] namely requires a lot of maintenance. I know how much investment is required to get a meeting with the board, to mobilise them, to bring them all together. That requires quite a lot of time'. Tax advisor 4 recognises the work involved in setting up a philanthropic organisation and says:

I sometimes also tell my clients – who say 'I want my own foundation' – you have to know that you also take on a lot of hassle [when setting up a foundation]. You have to meet all Public Benefit Organisation requirements. You are not the sole board member. [The PBO] has to be officially independent. So, you have to gather some people [to join you on the board]. It also includes some administrative obligations. So, it is not just fun to have [a foundation]. It also has other sides to it.

For philanthropic organisations that do not want to set up a legal entity abroad, relying on one of the legal solutions – the unilateral solution, tax treaty, or the four fundamental freedoms in the EU – could be an option.

The four fundamental freedoms in the EU require the philanthropic organisation to be considered equivalent to domestic philanthropic organisations. Philanthropic organisations would, therefore, need to meet certain requirements like obtaining the necessary tax and legal know-how or hiring an expert. The procedures to be recognised as an equivalent philanthropic organisation – the equivalence test – are often unclear and differ across EU Member States, which is the second hurdle. The proof that the donor must submit to demonstrate equivalence varies across countries, and sometimes there is lack of clarity regarding what proof is required. Then there are countries, such as Bulgaria, the Czech Republic, Estonia, Germany, Latvia, Lithuania, and the Slovak Republic, that decide whether a foreign charity is a charitable organisation on a case-by-case basis (for each donation filed for a tax benefit) (OECD, 2020, p. 111). This decision is made *ex post*, making it difficult for donors to anticipate on a potential tax benefit when donating to a foreign philanthropic organisation. Belgium also relies on a case-by-case approach. It is possible, though, to obtain a ruling on the equivalence of a foreign entity in Belgium (OECD, 2020, p. 111). Other countries make a general decision in which a foreign philanthropic organisation is granted equivalence to a domestic philanthropic organisation at once. In Finland, Ireland, Malta, the Netherlands, and Sweden, foreign philanthropic organisations must prove equivalence to a domestic charity and register themselves (OECD, 2020, p. 111). This *ex-ante* approach provides certainty on the applicability of a tax incentive to donors who want to contribute to a foreign charity and thus allows philanthropic organisations to use the available tax incentive as a tool to stimulate donations from foreign donors.

Philanthropic organisations that want philanthropic status in their country of residence as well as in the country where their foreign donors reside might have to meet the requirements in both countries. The interviewed tax advisors demonstrate that the key factor was whether a solution relied on home country control, host country control, or a combination of the two.

Koele (2007, pp. 389–390) and Oberson (2021) agree that in theory, a tax treaty can provide an effective solution to overcome the tax barrier to cross-border philanthropic giving. The tax advisors interviewed added that this provision is only useful from a practical point of view if it includes the concept that the philanthropic organisation under the legislation in one of the contracting states is essentially equivalent to a philanthropic organisation under the legislation

of the other contracting state. If equivalence of philanthropic organisations is not included in the tax treaty, and the treaty thus relies on host country control, it might not provide an effective solution.

In the case of *Persche*, the ECJ ruled that an EU Member State does not automatically have to acknowledge a foreign philanthropic status when granting tax relief to donations. In the EU, the predominant type of control, therefore, is host country control, with a few exceptions, such as Luxembourg. Under host country control, the philanthropic organisation must meet the requirements of a philanthropic organisation for tax purposes in the EU Member State where the donor resides (Hemels, 2009). This imposes a large administrative burden on philanthropic organisations, as they have to demonstrate that they meet the requirements in the foreign country. Philanthropic organisations would potentially have to meet 28 different sets of requirements to meet the definition of a philanthropic organisation in all 28 Member States.

If requirements of the host country conflict with those of the home country of the philanthropic organisation or with those of another country where the philanthropic organisation has donors, it might not even be possible to facilitate donors in multiple countries with a tax benefit based on a legal solution. Tax advisor 1 pointed to the requirements regarding the legal form as conflicting between the home country and the host country. Tax advisor 10 had a foreign religious philanthropic organisation as its client who could not be recognised as such in the country of tax advisor 10 since religion was not considered a cause qualifying for special tax treatment. The definition of a public benefit purpose was conflicting in this case. Other conflicting requirements between countries that were mentioned included the reimbursement of board members, the articles of association – as experienced by arts organisation 20 – and the disclosure of documents. When relying on a giving intermediary, it is not necessary to meet every single administrative requirement in the donor's country of residence, as the giving intermediary ensures it meets all legal and administrative requirements. It is usually sufficient if the foreign philanthropic organisation is not for profit, benefits the general public, and pursues a philanthropic purpose. Not having to meet every detail of the requirements in countries where foreign donors reside to some extent neutralises the fact that taxation rules applicable to philanthropic organisations are not coordinated across countries. It allows philanthropic organisations to facilitate foreign donors in multiple countries with a tax benefit on their gift, despite varying requirements.

What further hinders the effectiveness of the legal solutions is their scope. The number of tax treaties that include a provision on cross-border charitable giving is limited. Only one of the tax advisers interviewed actually had experience in using a provision on cross-border charitable giving, specifically the provision in the Canada-U.S. tax treaty.²⁰ The effectiveness of the fundamental freedoms in the EU as a solution to ensure tax-efficient cross-border giving is in the first instance limited to cross-border giving from one EU Member State to another EU Member State or member of the European Economic Area (EEA).²¹ To the best of my knowledge, the Netherlands is the sole country that has unilaterally extended the scope of its tax provision beyond the EEA. Canada and New Zealand allow foreign philanthropic organisations to become eligible recipients of gifts with a tax benefit (OECD, 2020 p. 113). The definition of qualifying philanthropic organisations, however, is limited.

B What the optimal solution would look like

Although the giving intermediary is currently the best available solution, it is not the optimal solution. The intermediary is a workaround, a service to avoid the actual cross-border situation for which a fee has to be paid. It does not allow the arts organisation to directly receive the

international donation and requires them to collaborate with giving intermediaries in all the countries where they have donors.

For philanthropic organisations, it would be far more appealing if they could directly receive a foreign gift with a tax benefit. This could be done by allowing for cross-border gifts based on domestic legislation, tax treaties, or a supranational agreement. Ideally, the solution would be available in numerous cross-border situations. The experiences of arts organisations and tax and philanthropy experts demonstrate that the optimal solution would need to have clear procedures that apply an *ex-ante* approach to provide donors with certainty in advance on the tax benefit they obtain on their gift. Finally, and most importantly, the ideal solution relies on home country control. This would avoid philanthropic organisations having to meet multiple sets of (potentially conflicting) requirements. Furthermore, it would be a cost-efficient solution, as fundraisers themselves are usually well aware of the tax requirements that their organisation has to meet in its country of residence to be considered philanthropic.

The question is whether a solution that relies on home country control is feasible. Considering the high degree in overlap of requirements to qualify as a philanthropic organisation and the definition of philanthropic purpose (OECD, 2020), one would expect it to be feasible. It, however, would require countries to give up part of their sovereignty and trust each other's supervising authorities. The unsuccessful attempt to introduce a European-wide uniform and supranational legal form for philanthropic organisations²² taught us that, thus far, this is an insurmountable barrier.

5 Conclusion

In the past three decades, extensive efforts have been made to overcome the tax barriers to cross-border giving. In line with the efforts within the EU to harmonise taxes, most EU Member States have opened their tax incentives to philanthropic organisations in other EU Member States. Networks of giving intermediaries like Transnational Giving Europe were established and grew from an annual turnover of €3 million in 2009 to almost €14 million in 2019 (Transnational Giving Europe, 2020). These efforts all contribute to create a level playing field for philanthropic organisations across countries. This stimulates international giving, which is important, as international philanthropy holds the potential to make a positive contribution to global challenges.

Still, a lot can be done to further ease cross-border philanthropy. The experiences of arts organisations show us that, despite legislation enabling tax-efficient cross-border giving in theory, in practice, obtaining a tax incentive on a cross-border donation is still challenging. Although the giving intermediary is effective and rather easy to use for arts organisations, this is no more than a workaround. Ideally, either at a national, bilateral, or supranational legal level, a provision should be introduced that allows for tax-efficient cross-border giving to equivalent foreign philanthropic organisations based on an *ex-ante* approach and home country control. The feasibility of such a solution is expected to be challenging, as states are not likely to give up a part of the sovereignty over their tax systems and trust each other's supervising authorities.

Notes

- 1 Philanthropic outflows are defined as 'a) the sum of charitable financial contributions sent by donors when the donor (individuals, corporations, foundations, or other grant-making organisations) and the beneficiary (individuals, philanthropic organisations, or intermediary organisations) are located in

- different countries; or b) giving to domestic philanthropic organisations in a given country that focus on broad categories of international causes, such as foreign affairs, humanitarian assistance, international relations, promotion of international understanding, and international solidarity' (Indiana University Lilly Family School of Philanthropy, 2020, p. 10).
- 2 Treaty on the functioning of the European Union (TFEU) and EU Treaty (as amended through 2007).
 - 3 TFEU and EU Treaty (as amended through 2007).
 - 4 Article 112 Loi concernant l'Impôt sur le Revenu (Income Tax Act, Luxembourg).
 - 5 Article 5b (1)b Algemene Wet Inzake Rijksbelastingen (Dutch General State Taxes Act).
 - 6 Article 5b (1)b Algemene Wet Inzake Rijksbelastingen (Dutch General State Taxes Act).
 - 7 Article 112 Loi concernant l'Impôt sur le Revenu (Income Tax Act) and Circulaire du directeur des contributions L.I.R. n° 112/2 du 7 avril 2010 (Circular of the director of Contributions, I.T.A. n° 112/2/ of 7 April 2010).
 - 8 Oberson (2021) elaborates on the potential of tax treaties to promote cross-border philanthropic payments.
 - 9 United Nations Model Double Taxation Convention between Developed and Developing Countries (1 January 2011) (22 July 2010), Treaties & Models IBFD, Treaties & Models IBFD, and OECD Model *Tax Convention on Income and on Capital*.
 - 10 *Convention between Canada and the United states of America with respect to Taxes on Income and on Capital* (26 September 1980, as amended through 2007), Treaties & Models IBFD; *Convention between the United states of America and the Government of Israel with respect to Taxes on Income* (20 November 1975), Treaties & Models IBFD; and *Convention between the United Mexican states and the Government of the United states of America with respect to Taxes on Income* (18 September 1992, as amended through 2002), Treaties & Models IBFD.
 - 11 TFEU and EU Treaty (as amended through 2007).
 - 12 ECJ (27 January 2009) *Hein Persche v. Finanzamt Lüdenscheid*, CASE, p. C-318/07.
 - 13 See *Country Profiles*. Available at: <https://www.philanthropyadvocacy.eu/legal-environment-for-philanthropy-in-europe/> last updated in 2020.
 - 14 Case No 2013–4086, MEMO15/6006 19 November 2015, https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_15_6006.
 - 15 European Commission (7 March 2015) Withdrawal of Commission Proposals, OJ. C80(17), available at EUR-Lex-52015XC0307(02)-EN-EUR-Lex (europa.eu). For a detailed analysis of the potential of the European Foundation to overcome the tax barriers to cross-border giving, I refer to Hemels (2009) and Hemels and Stevens (2012).
 - 16 This is part of a larger research on cross-border charitable giving to the arts and the tax barriers involved. It was carried out between 2012 and 2017; see *Tackling the International Tax Barriers to Cross-Border Charitable Giving* (Buijze, 2020).
 - 17 For a full list of interviewees, see Appendix 1.
 - 18 In this research, interviewees were questioned about actual experiences with cross-border giving (the *ex-post* perspective) as well as hypothetical situations based on a vignette (the *ex-ante* perspective). This resulted in rich data, from which criteria could be derived and parameters for the optimal solution could be set (to be met by the arts organisation) (Buijze, 2020). This chapter, however, focuses on the actual experiences of interviewees with fundraising abroad and the solutions to tax-efficient cross-border giving. Thus, this chapter takes the *ex-post* perspective.
 - 19 When the interviews took place, the United Kingdom was still part of the European Union.
 - 20 *Convention between Canada and the United states of America with respect to Taxes on Income and on Capital* (26 September 1980, as amended through 2007), Treaties & Models IBFD.
 - 21 As the relevant EU case law refers to the free movement of capital, EU law could remove the tax barrier when donating from an EU Member State to a third country, based on article 63 TFEU. The scope of article 63 TFEU, however, is limited by article 64 TFEU, which stipulates that EU Member States may retain the restrictions that existed on 31 December 1993. As the tax provisions on charitable giving were in place before this date in many EU Member States, the tax benefits do not have to apply in cross-border situations between EU Member States and third countries.
 - 22 On 8 February 8 2012, the EC presented a Proposal for a Council Regulation on the Statute for a European Foundation [COM (2012) 35 final, 2012/0022 (APP)]. These organisations and their benefactors would receive the same tax privileges as domestic charitable organisations in every EU Member State. By November 2013, the tax provision was excluded from the discussion of the Proposal. In March 2015, the Proposal was withdrawn.

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APPENDIX 22.1

Experts and patrons

<i>Location</i>	<i>Interviewee</i>
NL	Tax expert 1
NL	Tax expert 2
NL	Tax expert 3
NL	Tax expert 4
NL	Accountant 1
NL	Tax expert 5
NL	Tax expert 6
NL	Tax expert 7
NL	Tax expert 8
NL	Tax expert 9
NL	Tax expert 10
NL	Philanthropy advisor 1
NL/UK	Philanthropy advisor 2
NL	Philanthropy advisor 3
BE	Philanthropy advisor 4
NL	Philanthropy advisor 5
NL	Philanthropy advisor 6
U.S.	Philanthropy advisor 7
NL	Expert 1
NL	Expert 2
NL	Expert 3
NL	Expert 4
BE	Expert 5
NL	Patron 1
NL	Patron 2

Arts organisations

#	Location	Interviewee	Discipline	Type	Size	FEO*	EA**
1	NL	Fundraiser 1	Cultural heritage	Fixed location	Medium		
2	NL	Fundraiser 2	Performing art	Company	Small		
3	NL	Fundraiser 3	Fine arts	Fixed location	Medium		
4	NL	Director 4	Fine arts	Fixed location	Small		
5	NL	Fundraiser 5	Performing art	Festival	Medium		
6	NL	Director 6	Cultural heritage	Fixed location	Medium	V	
6	NL	Fundraiser 6	Cultural heritage	Fixed location	Medium	V	
7	NL	Fundraiser 7	Performing art	Company	Major	V	
8	NL	Fundraiser 8	Fine arts	Fixed location	Medium	V	
9	NL	Fundraiser 9	Performing art	Company	Superstar		
10	NL	Fundraiser 10A	Fine arts	Fixed location	Superstar		
10	NL	Fundraiser 10B	Fine arts	Fixed location	Superstar		
11	NL	Fundraiser 11	Cultural heritage	Fixed location	Small		
12	NL	Fundraiser 12	Performing art	Company	Medium		
13	NL	Fundraiser 13	Fine arts	Fixed location	Superstar		
14	NL	Director 14	Fine arts	Fixed location	Small		
15	NL	Fundraiser 15	Performing art	Company	Medium	V	
16	NL	Director 16	Fine arts	Network organisation	Small		
17	NL	Director 17	Cultural heritage	Network organisation	Small		
18	BE	Fundraiser 18A	Fine arts	Fixed location	Major		
18	BE	Fundraiser 18B	Fine arts	Fixed location	Major		
18	BE	In-house lawyer 18	Fine arts	Fixed location	Major		
19	CH	Fundraiser 19	Fine arts	Fixed location	Small	V	
20	IT	Fundraiser 20A	Cultural heritage	Network organisation	Major	V	
20	IT	Fundraiser 20B	Cultural heritage	Network organisation	Major	V	
20	IT	Fundraiser 20C	Cultural heritage	Network organisation	Major	V	
21	DE	Fundraiser 21	Fine arts	Festival	Major		
22	FR	Fundraiser 22A	Fine arts	Fixed location	Superstar	V	
22	FR	Fundraiser 22B	Fine arts	Fixed location	Superstar	V	
23	BE	Director 23	Fine arts	Fixed location	Medium		
24	DK	Fundraiser 24	Fine arts	Fixed location	Medium	V	
25	UK	Fundraiser 25	Fine arts	Fixed location	Superstar	V	
26	BE	Director 26	Cultural heritage	Fixed location	Small		
27	AT	Fundraiser 27	Performing art	Festival	Superstar	V	
28	U.S.	Fundraiser 28	Performing art	Fixed location	Superstar		
29	BE	Director 29	Fine arts	Fixed location	Small		
30	FR	Fundraiser 30	Fine arts	Fixed location	Major	V	
31	U.S.	Fundraiser 31	Cultural heritage	Network organisation	Medium		V
32	U.S.	Fundraiser 32A	Fine arts	Fixed location	Superstar		
32	U.S.	Fundraiser 32B	Fine arts	Fixed location	Superstar		
32	U.S.	In-house lawyer 32	Fine arts	Fixed location	Superstar		
33	U.S.	Fundraiser 33	Fine arts	Fixed location	Medium		
33	U.S.	In-house accountant 33	Fine arts	Fixed location	Medium		
34	U.S.	Fundraiser 34A	Fine arts	Fixed location	Superstar		
34	U.S.	Fundraiser 34B	Fine arts	Fixed location	Superstar		
35	FR	Fundraiser 35	Performing art	Festival	Major		
36	U.S.	Fundraiser 36	Fine arts	Fixed location	Superstar		V

* Foreign friends' organisation

** Legal entity abroad with charitable activities