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Taxation of Non-Profit Organizations with Multinational Activities – The *Stauffer* Aftermath and Tax Treaties

Thomas Ecker¹

I. Introduction

Non-profit organizations (hereafter, NPOs), usually based on private initiative, are placed in the 'third sector' between activities of the state aimed to promote general public welfare and private activities motivated by economic reasons. NPOs are an embodiment of civil society and they are necessary in areas where the state is not capable, not willing or not really suited to take actions needed to achieve social welfare. Globalization and the increasing complexity of resulting challenges for society demand an increase in the activities of NPOs. The result is a situation in which problems can often only be effectively solved on a multinational- or international scale. Thus, NPOs have continuously extended their radius of action within the last decade and have become an important economic factor. Still, the expansion across national borders – with respect to their activities as well as their fundraising – has led to new challenges and raised questions to be solved. The ECJ recently ruled in this respect in its decision in the *Stauffer* Case² but a lot of questions still remain unanswered. This article will identify some of these problems and provide some solutions focusing on corporate and income taxation.

2 The *Stauffer* Case

A. Facts and Issue

The *Centro di Musicologia Walter Stauffer Foundation* (hereafter, *Stauffer* foundation) is a charity, with its statutory seat and place of management in Italy. It is supervised by an Italian state authority and is exempt from Italian corporate tax under Italian tax law. In 1997, the *Stauffer* foundation owned real estate and commercial premises in Munich, Germany, from

which it derived rental income. It met all the requirements for being a German charity; however, it did not have a registered seat or place of effective management in Germany. Thus, it would have been exempt from corporate tax in Germany if it had been a German resident. Since the German Federal Tax Court (*Bundesfinanzhof*) had doubts about whether the German regulations were compatible with Community law, it referred the question to the ECJ for a preliminary ruling.

B. Applicability of the fundamental freedoms

The *Stauffer* foundation did not have any premises in Germany for purposes of pursuing its activities. Further, the services ancillary to the rental of the property were provided by a German property management agent. Thus, the ECJ held that the provisions governing the freedom of establishment are not applicable in circumstances such as those in this case.³ The free movement of capital, on the other hand, did apply.

C. Objectively comparable situation and discrimination

The *Stauffer* foundation finds itself in a situation objectively comparable to a foundation resident in Germany. It satisfies the requirements imposed for beneficial tax treatment under German law. Its objective is to promote the very same interests of the general public as determined by German law.⁴ Thus, the German provisions treat foundations that are otherwise comparable differently by reason of their place of residence.

The German and United Kingdom governments,⁵ as well as some authors,⁶ object to the above view and

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² ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203.

³ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 19 et 20.

⁴ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 40.

⁵ Cf. Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, points 84 and 85, respectively; ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 33 et seq.

⁶ Cf. Jachmann/Meier-Behringer, *Gemeinnützigkeit in Europa: Steuer- und europarechtliche Rahmenbedingungen, Betriebs-Berater* (hereafter, *BB*) 2006, pp. 1827 et seq.

counter that the comparability of domestic and foreign NPOs is to be denied on the grounds of the structural reference of German law concerning charities to Germany. They argue that charitable activities serve as a substitute for the fulfillment of public duties, otherwise assumed by the state. This argument cannot be upheld.⁷ It may allow a limitation of charitable purposes to those which show a sufficient domestic link⁸ but it does not affect the comparability of the situations in this case.⁹

The criterion for an objectively comparable situation in this case is German national tax law. The *Stauffer* foundation satisfies the requirements imposed for beneficial tax treatment under German law. Its objective is to promote the very same interests of the general public as established by German law.¹⁰ Thus, the *Stauffer* foundation finds itself in a situation objectively comparable to a foundation resident in Germany. The German provisions treat foundations in objectively comparable situations differently by reason of their place of residence. Such unequal treatment is not permitted by the EC Treaty unless it can be justified by overriding reasons in the general interest.¹¹

D. Justifications

As grounds for justification, the ECJ considered the effectiveness of fiscal supervision, cohesion, the prevention of tax evasion and criminal activities, and the reduction of tax revenue. None of these reasons have been upheld by the ECJ.

Concerning the effectiveness of fiscal supervision, the German government, Ireland and the United Kingdom government had brought forward the difficulty of ascertaining whether, and to what extent, a foreign charitable foundation actually fulfills the objectives laid down in its statutes in accordance with national law. Additionally, the need to monitor the effective management of that foundation was seen as a ground for justification by these governments.¹²

Even though the ECJ confirmed that, in principle,

the effectiveness of fiscal supervision constitutes an overriding reason of general interest, capable of justifying a restriction of the exercise of the fundamental freedoms guaranteed by the Treaty,¹³ it rejected this argument.¹⁴ The ECJ pointed out that difficulties of fiscal supervision of foreign foundations are of a pure administrative nature and thus not sufficient to justify discrimination in this case. The tax authorities can always require the charitable organization to provide relevant supporting evidence. The Court made clear that national legislation which absolutely prevents this cannot be justified. Moreover, the ECJ drew attention to the fact that the tax authorities concerned may avail themselves of the rights granted by the Mutual Assistance Directive¹⁵ and call upon the authorities of another Member State in order to obtain all the necessary information.¹⁶ Finally, AG *Stix-Hackl* argued that since the German Federal Tax Court (*Bundesfinanzhof*) did not have any doubts concerning the charitable status of the foundation in this case, it apparently acted on the assumption that the possibilities of fiscal supervision of the German tax authorities are sufficient.¹⁷

With respect to coherence, the ECJ denied this argument since there is no direct link between the grant of the tax advantage and the offsetting of that advantage by a particular tax levy. Furthermore, German law does not require the German general public to be a beneficiary of the charity's activities.

Finally, the ECJ denied prevention of tax evasion and criminal activities as reason for justification. Instead, it held the general exclusion from preferential tax treatment of all non-resident foundations to be disproportionate.¹⁸

E. The judgment - infringement of Community law

For the aforementioned reasons, the ECJ held that discrimination just by virtue of residence of a charitable organization is not justifiable and therefore an infringement of the free movement of capital.

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⁷ Cf. ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 36 et seq.

⁸ Cf. section III.2 of this article.

⁹ Cf. Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, points 89 et seq.

¹⁰ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 40.

¹¹ Cf. ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 42; Cf. also e.g. ECJ, June 6, 2000, Case C-35/98, *Verkooijen* [2000] ECR I-4071, para. 46; ECJ, September 7, 2004, Case C-319/02, *Manninen* [2004], ECR I-7477, para. 29.

¹² ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 46.

¹³ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 47; see also, inter alia, ECJ, February 20, 1979, Case 120/78, *Reue-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, para. 8; ECJ, May 15, 1997, Case C-250/95, *Futura Participations and Singer* [1997] ECR I-2471, para. 31.

¹⁴ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 48 to 50.

¹⁵ Council Directive 77/799/EEC of December 19, 1977, concerning the competent authorities of the Member States in the field of direct taxation, OJ 1977 L 336, p. 15, as amended by Council Directive 2004/106/EC of November 16, 2004, OJ 2004 L 359, p. 30.

¹⁶ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 48 to 50, with further references.

¹⁷ Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, point 110.

¹⁸ ECJ, September 14, 2006, Case C-376/04, *Stauffer* [2006] ECR I-8203, para. 61.

3. Questions beyond the Stauffer Case

A. Applicability of the right of establishment to NPOs

Since the ECJ's decision is limited to the reference for a preliminary ruling, the judgment leaves a lot of questions unresolved. Some of these questions will be discussed in the following.

A first question that arises concerning the general applicability of the fundamental freedoms to NPOs is whether charitable organizations may benefit from the right of establishment enshrined in the EC Treaty. Neither the ECJ nor AG *Stix-Hackl* expressly discussed this issue in connection with the *Stauffer*¹⁹ Case. Both denied the applicability of the right of establishment, arguing that the *Stauffer* foundation had not secured a permanent presence in Germany and that it did not actively manage its property. Therefore, it is still unclear whether the right of establishment would have been applicable if the foundation had secured a permanent presence in Germany and actively managed its property. The main point of discussion in this regard is the interpretation of Art. 48(2) EC Treaty, which defines the term 'companies or firms' appearing in Art. 48(1) EC Treaty. The latter provision extends the right of establishment to legal entities. Art. 48(2) EC Treaty includes 'companies and firms' constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, 'save for those which are non-profit-making.'²⁰ Generally, two interpretations exist. These are analyzed in the following.

It is sometimes argued that Art. 48(2) EC Treaty refers to the legal entity *in toto*.²¹ Supporters of this interpretation are of the opinion that organizations which are non-profit-making never fall under the personal scope of the right of establishment, regardless of the character of their particular activities. As a

result, activities that fall under the factual scope of Art. 43 EC Treaty would nevertheless be denied the benefit of the right of establishment if this interpretation were followed.

The prevailing opinion²² follows a more functional approach, however. They interpret Art. 48(2) EC Treaty as referring to the particular operations of the NPO. In other words, this means that economic activities that are seen as participation in economic life fall under the scope of the right of establishment, even if performed by an NPO. Only organizations with mainly charitable purposes and organizations within the sphere of public law in no way connected with the economic objectives of the EC Treaty are excluded from the right of establishment.²³ It is sometimes²⁴ argued that Art. 48(2) EC Treaty only repeats and confirms the requirement of an economic activity, stated in Art. 43(2) EC Treaty and that it has no additional meaning. This would mean that Art. 48(2) EC Treaty would be completely redundant, however.²⁵ While Art. 43 EC Treaty, *inter alia*, concentrates on the substantial scope of the right of establishment, Art. 48 EC Treaty encompasses only the personal scope. Thus, if the same criteria are applied in connection with those two provisions, it would in the one case affect the factual scope and in the other case the personal scope of the right of establishment. This distinction has no effect on the final outcome as of whether or not the freedom is applicable but this approach might at least leave the restriction concerning non-profit-making corporations in Art. 48(2) EC Treaty with some meaning.

Randelzhofer/Forsthoff and others take a different path.²⁶ They argue that the purpose of Art. 48(2) EC Treaty is the avoidance of distortions of competition, which may occur if charitable organizations were to compete with private institutions. The distortion of competition is a consequence of the preferential treatment of charitable organizations. In cases where activities of an NPO are taxed normally, i.e. if no tax

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¹⁹ Cf. ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203; Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*.

²⁰ In the French version: '... qui ne poursuivent pas de but lucratif'; in the German version: '... die keinen Erwerbszweck verfolgen'. At this point it should also be mentioned that the question of the applicability of the right of establishment to NPOs is of equal importance also in respect of the freedom to provide services since Art. 55 EC Treaty refers, *inter alia*, to Art. 48 EC Treaty.

²¹ Cf. FA Munich (cf. Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, points 28 and 29); Ipsen, *Soziale Dienstleistungen und EG-Recht* (1997), pp. 55 et seq.

²² Cf. BFH (cf. Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, point 13); Tiedje/Troberg, in van der Groeben/Schwarze (eds.), *Kommentar zum EU-Vertrag/Gründung der EG*⁶ (2003), Art. 48 MN 5; Helios, *Das deutsche Gemeinnützigkeitsrecht innerhalb der Schranken des Europarechts*, *BB* 2002, p. 1895; Reimer/Ribbrock, *Gemeinnützigkeit auch für ausländische Körperschaften?*, *Recht der Internationalen Wirtschaft* (hereafter, *RIW*) 2005, p. 612; Helios/Müller, *Vereinbarkeit des steuerlichen Gemeinnützigkeitsrechts mit dem EG-Vertrag*, *BB* 2002, p. 2334; Eicker, *Do basic freedoms of the EC Treaty also require an amendment to the national tax laws on charities and non-profit organisations?*, *EC Tax Review* 2005, p. 143; Reimer, *Grenzüberschreitende Gemeinnützigkeit? – Vor der Entscheidung des EuGH im Fall 'Centro di Musicologia Walter Stauffer'*, *Steuer Wirtschaft International* (hereafter, *SWI*) 2006, p. 199; Jachmann/Meier-Behringer, *BB* 2006, p. 1827; von Hippel, *Zukunft des deutschen Gemeinnützigkeitsrechts nach der 'Stauffer'-Entscheidung des EuGH*, *Europäische Zeitschrift für Wirtschaftsrecht* (hereafter, *EuZW*) 2006, p. 614; Mamut/Stürzlinger, *Gemeinnützigkeit und Gemeinschaftsrecht: EuGH zur Rs. Stauffer*, *SWI* 2006, pp. 552 et seq.; Schäfers, *Steuerliche Gemeinnützigkeit ausländischer Körperschaften*, *Internationales Steuerrecht* (hereafter, *IStR*) 2004, pp. 754 et seq.; Smit/Herzog, *The Law of the European Community – A Commentary on the EEC Treaty* (1994), p. 2-642.

²³ Smit/Herzog, *The Law of the European Community – A Commentary on the EEC Treaty*, p. 2-642.

²⁴ See Schwarze (ed.), *EU-Kommentar* (2000), MN 6; Groeben/Thiesing/Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*⁵ (1997); Reimer, *SWI* 2006, p. 199; cf. also Schäfers, *IStR* 2004, p. 755.

²⁵ See Randelzhofer/Forsthoff, in Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, Art 48 EGV, MN 8; Mamut/Stürzlinger, *SWI* 2006, pp. 552 et seq.

²⁶ Cf. Randelzhofer/Forsthoff, in Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, Art 48 EGV, MN 8; see also Mamut/Stürzlinger, *SWI* 2006, pp. 552 et seq.

advantage is granted to the NPO in respect of this activity, Art. 48(2) EC Treaty has to be interpreted teleologically. Following this opinion, the protection of the right of establishment is only denied if the economic activities of NPOs threaten to distort competition.

In contrast to the last opinion, it can be argued that the distortion of competition is a direct result of the preferential tax treatment of the activities of charities. The competitive advantage is based on a political decision²⁷ and a distortion of competition is therefore politically accepted if it leads to a promotion of the intended purpose. It is the result of a favouritism of the non-profit sector, which is justified by socio-political values.²⁸ Whether or not these preferential activities, which are accepted as distortive, are conducted by resident or non-resident charities is (and has to be) irrelevant. It is the result, i.e. the fulfillment of a purpose favoured by the state, that counts, not who fulfills it. The questions of distortion of competition and the justification of political decisions causing this distortion should therefore be examined under EC competition rules or state aid aspects.²⁹

Furthermore, the ECJ held in respect of the meaning of Art. 48 EC Treaty in the *Sodemare*³⁰ case that

'[a]s regards Article 58 [now Art. 48] of the Treaty, taken in isolation [...], it must be borne in mind that the effect of that provision is to assimilate, for the purpose of giving effect to the chapter relating to the right of establishment, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to natural persons who are nationals of one of the Member States, although non-profit-making companies are excluded from the benefit of that chapter. Since that provision does no more than define the class of persons to whom the provisions on the right of establishment apply, it cannot preclude, as such, national rules of the kind at issue in the main proceedings.'

Thus, it can be concluded that Art. 48 EC Treaty regulates the personal scope of the right of establishment, by simply extending it.³¹

As can be seen, opinions about the applicability of the right of establishment to NPOs differ a lot. The lowest common denominator, so to say, is that purely charitable or cultural associations that do not participate in economic life and do not perform economic activities, do not fall under the scope of the right of establishment. All of the opinions presented here are in agreement on this point. The future will show how the ECJ will decide this matter.

B. Possibility of the Member States to limit beneficial tax treatment to domestic charitable purposes

In the *Stauffer* Case, the ECJ decided that discrimination solely by virtue of residence of a charitable organization is not justifiable. Hence, it follows that all organizations that fulfill a Member State's criteria to obtain a charitable status in this state are to be granted the same tax treatment as comparable domestic organizations. But are Member States allowed to limit the scope of charitable activities to those that have a strong domestic link or which by nature are restricted to the domestic territory?³²

Such a limitation, although not expressly excluding foreign NPOs, could have the effect that it would be less attractive or even impossible for these NPOs to benefit from the advantageous treatment for charitable organizations. It might therefore be indirect discrimination or disguised restriction of foreign charitable NPOs, which may be examined for conformity with Community law.

It is settled case law that, if not justified and proportional, indirect discrimination constitutes an infringement of the fundamental freedoms as provided for in the EC Treaty.³³ The ECJ has repeatedly held in this respect that

'a national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty may be justified by overriding reasons of general interest, provided that the measure in question is

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²⁷ See Weisbrod, The Complexities of Income Generation for Nonprofits, in: Hodgkinson/Lyman (eds.), *The Future of the Nonprofit Sector* (1989), p. 113.

²⁸ See also Badelt, in Badelt (ed.), *Handbuch der Nonprofit Organisation*, p. 683.

²⁹ These are not discussed in this article.

³⁰ ECJ, June 17, 1997, Case C-70/95; *Sodemare SA and others* [1997] ECR I-03395, para. 25; also ECJ, November 6, 1984, Case 182/83, *Fearon v Irish Land Commission* [1984] ECR 3677, para. 8.

³¹ Cf. also Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, point 33.

³² Giving an indication that the German government will head in this direction: statement of practice of the German tax administration, September 20, 2005, *Bundessteuerblatt* (hereafter, BStBl) I 2005, p. 902; cf. also Fischer, Grundfragen der Bewahrung und einer Reform des Gemeinnützigkeitsrechts – Zum Gutachten des Wissenschaftlichen Beirats beim BMF 'Die abgabenrechtliche Privilegierung gemeinnütziger Zwecke auf dem Prüfstand', *FR* 2006, pp. 1001 et seq.

³³ Cf. ECJ, June 12, 2003, Case C-234/01, *Gerritse* [2003] ECR I-5933, para. 28; ECJ, October 3, 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen* 2006 ECR I-9461, paras. 43 et seq.

³⁴ ECJ, April 21, 2005, Case C-140/03, *Commission/Greece* [2005] ECR I-3177, para. 34; See also ECJ, March 31, 1993, Case C-19/92, *Kraus* [1993] ECR I-1663, para. 32.

appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose'.³⁴

Looking at the *Stauffer* Case, one should note that the German regulations of the German Fiscal Code (*Abgabenordnung*) determining charitable purposes were in conformity with Community law. It was the limitation of preferential tax treatment to resident NPOs, regulated in the German Corporate Income Tax Act, that infringed the EC Treaty. The latter provision caused an indirect discrimination which could not be justified since it far exceeded what is necessary to promote the charitable purpose in question.

Even though the discrimination underlying the *Stauffer* decision could not be justified since it was not proportionate, a restriction of tax concessions to domestic charitable purposes might nevertheless, in my opinion, be justified by the special relationship and interdependence between a state and its nationals.³⁵ Such a restriction also has to be proportionate, of course.

In modern thinking, the preferential tax treatment of charitable organizations is deemed as compensation because charitable organizations relieve the state from performing some of its tasks.³⁶ Thus, the justification of tax concessions in public interest and charity law is closely related to the justification of tax levies in general. By paying taxes, a citizen complies with his responsibility to promote the common welfare. Through the choice of residence, the citizen decides to be part of a specific welfare community.³⁷ The state's performance of public services itself is, in principle, accepted under EC law.³⁸ But public interest reaches beyond only duties of the state. It also comprises matters that are not accessible to the state.³⁹ The state generally has a responsibility vis-à-vis its citizens with regard to the concept of public welfare. Since its capacities to act are limited, it has to make some room for private initiatives which serve

public welfare. A necessary means to control and promote these private initiatives are the granting of tax incentives. This is also within the meaning of the principle of subsidiarity.⁴⁰

The question of the justification of such a limitation is also a question of delimitation between national and Community competences.⁴¹ Due to lack of harmonization in the field of public welfare and because of the fragmentary competence of the Community to make regulations in non-economic matters, Member States are autonomous in deciding which activities promote public welfare. This is a consequence of the sovereignty of the Member States and, as already mentioned, consistent with the principle of subsidiarity.⁴² The idealistic foundation of public welfare has not yet been touched by European law.⁴³ Thus, the ECJ held that 'Member States are entitled to require a sufficiently close link between foundations upon which they confer charitable status for the purposes of granting certain tax benefits and the activities pursued by those foundations.'⁴⁴ '[T]hey are free to determine what the interests of the general public they wish to promote are by granting benefits to associations and foundations which pursue objects linked to such interests in a disinterested manner.'⁴⁵ The Member States have discretion in this regard but they must exercise this power in accordance with community law,⁴⁶ especially the fundamental freedoms.

Take the example that a Member State decides that the protection of domestic historic monuments is charitable and grants preferential tax treatment to all charitable organizations – regardless of their residence – serving this charitable purpose. Although it hinders and/or renders less attractive the exercise by foreign NPOs of the fundamental freedoms guaranteed by the EC Treaty, the restriction to *domestic* monuments would, according to the argument just set forth, be justifiable. In this case, the restrictive measure is also proportionate to serve this purpose. In this respect, *Hüttemann/Helios*⁴⁷ correctly state that a territorial

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- ³⁵ Cf. also to that effect Jachmann, Die Entscheidung des EuGH im Fall *Stauffer* – Nationale Gemeinnützigkeit in Europa, *BB* 2006, p. 2610.
- ³⁶ Cf. inter alia, Isensee, Gemeinnützigkeit und Europäisches Gemeinschaftsrecht, in Jachmann (ed.), *Gemeinnützigkeit – Deutsche Steuerjuristische Gesellschaft* (hereafter, *DStjG*) Band 26, pp. 98 et seq.; Reimer, *SWI* 2006, p. 201; Achatz/Leitner, Austria, in IFA, *Cahier de droit fiscal international* (1999), p.252.
- ³⁷ See Jachmann, *BB* 2006, p. 2607; cf. also Jachmann, in Igl, *Rechtliche Rahmenbedingungen bürgerschaftlichen Engagements* (2002), pp. 196 et seq.
- ³⁸ See Reimer, *SWI* 2006, p. 201, who argues correctly that the power to define and constrain charitable purposes that enjoy beneficial treatment is therefore justified and limited by the circle of legitimate duties of a State; cf. also Jachmann, *BB* 2006, p. 2608.
- ³⁹ See Isensee, in Jachmann (ed.), *Gemeinnützigkeit – DStjG Band 26*, pp. 98 et seq. with further references.
- ⁴⁰ Cf. Isensee, in Jachmann (ed.), *Gemeinnützigkeit – DStjG Band 26*, pp. 100 et seq.; Reimer, *SWI* 2006, p. 201; Eicker, *EC Tax Review* 2005, p. 143; Jachmann/Meier-Behringer, *BB* 2006, pp. 1827 et seq.; Kube, Die Zukunft des Gemeinnützigkeitsrechts in der europäischen Marktordnung, *ISIR* 2005, p. 476; Badelt, in: Badelt (ed.), *Handbuch der Nonprofit Organisation*, pp. 113 et seq.; Ipsen, Gemeinschaftsrechtliche Tendenzen und Gemeinnützigkeit, in Drenseck (ed.), *Festschrift für Heinrich Wilhelm Kruse* (2001), p. 567.
- ⁴¹ See Jachmann, *BB* 2006, p. 2608.
- ⁴² Cf. Jachmann/Meier-Behringer, *BB* 2006, p. 1828.
- ⁴³ Cf. Isensee, in Jachmann (ed.), *Gemeinnützigkeit – DStjG Band 26*, p. 107; ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 39; Opinion of AG Stix-Hackl, December 15, 2005, Case C-376/04, *Stauffer*, point 94; Reimer, *SWI* 2006, p. 201.
- ⁴⁴ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 37.
- ⁴⁵ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 39.
- ⁴⁶ See ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 37.
- ⁴⁷ See Hüttemann/Helios, Gemeinnützige Zweckverfolgung im Ausland nach der 'Stauffer'-Entscheidung des EuGH, *Der Betrieb* (hereafter, *DB*) 2006, p. 2490.

distinction which is made based on the place where an activity is conducted is generally possible; however, it must not be discriminatory. In order for a different treatment to be in accordance with Community law, domestic and foreign activities must not be objectively comparable, or the limitation must be proportionate, as measured by the political purpose of the preferential tax treatment.⁴⁸

A limitation to charitable purposes conducted domestically is not always proportionate, however. Imagine, for example, that a Member State considers the promotion and conservation of its culture as a charitable purpose. Furthermore, assume this state exempts NPOs – regardless of their residence – from unlimited liability to tax if they adhere to this purpose. Again, restriction to *domestic* culture is indeed an indirect discrimination but it can be justified. The restriction is also proportionate. By contrast, a limitation to the promotion and conservation of domestic culture *in the country itself* could be seen as being unjustified and disproportionate. It can hardly be argued that the preservation of culture necessarily has to be conducted within the country's borders. Furthermore, the promotion and conservation of domestic culture can be supported in a way that is less restrictive of the Community nationals' exercise of the fundamental freedoms, e.g. if the purpose were also allowed to be followed abroad.

In this respect, the ECJ's decision in the *Laboratoires Fournier SA*⁴⁹ Case may be of interest. The case concerned a French provision that denied a tax credit for any research not carried out in France. The ECJ held that the domestic provisions constituted an infringement of the free movement of services within the meaning of Art. 49 EC Treaty. It ruled that the legislation in question was 'directly contrary to the objective of the Community policy on research and technological development which, according to Article 163(1) [EC Treaty] is, *inter alia*, "strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level".⁵⁰ The ECJ pointed out that Article 163(2) EC Treaty requires, *inter alia*, 'the removal of legal and fiscal obstacles to that cooperation.'⁵¹ If this concept is applied to charity law, this

means that the ECJ can be expected to reserve the right to examine whether a Member State's distinction between domestic and foreign pursuance of a purpose is an infringement of Community law because it is contrary to specific regulations in the EC Treaty.⁵² Thus, as *Hüttemann/Helios*⁵³ correctly conclude, Member States may indeed decide autonomously whether or not they wish to fiscally encourage, for example, the promotion of science. If they decide in favour of this, the provision must be in accordance with Community law, and, as a consequence, may not be allowed to differentiate between domestic and foreign activities. The possibility that the ECJ also derives similar requirements from the EC Treaty for other political areas cannot be ruled out.⁵⁴

If we apply this concept to the *Stauffer* Case, we come to the conclusion that in this case the German legislator would not be allowed under EC law to restrict the tax exemption only to charities fulfilling this purpose in Germany. The objective of the *Stauffer* foundation, the instruction in the classical methods of production of stringed instruments, is a justifiable purpose. However, it is not necessary to follow its promotion on domestic territory, to fulfill this purpose. Furthermore, a restriction to German students would not be necessary. Thus, these restrictions are not proportionate as measured by the purpose.

Only if a cross-border European public welfare concept is used – as is done by the Commission⁵⁵ – the sovereignty of the Member States in public welfare matters would be limited. A counter-argument to this assumption is that it would encroach on the core areas of the relationship between the state and its citizens.⁵⁶ This concept has therefore been explicitly denied by the ECJ,⁵⁷ which implicitly followed the Opinion of AG Stix-Hackl.⁵⁸

In brief, one can say that from a Community law point of view, Member States are generally free to define eligible charitable purposes. The Member States are allowed to promote these purposes by granting tax exemptions to NPOs serving them but they have to exercise this liberty in accordance with Community law. They are likewise generally free to limit tax concessions to charitable purposes on their territory,⁵⁹ or at least to those purposes that have a strong link to

Notes

⁴⁸ See Hüttemann/Helios, *DB* 2006, p. 2490; cf. also to that effect Jachmann, *BB* 2006, p. 2610.

⁴⁹ ECJ, March 10, 2005, Case C-39/04, *Laboratoires Fournier SA* [2005] ECR I-2057.

⁵⁰ ECJ, March 10, 2005, Case C-39/04, *Laboratoires Fournier SA* [2005] ECR I-2057, para. 23.

⁵¹ ECJ, March 10, 2005, Case C-39/04, *Laboratoires Fournier SA* [2005] ECR I-2057, para. 23.

⁵² See Hüttemann/Helios, *DB* 2006, p. 2490.

⁵³ See Hüttemann/Helios, *DB* 2006, p. 2490.

⁵⁴ See Hüttemann/Helios, *DB* 2006, p. 2490.

⁵⁵ Cf. statement of the Commission in the *Stauffer* Case, December 14, 2004, JURM(2004)3112, MN 35.

⁵⁶ Cf. Jachmann, *BB* 2006, p. 2608.

⁵⁷ Cf. ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 37 and 39.

⁵⁸ See Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, point 94, who even calls the assumption of such a concept by the Commission as '*kühn*' (audacious).

⁵⁹ See also Mamut/Stürzlinger, *SWI* 2006, p. 556; Reimer, *SWI* 2006, p. 202; Contra: Cf. Reimer/Ribbrock, *RIW* 2005, p. 615.

it. This limitation still has to be in accordance with Community law,⁶⁰ especially concerning a differentiation between domestic and foreign activities.⁶¹ States, moreover, remain obliged to respect domestic national law and its principles.⁶² And, finally, they always remain responsible to their citizens.

At this point, it should also be mentioned that even if a limitation of charitable purposes to those that have a domestic link is generally in conformity with the EC Treaty, such limitations are nevertheless problematic from a socio-political point of view. Especially with regard to purposes such as catastrophic help, development aid, or cross-national purposes such as environmental protection or respect for human rights, to mention just a few, it is probably not desirable to completely seal off national charitable systems.⁶³ Furthermore, the economic importance of the non-profit sector should be considered in this respect.⁶⁴

C. Deductibility of donations to charitable corporations

According to a press release of the Commission,⁶⁵ the European Commission has sent the UK a formal request to end discrimination of foreign charities. The UK allows tax relief for donations to charities, but only if they are established in the UK. Charities in other Member States are excluded from relief and the Commission considers this discrimination to be contrary to the EC Treaty. The request is in the form of a 'reasoned opinion' under Article 226 of the EC Treaty. If the UK does not reply satisfactorily to the reasoned opinion within two months, the Commission may refer

the matter to the ECJ.⁶⁶ Similar requests were recently sent to Ireland,⁶⁷ Poland,⁶⁸ and Belgium,⁶⁹ where the same problems occur. Germany has not yet received a formal request by the Commission, although German tax law also contains problematic provisions in this respect.⁷⁰

As regards the applicability of the right of establishment, the Commission⁷¹ sees the British provision to be an infringement of this fundamental freedom. It argues that foreign charities are forced to set up branches in the UK in order to benefit from the favourable tax treatment. This argument cannot be followed. The denial of tax benefits in connection with the non-active letting of a property to foreign charitable organizations, as was the case in the *Stauffer* decision, would also force foreign charities to set up not only PEs but also branches in Germany in order to benefit from the favourable tax treatment. Nevertheless, the ECJ did not hold the right of establishment applicable since no active management in Germany was involved.⁷²

Moreover, as *Helios/Schlotter*⁷³ explain, the right of establishment requires an economic activity. Decisive is an active economic activity that is carried out in return for compensation.⁷⁴ Donations, on the other hand, are by definition voluntary contributions that are made without any consideration of the beneficiary and without a mandatory legal obligation of the donor.⁷⁵ Thus, the right of establishment is not applicable in this case. And even if the factual scope of this freedom was fulfilled, the problem concerning the personal scope of this freedom (more precisely, the interpretation of Art. 48(2) EC Treaty) would still remain.⁷⁶

In contrast to the right of establishment, the free

Notes

⁶⁰ See ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 37.

⁶¹ Cf. Hüttemann/Helios, *DB* 2006, p. 2490.

⁶² Cf. Reimer, *SWI* 2006, p. 201.

⁶³ Cf. also Thömmes, Steuerbefreiung ausländischer gemeinnütziger Stiftungen, *Internationale Wirtschaftsbrieft* (hereafter, *IWB*) 2006, p. 886, subject 11A, p. 1064; Sutter, Körperschaftsteuerpflicht einer gemeinnützigen Stiftung, *EuZW* 2006, pp. 629 et seq.; von Hippel, *EuZW* 2006, p. 618; Hemels, The Implications of the *Walter Stauffer* Case for Charities, Donors and Governments, *European Taxation* 2007, pp. 19 et seq.

⁶⁴ NPOs play an important role in cultural, social but also economic life of modern societies. In the 22 countries examined within the Johns Hopkins Comparative Nonprofit Sector Project, NPOs had total expenditures of USD 1.3 trillion and employed 25 million paid employees. These expenditures average 5.4 percent of the gross domestic product of these countries. (cf. Salamon/Sokoloski, *Global Civil Society: An Overview*, in Salamon/Sokolowski/List (eds.), *Global Civil Society* (2004), pp. 15 et seq.; Salamon/Anheier, *The emerging sector revisited. A summary* (1999), p. 3 et seq.; cf. also Commission communication on promoting the role of voluntary organisations and foundations in Europe, June 6, 1997, COM(1997)241 final, p. 6).

⁶⁵ Commission, June 10, 2006, IP/06/964, Commission's case reference number 2005/2281.

⁶⁶ So far the Commission has not referred the matter to the ECJ.

⁶⁷ Commission, October 17, 2006, IP/06/1408, Commission's case reference number 2005/2430.

⁶⁸ Commission, October 17, 2006, IP/06/1408, Commission's case reference number 2005/2410.

⁶⁹ Commission, December 21, 2006, IP/06/1879, Commission's case reference number 2005/5062.

⁷⁰ Cf. FG Münster, October 28, 2005, 11 K 2505/05, revision at the BFH under XI R 56/05.

⁷¹ Commission, June 10, 2006, IP/06/964, Commission's case reference number 2005/2281.

⁷² ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, para. 19.

⁷³ Cf. Helios/Schlotter, *ISrR* 2006, p. 485.

⁷⁴ Zimmer/Raab, *Inspire Art und Stiftungen*, in Asche/Kötz/Rawert/Schmidt/Walz, *Non Profit Law Yearbook* (2004), pp. 111 et seq.

⁷⁵ Cf. e.g. Austrian Administrative Court; VwGH, September 7, 1990, 90/14/0093.

⁷⁶ On this matter I can refer to section III.1. of this article.

movement of capital is applicable. It is comprised of capital movements⁷⁷ and payments.⁷⁸ The latter are defined as transfers of assets that constitute the consideration within the context of an underlying transaction.⁷⁹ Donations therefore cannot be seen as payments since they are voluntary contributions that are made for no consideration.⁸⁰ The EC Treaty does not define the term 'capital movement'.

However, it is established case law that the nomenclature in respect of 'movements of capital' annexed to Directive 88/361⁸¹ has indicative value for the purposes of defining capital movements. The list set out therein is not exhaustive.⁸² Section XI of the Annex to Directive 88/361 includes, *inter alia*, 'gifts and endowments'. Since in civil law⁸³ donations are normally seen as gifts, they are comprised by the term 'gifts and endowments'.⁸⁴ The ECJ recently confirmed in the cases *van Hilten*⁸⁵ and *Barbier*⁸⁶ that the free movement of capital also includes inheritances. These are also listed in section XI of the Annex to Directive 88/361, which is entitled 'Personal Capital Movements'. AG Léger⁸⁷ stated in his Opinion that this section in particular mentions transactions that make it possible for a person to wholly or partially transfer his fortune either during lifetime by means of loans, gifts, endowments, and dowries, or after his death by means of inheritances and legacies. This means that even if donations are not comprised by the term 'gifts',⁸⁸ they would fall within this section, which, as already mentioned, is not exhaustive.

The ECJ considers the free movement of capital as

object-related.⁸⁹ Its scope of protection is also available for charitable organizations.⁹⁰ Thus, it does not matter for the applicability of this fundamental freedom whether or not donations only concern the idealistic part of NPOs.⁹¹ It must therefore be concluded that a case such as the one in dispute falls under the scope of the provisions governing the free movement of capital.⁹²

Given the applicability of the free movement of capital, the ECJ's argumentation in the *Stauffer* Case about the conformity with Community law of preferential corporate tax treatment of charities is generally also applicable to donations to charitable organizations. According to the Commission,⁹³ the UK grants tax exemptions for donations to charitable organizations only if they are resident in the UK. NPOs resident in other Member States do not benefit from such a preferential treatment. This is a huge disadvantage for foreign NPOs because the possibility for the donee to deduct donations from his tax base may strongly influence his willingness to make donations, and donations are of great importance for the fundraising of charitable organizations. Assuming that a non-UK charity fulfilled all the requirements according to UK national law, it would be in an objectively comparable situation⁹⁴ and the difference in treatment would simply be a result of the foreign residence⁹⁵ of the entity. Thus, the British provisions in question would be discriminatory.

As grounds for justification, the effectiveness of fiscal supervision, cohesion, the prevention of tax

Notes

⁷⁷ Art. 56(1) EC Treaty.

⁷⁸ Art. 56(2) EC Treaty.

⁷⁹ Cf. Stadlmeier, Das materielle Recht der EG, in Fischer/Köck/Karollus (eds.), *Europarecht*⁴, MN 1494 et seq.; ECJ, January 31, 1984, joined cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR 00377.

⁸⁰ Cf. Helios/Schlottter, *ISr* 2006, p. 485; Schauhoff, in Schauhoff, *Handbuch der Gemeinnützigkeit* (2005), Sec. 10 MN 26 et seq.; EStR 2000 MN 4832; VwGH, September 7, 1990, 90/14/0093.

⁸¹ Council Directive 88/361/EEC, June 24, 1988, for the implementation of Article 67 of the Treaty, OJ L 178, July 8, 1988, p. 5 – 18.

⁸² ECJ, October 3, 2006, Case C-452/04, *Fidium Finanz* [2006] ECR I-8203, para. 22; see also, *inter alia*, ECJ, March 16, 1999, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, para. 21; ECJ, March 5, 2002, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch and Others* [2002] ECR I-2157, para. 30; ECJ, February 23, 2006, Case C-513/03, *van Hilten-van der Heijden* [2006] ECR I-1957, para. 39.

⁸³ Cf. Schauhoff, in Schauhoff, *Handbuch der Gemeinnützigkeit*, Sec. 10 MN 14.

⁸⁴ Cf. Helios/Schlottter, *ISr* 2006, p. 486; Schäfers, *ZEV* 2006, pp. 459 et seq.; von Hippel, *EuZW* 2006, p. 616; Commission, June 10, 2006, IP/06/964, Commission's case reference number 2005/2281; contra: Eicker, *Ist das deutsche Spendenrecht 'Europa'-tauglich?*, *Zeitschrift für die Steuer- und Erbrechtspraxis* (hereafter, *ZErB*) 2005, p. 244.

⁸⁵ ECJ, February 23, 2006, Case C-513/03, *van Hilten-van der Heijden* [2006] ECR I-1957.

⁸⁶ ECJ, December 11, 2003, Case C-364/01, *Barbier* [2003] ECR I-15013.

⁸⁷ Opinion of AG Léger, June 30, 2005, Case C-513/03, *van Hilten-van der Heijden* [2006] ECR I-1957, point 52.

⁸⁸ As Eicker argues; cf. Eicker, *ZErB* 2005, p. 244.

⁸⁹ Cf. Opinion of AG Stix-Hackl, December 15, 2005, Case C-386/04, *Stauffer*, point 59.

⁹⁰ ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203, paras. 21 to 25.

⁹¹ As is argued by: FG Münster, October 28, 2005, 11 K 2505/05 E, revision at the BFH under XI R 56/05, para. 23, *ISr* 2006, p. 497.; Heger, *Gemeinnützigkeit und Gemeinschaftsrecht*, *Finanz-Rundschau*, 2004, 1158

⁹² Cf. also Helios/Schlottter, *ISr* 2006, p. 486; Schäfers, *ZEV* 2006, pp. 459 et seq.; von Hippel, *EuZW* 2006, p. 616; Schäfers, *Die steuerrechtliche Behandlung gemeinnütziger Stiftungen in grenzüberschreitenden Fällen*, p. 367; Commission, June 10, 2006, IP/06/964, Commission's case reference number 2005/2281.

⁹³ Commission, June 10, 2006, IP/06/964, Commission's case reference number 2005/2281.

⁹⁴ Cf. ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203; section II.3. of this article.

⁹⁵ We would come to the same result if the preferential tax treatment was granted only in the case of unlimited liability to tax of the entity (cf. ECJ, September 14, 2006, Case C-386/04, *Stauffer* [2006] ECR I-8203).

evasion and criminal activities, and the reduction of tax revenue can be considered. They have to be rejected, however, for the same reasons the ECJ did in the *Stauffer* Case.

Thus, Art. 56 EC Treaty, in conjunction with Art. 58 EC Treaty, must be interpreted as precluding a Member State from denying the deduction from the tax base of donations to non-resident charitable entities, while, under the same circumstances, allowing a deduction of donations to resident charitable entities. A limitation to charities that have a sufficient domestic link might again be justifiable, however.⁹⁶

4. Solutions in tax treaties

A way to guarantee equal treatment of foreign or multinational charities is the implementation of bilateral or multilateral tax treaties between states. Herein, provisions can be stipulated that assure the accordance of tax benefits to foreign charities if – other than the criterion of residence – they fulfill the requirements for beneficial tax treatment in the source state. This is especially of interest in relation to third countries or if a foreign NPO is not recognized as such by the source state. The OECD Model Tax Convention on Income and on Capital (2005)⁹⁷ does not propose such a regulation. Still, there are some states, such as Germany, which nevertheless have included such provisions in some of their DTCs.⁹⁸

Another way to assure equal treatment of foreign and domestic NPOs can be non-discrimination clauses in DTCs. Provisions following Art. 24(3) OECD Model Tax Convention are of particular interest if the foreign NPO has a permanent establishment in the source state. A condition is the applicability of the tax treaty to NPOs. Furthermore the NPO must be considered an enterprise in the meaning of the treaty.

Further, it would be important for an NPO to fall under the scope of a DTC with its multinational activities since, even though exempt from income tax under domestic law, it might still be taxable in the source country and vice versa. The DTC would then

determine which state has the right to tax and which method for the avoidance of double taxation is applicable. The applicability of DTCs to charities is clear if the latter are explicitly mentioned in the DTC. It is also clear if the definition of 'resident of a Contracting State' does not refer to liability to tax. Thus, if a DTC's scope is limited to companies having their seat or place of effective management in one of the contracting states, without making any reference to liability to tax, then NPOs fulfilling these requirements can benefit from the treaty.⁹⁹

In addition to those DTCs or countries that explicitly regulate the applicability of the respective treaty to charities, there is the possibility that the competent authorities of the contracting parties convene in a mutual agreement procedure and decide on the applicability of the DTC to NPOs. The respective administrations agreed on such applicability for the DTCs between Austria and Luxembourg,¹⁰⁰ Austria and Germany, and Austria and the UK.¹⁰¹

With treaties following the OECD MC, on the other hand, both interpretations, allowing or denying NPOs' access to the treaties, are possible.¹⁰² The crucial point is the interpretation of Art. 4(1) OECD MC. Any interpretation of this provision in its context must take account of the provision's function as a condition for applying the distributive rules. Application of the distributive rules is not conditional on the person concerned actually being taxed (as a resident). All it requires is that the person concerned has a personal attachment to at least one of the contracting states – the state of residence.¹⁰³ In addition to the wording of the treaty, this interpretation is also governed by systematic considerations.¹⁰⁴ The U.S. Model Convention¹⁰⁵ even sees this interpretation as 'the generally accepted practice of treating an entity that would be liable for tax as a resident under the internal law of a state but for a specific exemption from tax (either complete or partial) as a resident of that state for [religious, charitable, educational, scientific, or other similar purpose; or to provide pensions or other similar benefits to employees pursuant to a plan.]'

In this respect it is also interesting that some DTCs

Notes

⁹⁶ Following the same reasoning as presented in section III.2. of this article.

⁹⁷ Hereafter, OECD MC; Due to the almost identical wording of the United Nations Income and Capital Model Convention (2001) most of what is said here is valid for the UN Model Convention as well.

⁹⁸ Cf. e.g. Art. 27 of the DTC between Germany and the USA (2006); Art. 28 of the DTC between Germany and Sweden (1992); Art. 21(7)(b) of the DTC between France and Germany (2001).

⁹⁹ Cf. e.g. Art. III of the DTC between Austria and Japan (1961); Art. 1(2) of the DTC between Austria and the former USSR countries (Tajikistan and Turkmenistan) (1981); Art. 1(2)(b) of the DTC between Austria and Bulgaria (1983); Art. 4(1)(b) of the DTC between Austria and Liechtenstein (1969).

¹⁰⁰ See statement of practice of the Austrian Federal Ministry of Finance, June 6, 1991, OJ of the Austrian Tax Authorities, 1991/184.

¹⁰¹ See statement of practice of the Austrian Federal Ministry of Finance, July 6, 1992, OJ of the Austrian Tax Authorities, 1992/246.

¹⁰² See paras. 8.2 and 8.3 of the OECD Commentary to Art. 4 OECD MC.

¹⁰³ Vogel, *DBA-Kommentar*³, Art. 4 MN 24a; Lehner, in Vogel (ed.) *DBA-Kommentar*⁴, Art. 4 MN 26; Lang, *Die Stiftung im internationalen Ertragsteuerrecht*, in Csoklich/Müller (eds.), *Die Stiftung als Unternehmer* (1990), pp. 197 et seq.; Lang, *Österreichische Stiftungen im internationalen Ertragsteuerrecht*, SWK 1990, pp. A 1 175 et seq.; BFH, August 4, 1976, I R 152-153/74, BStBl. II 1976, p. 662; BFH, September 13, 1972, I R 130/701973, BStBl. II 1973, p. 57; RFH, February 29, 1940, III 206/39, RStBl. 1940, p. 532.

¹⁰⁴ Lang, SWK 1990, p. 175.

¹⁰⁵ Cf. Art. 4(1)(b) of the Technical Explanations to the U.S. Model Convention (1996).

explicitly mention charities in the article dealing with Artists and Sportsmen.¹⁰⁶ In these cases one can assume the DTC to be applicable to charities. If the opposite were true, the DTC would already lack personal scope and we would not even get to the rules of distribution, such as the Article dealing with Artists and Sportsmen. The latter provision would be completely redundant if the DTC were not applicable to NPOs. The OECD MC does not contain such a regulation, however. Only the Commentary (since 2000) on Art. 17 mentions in paragraph 1(3) that '[t]he Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present.' Hence, it can be concluded that the existence of a provision within the meaning of paragraph 1(3) of the Commentary to the OECD MC requires the applicability of the DTC to organizations mentioned in the respective Article.

To recapitulate, it can be said that states should make use of bilateral or multilateral tax treaties to guarantee equal treatment of multinational charities. Concerning the applicability of DTCs to charities it has been pointed out that even though there are strong indications for an NPO-friendly interpretation of DTCs, especially if they are mentioned in one of the distributive Articles, a negative interpretation also appears to be possible. As a consequence, every DTC has to be interpreted separately. If not dealt with in the treaty, the question of the application of the treaty to NPOs is often decided by the contracting states through a mutual agreement procedure. The Austrian and German authorities, for example, decided to expand the scope of the DTC between Austria and Germany (2000) to tax exempt corporations with their

seat or effective management in one of the states through such a mutual agreement.¹⁰⁷

5. Final considerations

From a legal policy point of view, the *Stauffer* decision is to be embraced. It promotes the fulfillment of purposes declared as benefited by a state, and not only by domestic NPOs but also by foreign ones. And although the case at hand concerned only corporate income tax, the *Stauffer* decision is expected to influence other areas of tax law where special provisions for charities are provided, as well. The possibility of international activities and international fundraising opens opportunities for NPOs to achieve the size and power necessary to engage in large-scale projects. In this respect, it can only be hoped that the Member States will not limit tax concessions to charitable entities that follow domestic purposes.

Concerning countries outside the European Union, the freedom of NPOs is much more restricted and barriers for multinational activities are found that often prevent an internationalization of the third sector. The instrument currently best suited to change this situation are clauses in bilateral treaties (especially tax treaties) that regulate a mutual acknowledgement of charitable organizations.

Even if the point has admittedly not yet been reached, maybe one day a cross-border European or even worldwide public welfare will exist. And NPOs may serve even more as adequate means to dampen some of the negative side effects of globalization, in cases where states are not capable of doing so. The *Stauffer* decision was at least a small step into this direction.

Notes

¹⁰⁶ Cf. e.g. Art. 17(3) of the DTC between Austria and Germany (2000); in this context Express Answering Service (hereafter, EAS) 2417 of the Austrian Federal Ministry of Finance, February 16, 2004, SWI 2004, p. 166 and EAS 2602 of the Austrian Federal Ministry of Finance, March 24, 2005, SWI 2005, p. 282; Art. 17(3) of the DTC between Austria and Poland (2004); Art. 17(3) of the DTC between Austria and Romania (2005); Art. 18(3) of the DTC between Austria and the Netherlands (2001); Art. 17(3) of the DTC between Austria and the UK (1993).

¹⁰⁷ EAS 111 of the Austrian Federal Ministry of Finance, April 6, 1992, concerning royalties to an Austria charitable choral society, SWI 1992, p. 225.

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