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A statute for European cross-border associations and non-profit organizations – A new dawn for European regulatory harmonization in the non-profit sector?

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As it currently stands, the legal and policy framework for non-profit organisations and foundations within the European Union differ – in some cases slightly, in others significantly. This regularly causes an inconsistent treatment of cross-border activities and generates high compliance and legal costs for NPO's carrying out cross-border activities within the European Union. On February 17th 2022 the European Parliament adopted a resolution containing recommendations to the European Commission on a statute for cross-border European associations and non-profit organisations. The initiative builds on prior – unsuccessful – legislative proposals, such as the proposal for a European Foundation. At this stage there is no draft for such a statute and it is still uncertain, whether such a statute will eventually become law – however if the long process for increased regulatory harmonization in the non-profit sector should be successful, this may mark a new dawn for many NPO's and their efforts to be active in multiple member states.

Status Quo

ECJ jurisprudence based on the fundamental freedoms – especially the cases: Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften ('the Stauffer case' – C-386/04), Heinz Persche v. Finanzamt Lu?denscheid ('the Persche case' – C-318/07), Missionswerk Werner Heukelbach eV v. État Belge ('the Missionswerk case' – C-25/10) – has led to some improvement for NPO's regarding the tax-treatment in case of cross-border activities. However multiple problems and inefficiencies rooted in the European legislative framework persist. Recent studies by the European Parliamentary Research Service as well as the Policy Department for Citizens' Rights and Constitutional Affairs of the European Commissions' Directorate-General for Internal Policies[1] have pointed out the main issues with the current status quo. These issues are primarily:

- the lack of consistent definitions and data on NPO's,
- an uneven approach to tax exemptions for NPO's across the Member States,
- barriers to cross-border charitable donations to NPO's,
- complexity and inconsistency of comparability procedures,
- as well as the fact, that Member States have taken limited action (*policy neglect*).

From the perspective of NPO's as well as legal practitioners in this field, these findings aren't surprising. All of these issues play a role in how NPO's can finance their activities in a cross-border setting. One of the most central issues is usually whether the national tax-exemptions most NPO's enjoy, apply to such "international activities" or whether an eventual tax bill may prove to be prohibitive for certain undertakings.

NPO's regularly enjoy tax-exemptions in the country they are based in. If they want to become active in additional member states, they'll have to adhere to the tax laws and the conditions of the respective country – so far so unsurprising. But these conditions regularly go as far as stipulating the exact content of e.g. the articles of association, sometimes even the exact wording. Unsurprisingly organizations regularly create new organizations in each country they want to be active in. However, this alleviates the problems only partially. Unlike for-profits, which regularly have corporate structures in the respective member states as well, non-profits usually don't have a sufficient source of income in each of these countries. Consequently, such organizations have a need for capital, but the potential capital may be primarily based in one country which creates a need for funds to be transferred (*transfer of funds*) from one country to another. Likewise, private individuals or non-tax-exempt organizations may donate to such organizations in another country (*donations*).

These financial flows are not per se inhibited by national legislation (*freedom of capital*). However, for a transfer of funds to not endanger the tax-exempt status of an NPO, tax-exempt funds may regularly only be transferred to another tax-exempt organization. Similarly, the tax deductibility of donations is regularly subject to the recipient being a tax-exempt NPO (*or similar organization, e.g. faith-based organizations*). This is the case for rather obvious reasons – tax exemptions are exactly that: exemptions. These are usually based on legislatively privileged purposes. Any financial flow which leaves this privileged sphere becomes part of the regular market economy, which is why any tax-privilege (usually) seizes in the moment capital leaves this sphere of privilege. Correspondingly no tax privilege exists if funds are provided or donations given to organizations, which fall outside this sphere of tax privilege.

In a cross-border setting the problem usually is for the recipient to qualify as a tax-exempt NPO in the country where the capital comes from, since otherwise the NPO which transfers funds may endanger their status as tax-exempt (correspondingly for the deductibility of donations). As to not be a general discriminatory matter or an issue of the freedom of capital under EU law, generally "only" so called comparability-tests have to be met for the recipient third country organization to be an adequate tax-exempt organization for the purposes of the transferring organization/the donor.

Comparability in this sense is not uniform in the member states, but usually involves some or all of the following criteria:

- both the domestic NPO and the one based in another EU country pursue a public-benefit purpose according to the laws of the respective Member States,
- both pursue a public-benefit purpose,
- and the respective NPO articles of incorporation include a non-distribution constraint, whereby revenues cannot be distributed as income but are exclusively dedicated to the public benefit.

Several member states require further considerations, which are – due to the different tax-systems and legislation governing tax-exemptions – often not easily met. These circumstances are further complicated by the fact that these comparability-tests are usually handled on a case-by-case basis,

giving the relevant domestic tax authority broad discretion. In turn these procedures are regularly time-consuming, costly (*legal and compliance costs*) and – at least to some degree – non-transparent.

Resolution of the European Parliament containing recommendations to the European Commission

The obstacles faced by non-profit organizations across the EU and the disparities resulting from national laws, regulations or administrative practices or policies as well as the negative impact on civil society, restriction of fundamental rights, the restriction of expression and information, and discouragement of NPO's from expanding their activities across borders have now led the European Parliament to pass the above mentioned resolution, calling upon the European Commission to:

"submit, on the basis of Article 352 of the Treaty on the Functioning of the European Union, a Regulation establishing a statute for a European Association setting out the conditions and procedures governing the creation, governance, registration and regulation of legal entities in the form of a European association"

and

"submit, on the basis of Article 114 of the Treaty on the Functioning of the European Union, a proposal for a Directive on common minimum standards for non-profit organisations in the Union, with a view to creating a level playing field for non-profit organisations by establishing minimum standards, enabling civil society to benefit from freedoms and fundamental rights, as well as to contributing to strengthening European democracy."

A European legal entity, which may be recognized as tax-exempt, could make the above-mentioned comparability tests partially obsolete (*the legal forms would then be the same and thus comparable*). However, many NPO's may, for a wide array of reasons, prefer a different (e.g. currently already existing) corporate legal form. Notwithstanding the general importance of such a statute, the harmonization and transparency of comparability-tests should not be forgotten, if the current regulatory environment is to be truly improved. This is where the common minimum standards may play a role as well.

Whether or not a new regulatory dawn for NPO's is about to become reality or not, will depend heavily on the political will amongst all member states. Art. 114 TFEU allows for the adoption of measures to establish and improve the functioning of the internal market. However Art. 114 TFEU does not apply to fiscal provisions. Limiting the scope of potential legislative action on its basis. Moreover, Article 352 TFEU requires unanimity in the European Council. The latter being the reason for the failures of the past.

Past failures, future chances?

The last decades have seen several proposals to facilitate cross border activities of NPO's (e.g. for the European Association, the European Foundation, and the European Mutual Society). None have come to fruition as Article 352 TFEU with its unanimity requirement has been an obstacle too difficult to overcome.

Systematical differences in the Member States, such as e.g. the definition of "public benefit", tax

exemption criteria, minimum requirements as well as regulatory and supervisory aspects persist. If this time around a reform is supposed to be successful, the legislative process will need to adequately respond to the concerns of some Member States and accommodate at least some of these differences of the past.

While the unanimity requirement in the Council carries an imminent risk of failure for a statute for European cross-border associations and non-profit organizations the timing may prove right for legislative action. The Russian war against Ukraine and the still ongoing Sars-Cov-2 pandemic are currently perhaps some of the most prominent examples as to why societies may benefit immensely from the work of non-profits in cross-border settings. The same seems true with regard to climate change and currently especially apparent – women's rights. Last but not least, such legislative reform may further European integration by way of contributions to the public good and may strengthen the social cohesion of the Union.

Whether or not the timing to facilitate cross-border activities of NPO's by reducing existing (legislative) barriers is finally right remains to be seen – it looks like it will depend decisively on a uniform political will of the member states to "get it done". NPO's might examine their advocacy efforts in this regard. If a Statute for European cross-border associations and non-profit organizations becomes law, it may just prove to be a new dawn for European regulatory harmonization in the non-profit sector.

[1] The study by European Parliamentary Research Service – "A statute for European cross-border associations and non-profit organisations – European added value assessment, April 2021" may be found here: Study_StatuteforEuropeancross-borderassociationsandnon-profitorganisations_EN.pdf (europa.eu).

A statute for European cross-border associations and non-profit organizations Potential benefits in the current situation by the Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies – PE 693.439 – May 2021 is available under: https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2021/06/Fici_Resource2-1.pdf.

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