We're Starting To Share Well with Others: Cross-Border Giving Lessons from the Court of Justice of the European Union

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I. INTRODUCTION

Most nations agree that a tax deduction should apply to an individual's or organization's philanthropic act of contributing money to charity. However, divergent opinions, and laws enforcing those opinions, exist among each nation as to how, why, and for whom such a deduction should apply. National policies for deductions become more attenuated when a donor seeks favorable tax treatment for contributions made across national borders to a foreign civil society organization (CSO).[1]

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1. "Civil society organization" is an umbrella term that includes nonprofit organizations, public charities, private foundations, and nongovernment organizations, among others. Use of this term in this Comment is meant to overcome specific and unique country definitions of

For example, in the seminal case of *Hein Persche v. Finanzamt Lüdenscheid* before the Court of Justice of the European Union (Court of Justice), a German taxpayer sued his district tax court when a deduction on his tax return was denied for a donation of goods made to a charitable organization in Portugal.[2] A primary aspect of *Persche* consists of the court explaining the procedure whereby one country within the European Union (EU) judges another EU country's CSOs as sufficiently charitable to permit a tax deduction.[3] Further, a more implicit aspect to *Persche* is why a country would even want to provide tax incentives for one of its citizens to give to a foreign CSO in the first place.[4]

Indeed, the taxpayer in *Persche* did not engage in aberrant activity. Every day, people all over the globe give in a variety of forms. For example, the American Red Cross raised over $30 million in $5 and $10 donations for earthquake relief in Haiti by having donors text "HAITI" on their cell phones.[5] Web-based charities such as Kiva allow donors to give money that provide capital for microfinance loans to impoverished individuals around the globe.[6] While these CSOs and hundreds like them make giving easy, the network of national and international laws that facilitate (and often inhibit) giving are vast, complex, and in flux. For example, the American Red Cross and Kiva are U.S.-based 501(c)(3) charities, and contributions made to them qualify for tax deductions in the United States.[7] However, Friends-International, a successful CSO that works with marginalized street children in countries including Laos, Cambodia, and Indonesia has taken the time, money, and legal resources to become tax deductible in the United States, Switzerland, Germany, and Australia—despite each country possessing different charitable

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organizations whose work is for public benefit, not focused on profit, and not an extension of any government. *See, e.g.*, LESTER M. SALAMON ET AL., GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR 3-4 (1999) (describing the looseness of the term "CSO," among others such as "NPO" and "NGO").

2. Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, 2009 E.C.R. I-359, para. 2.

3. *Id.* para. 37; *see infra* Part III.C.

4. *See infra* Part III.D.

5. Suzanne Choney, *Mobile Giving To Help Haiti Exceeds $30 Million*, MSNBC (Jan. 21, 2010, 10:44 PM), http://www.msnbc.msn.com/id/34850532/ns/technology_and_science-wireless/.

6. *See How Kiva Works*, KIVA, http://www.kiva.org/about/how (last visited May 9, 2011); *see also About Our Mission*, WOKAI, http://www.en.wokai.org/about (last visited May 9, 2011) (explaining that Wokai focuses their microfinance operations solely in rural China).

7. *See* IRS Pub. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986 (2011), *available at* http://www.irs.gov/app/pub-78/; *infra* Part IV.

laws.[8] For Friends-International and thousands of similar CSOs across the globe, the costs of satisfying and maintaining charitable status in each of those countries is money that could instead be spent on their charitable mission by either reaching more children or providing greater benefits to children already receiving services. However, these overhead costs could be the stepping stone to larger and greater amounts of donations from abroad—assuming that one believes in the incentivizing properties of tax deductions in the first place.[9] Further still, many grassroots CSOs working in developing countries simply do not possess the resources or capacity to actively solicit international contributions.

With these considerations in mind, this Comment explores the ramifications of the *Persche* decision on cross-border philanthropy in the EU and examines the Court of Justice's articulation of public benefit, upon which tax deductions for charitable giving throughout the EU are partially based. Part II provides an overview of global philanthropy and tax deductions on giving. Part III delves into the *Persche* decision and its effect on EU law. Part IV examines how the United States' approach to cross-border giving differs from the EU. Part V concludes.

II. GLOBAL PHILANTHROPY IN CONTEXT: TAX DEDUCTIONS MATTER

The barriers to philanthropy are vastly greater and more complex than, as in *Persche*, a donor wishing to receive a tax deduction from his or her home country for a contribution made to a foreign CSO.[10] Specifically, hindrances to cross-border giving can occur during at least three stages: (1) at the donor country—such as burdensome procedural requirements for foreign grants, lack of tax incentives for making a cross-border grant, and counter-terrorism legislation;[11] (2) at the recipient country—including restrictions on the type of activities that can be supported by foreign funding, burdensome notification and reporting requirements for contributions received, and taxation of contributions

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8. *See About Us*, FRIENDS-INT'L, http://www.friends-international.org/aboutus/aboutus.asp?mainmenu=aboutus (last visited Sept. 28, 2011); *Where To Donate to Friends-International*, FRIENDS-INT'L, http://www.friends-international.org/supportus/bank-account.asp (last visited May 9, 2011).

9. *See infra* Part II.

10. *See, e.g.*, INT'L CTR. FOR NOT-FOR-PROFIT LAW, LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY: BARRIERS AND OPPORTUNITIES, COUNCIL ON FOUNDATIONS 1-2 (2010), http://www.icnl.org/knowledge/themes/dcs/Legal_Framework_for_Global_Philanthropy.pdf [hereinafter LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY].

11. *Id.* at 4-9.

received;[12] and (3) legal barriers to the formation and operation of CSO beneficiaries, such as invasive government oversight, excessive government discretion in registration and termination decisions, and prohibitions on areas of activity.[13]

Despite these barriers, global giving happens. In 2008, U.S. private philanthropy to developing countries totaled $37.3 billion; giving by U.S. foundations to developing countries totaled $4.3 billion; and giving by U.S. corporations to developing countries totaled $7.7 billion—a total of $49.3 billion.[14] Indeed, private sources from the United States gave more to developing countries in 2008 than official development aid provided by the U.S. government, which totaled $26.8 billion.[15] In 2008, private giving in the United Kingdom totaled $6.3 billion to U.K. charities working in the developing world—a sizable figure that excludes contributions by foundations, corporations, and churches.[16] Further, French private sources gave $1 billion to developing countries in the same year.[17] In 2007, Dutch private sources gave $696.9 million to developing countries.[18] While these figures are impressive, they do not divulge whether the donors made tax deductible contributions and, if so, whether the donors even bothered to include such a deduction on their tax returns.

Motivations for giving are complex and include desires to provide basic needs, make the world a better place, build community ties, and instill global equality, with giving levels of donors affected by their income, education, and geographic region.[19] In this light, studies tend to demonstrate that tax deductions, while not a primary factor, play a significant role in individual giving: In a 2010 U.S. study, only 32.6% of high net worth individuals reported that their giving would remain the same if the tax deductions on their donations were eliminated, whereas

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12. *Id.* at 11-17.

13. *Id.* at 17-19; *see also* Rebecca B. Vernon, *Closing the Door on Aid*, 11 INT'L J. NOT-FOR-PROFIT L. 5, 5-7 (2009), http://www.icnl.org/knowledge/ijnl/vol11iss4/vol11iss4.pdf (providing an overview of recent restrictive regulations and hostilities aimed at CSOs).

14. CTR. FOR GLOBAL PROSPERITY, THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 2010, HUDSON INST. 12 (2010), http://www.hudson.org/files/pdf_upload/Index_of_Global_Philanthropy_and_Remittances_2010.pdf.

15. *Id.*

16. *Id.* at 41.

17. *Id.*

18. *Id.* at 42.

19. *See* CTR. ON PHILANTHROPY AT IND. UNIV., UNDERSTANDING DONORS' MOTIVATIONS 8-9, 17-18 (2009), http://www.philanthropy.iupui.edu/Research/docs/2009CCS_FinalReport.pdf.

48.3% reported their giving would "somewhat decrease."[20] However, a study conducted under the United States Department of the Treasury found that most high net worth households give twice as much as they could possibly deduct on their tax returns, relying in part on a carry-over option.[21] In contrast, one economist notes that low-income U.S. donors, those who make $50,000 or under annually, are less concerned about tax incentives when they give than U.S. donors who make $100,000 or more annually.[22]

However, not all countries provide tax incentives for giving. The U.S. studies mentioned above are inapplicable to countries including, but not limited to, Sweden, Russia, and South Africa, which provide little or no tax benefits for giving.[23] Despite the lack of incentives, Swedes donated $698 million to charitable causes in 2009; Russia's largest corporations are said to give over $2.5 billion a year, and the Russian middle class give approximately $20 million a year; and a 2004 study reported South Africans gave on average $1.5 billion a year.[24] While countries like Sweden and Russia demonstrate that tax incentives do not fuel giving, favorable tax treatment in countries such as the United States, Canada, the United Kingdom, Germany, and France act as powerful currents affecting donors' motivations.[25]

If anyone cares about the methods that various types of donors utilize when giving, it is the countries' governments, which experience holes in their tax bases when donors deduct charitable contributions from income that the government otherwise could tax. In 2006, individual taxpayers alone in the United States accounted for $186.65 billion in itemized charitable deductions.[26] Indeed, every country that provides tax benefits for giving or tax breaks for the operations of CSOs, or both, loses revenue that could have otherwise rested in state coffers. In this

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20. CTR. FOR PHILANTHROPY AT IND. UNIV., THE 2010 STUDY OF HIGH NET WORTH PHILANTHROPY 47 (2010), http://www.philanthropy.iupui.edu/Research/docs/2010BAML_HighNetWorthPhilanthropy.pdf.

21. David Joulfaian, *Charitable Giving in Life and at Death*, *in* RETHINKING ESTATE AND GIFT TAXATION 350 (William G. Gale et al. eds., 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=905937.

22. Laura Tiehen, *Tax Policy and Charitable Contributions of Money*, 54 NAT'L TAX J. 707, 716-17 (2001).

23. *See* Tara Loader Wilkinson, *Spreading the Wealth*, WALL ST. J., Dec. 13, 2010, http://online.wsj.com/article/SB10001424052748704243904575630340322011652.html.

24. *Id.*

25. *See* HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 233-34 (2d ed. 2004).

26. CTR. FOR PHILANTHROPY AT IND. UNIV., HOW CHANGES IN TAX RATES MIGHT AFFECT ITEMIZED CHARITABLE DEDUCTIONS 3 (2009), http://www.philanthropy.iupui.edu/docs/2009/2009_TaxChangeProposal_WhitePaper.pdf.

regard, loss of state revenue was one of the German government's main arguments in *Persche* against allowing deductions to taxpayers' income for contributions made to a foreign CSO.[27]

III. *HEIN PERSCHE V. FINANZAMT LÜDENSCHEID*

A. *Introduction*

While no stranger to tax principles, Hein Persche, a tax adviser in Germany, was surprised when the German *Finanzamt Lüdenscheid* (District Tax Office, Lüdenscheid) denied his income tax deduction for a series of goods that he gave to a charity in Portugal.[28] Accompanying the €18,180 deduction made on his tax return, Persche included a receipt from the charity for his donation and a declaration by the proper Portuguese authority stating that the charity was entitled to tax benefits conferred by the Portuguese law on charities.[29] Despite this documentation, Persche lost two appeals before the District Tax Office.[30]

On further appeal, the *Bundesfinanzhof* (Federal Finance Court) stated the rejection of Persche's deduction was required by the District Tax Office because the gift in question was made to a recipient entity not established under German law and, consequently, a proper donation certificate was lacking.[31] However, the Federal Finance Court recognized that articles 63 and 65 of the Treaty of the Functioning of the European Union (TFEU) relating to the free flow of capital between Member States applied, but it was uncertain if those articles permitted a Member State to reject a tax deduction when the gift was made outside its own national territory.[32] Further, considering that the TFEU gives each Member State the power to determine what public interests it wants to

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27. *See infra* Part III.C (discussing that the Court of Justice did not find this argument persuasive).

28. Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, 2009 E.C.R. I-359, paras. 2, 12. The Portuguese charity in question was a retirement home that also included a children's home. Persche gave to the children's home, and the gifts included bed linens, towels, toy cars, and walkers for handicapped children. *Id.* para. 12.

29. *Id.* paras. 12-13.

30. *Id.* para. 14.

31. *Id.* paras. 14-15.

32. *Id.* para. 15. The Court of Justice of the European Union throughout its opinion refers to articles 56 and 58 of the Treaty. These articles have been subsequently renumbered since the *Persche* ruling by the Treaty of Lisbon to become articles 63 and 65 of the TFEU. No substantive changes to the articles discussed were made in the renumbering. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]; Consolidated Version of the Treaty on the Functioning of the European Union arts. 63, 65, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

promote through tax benefits, the court noted diverging viewpoints within German tax law as to whether granting tax benefits must be conferred only upon German nationals and residents.[33] Lastly, the court questioned whether the tax authorities of one Member State were supposed to verify information in the other Member State regarding the foreign grant, or whether the burden of proof rested with the taxpayer.[34]

Acknowledging the various layers of uncertainty within the law, the Federal Finance Court stayed its proceedings with Persche and sought a preliminary ruling from the Court of Justice.[35] The Court of Justice held that article 63 of the TFEU precludes a Member State from making laws that restrict deductions to charitable entities to include only charities established in that Member State without the possibility for the taxpayer to show that the foreign charity would also satisfy the Member State's domestic charity laws.[36]

B. Background

While the beginnings of a consolidated European Community trace back to the end of World War II, the Treaty on European Union (TEU) (also known as the Treaty of Maastricht) entered into force on November 1, 1993, and marked the formal beginning of the EU, implemented the use of a single currency (the euro) among Member States, and established a single market throughout the EU.[37] The single market embraced by the TEU guaranteed the commonly known "four freedoms" to citizens and entities of the Member States: The free movement of services, goods, people, and capital.[38] The operation of the single-market system is governed by the TFEU. The TFEU was brought into its present form by the Treaty of Lisbon, which entered into force December 2009, thereby modifying the TEU of 1993 and the precursor of the TFEU.[39] Currently, twenty-seven countries are members of the EU and have relinquished significant legal autonomy to stand under the umbrella of the TFEU.[40]

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33. Case C-318/07, *Hein Persche,* 2009 E.C.R. I-359, para. 16.

34. *Id.* paras. 18-19.

35. *Id.* paras. 16-19.

36. *Id.* para. 73.

37. PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 3-8, 22-23 (3d ed. 2003).

38. *Id.* at 580.

39. *See* Klaus-Dieter Borchardt, *The ABC of European Union Law*, PUBL'NS OFFICE OF THE EUR. UNION 14-16 (2010), http://eur-lex.europa.eu/en/editorial/OA8107147C_002.pdf.

40. *See The 27 Member Countries of the European Union*, EUR. COMM'N, http://europa.eu/about-eu/member-countries/index_en.htm (last visited May 9, 2011).

The pertinent part of article 63(1) of the TFEU states, "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."[41] However, limiting article 63(1), article 65(1) of the TFEU asserts that Member States shall be able to apply their respective tax laws to distinguish between taxpayers' geographic places of residence or places of investment.[42] Further, article 65(1) allows Member States to take all necessary measures, justified by public policy or public security, to prevent infringements of national tax laws and laws pertaining to financial institutions.[43] Leveling out the maneuvering room of article 65(1), subsection 3 of article 65 does not allow measures in 65(1) to be arbitrary or disguised restrictions to capital movements.[44]

Originally enacted to help combat tax evasion, Council Directive 77/799/EEC, facilitates communication between the tax authorities of each Member State.[45] Council Directive 77/799/EEC requires Member States to exchange information to allow a Member State's tax authority to correctly assess taxes on income and capital.[46] A Member State may request the tax authorities of another Member State to send information to help effect a correct tax assessment; however, the requested Member State does not need to comply if the requesting Member State has not "exhausted" its own sources of information in the light of the circumstances of the case at hand.[47]

Plugging into the nexus of EU laws, German tax law (like that of most developed nations) allows its taxpayers to deduct from their total amount of income expenditures that promote benevolent, religious, or scientific charitable purposes.[48] In addition, donations are tax deductible only if the recipient of the donation is a legal resident governed by German public law or an entity such as a public office, corporation, fund, or unincorporated association.[49] German tax law further provides that tax-exempt status for entities (provided the entities abide by the purposes

41. TFEU art. 63(1).
42. *Id.* art. 65(1).
43. *Id.*
44. *Id.* art. 65(3).
45. Council Directive 77/799/EEC, pmbl., 1977 O.J. (L 336) 15; *see Mutual Assistance by Member States in the Field of Direct Taxation and Taxation of Insurance Premiums*, EUR. COMM'N, http://europa.eu/legislation_summaries/taxation/l33029_en.htm (last visited May 10, 2011) (providing an explanatory list and chart of all amendments to Council Directive 77/799/EEC).
46. Council Directive 77/799/EEC, *supra* note 45, art. 1(1).
47. *Id.* art. 2(1).
48. Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, 2009 E.C.R. I-359, para. 5.
49. *Id.* para. 6.

and activities which are deemed charitable under German law) is only available to entities which are actually established in Germany.[50]

Persche was not the first time the German Federal Finance Court sought a preliminary ruling from the Court of Justice regarding the free movement of capital. In *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, the Federal Finance Court sought a clarification regarding how German corporate tax was to apply to a foreign charitable foundation that was established under Italian law but operated in Germany.[51] The charitable foundation formed under Italian law was receiving income from a rental property in Munich, Germany, which the charity rented out as part of its asset management activities.[52] Because the charity was a nonresident, and thus possessed only limited tax liability under German law, the charity was taxed for its rental income—however, a resident charity, which possessed unlimited tax liability, would be tax-exempt from such income.[53] The Court of Justice held that foreign charitable foundations were at a disadvantage and restricted with regard to rental income compared to their domestic counterparts under German law; thus, Germany had violated the free movement of capital under article 63 of the TFEU.[54] Despite Germany's objection that it possessed the right under article 65(1) of the TFEU to distinguish for tax purposes based on geographic residence, the court insisted no justification for the law was present. Where the foreign charitable foundation complies with same requirements as a domestic charity, equal tax treatment must ensue.[55]

C. The Grand Chamber's Decision

In holding that a deduction for gifts made to an organization recognized as charitable in another Member State was protected under the free movement of capital provision of article 63 of the TFEU, the Grand Chamber focused on the chilling effect an opposite ruling would have on cross-border gifts.[56] The Grand Chamber then determined that charitable bodies across Member States should not be discriminated against with respect to tax treatment when they perform the same

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50. *Id.* para. 7.
51. Case C-386/04, 2006 E.C.R. I-8203, paras. 2, 7-13.
52. *Id.* paras. 7-9.
53. *Id.* para. 11.
54. *Id.* paras. 26-28. The free movement of capital articles that the court refers to in *Centro di Musicologia* as 73(b) and 73(g) of the EC Treaty has since been renumbered and renamed by the entering into force of the Treaty of Lisbon. *See* Treaty of Lisbon arts. 56, 60.
55. Case C-386/04, *Centro di Musicologia*, 2006 E.C.R. I-8203, paras. 29-36, 40.
56. Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, 2009 E.C.R. I-359, para. 73.

charitable functions under the respective Member States' laws.[57] Lastly, the Grand Chamber held that the difficulty in verifying the foreign charitable entity as satisfying the deducting Member State's charity laws is not a valid reason to reject a deduction when the taxpayer claiming the deduction can provide the relevant evidence.[58]

In its first move, the Grand Chamber razed any distinction between a gift of consumer goods for nonprofit, altruistic motives as compared with the movement of capital for economic activity for the purposes of article 63 of the TFEU.[59] The Grand Chamber stressed that article 63 is a general prohibition on restrictions of the movement of capital and that "movement of capital" was not defined by the TFEU.[60] The Grand Chamber then extrapolated from prior case law and Council of the European Union Directive 88/361 regarding inheritance tax among Member States, noting that sums of money and property are treated the same and count as movement of capital for inheritance tax purposes.[61] Because tax is levied on inheritances in money and property form, the Grand Chamber reasoned that the tax treatment of gifts in goods or money also comes under article 63.[62] Capping off this distinction, the Grand Chamber noted that a Member State's purpose in legislation is a key consideration, and that the German tax law at issue made no distinction between gifts in money versus gifts in goods.[63]

The Grand Chamber then ruled that denying a deduction in the home Member State for gifts made outside that Member State was indeed a restriction on the movement of capital per article 63.[64] The Grand Chamber recognized that tax benefits exert substantial influence on a taxpayer's decision to make a charitable gift and that by not allowing a deduction for gifts made outside of Germany, a German taxpayer was much less likely to make a cross-border gift.[65] Based on the curbing effect of the German tax law, such legislation was a restriction on the free movement of capital prohibited by article 63.[66]

The Grand Chamber also addressed the leeway in article 65 for Member States to distinguish in their respective tax laws between

57. *Id.* paras. 42-50.
58. *Id.* paras. 51-62.
59. *See id.* paras. 20-30.
60. *Id.* paras. 23-24.
61. *Id.* paras. 25-26.
62. *Id.* para. 27.
63. *Id.* paras. 28-30.
64. *Id.* paras. 37-39.
65. *Id.* paras. 37-38.
66. *Id.* paras. 38-39.

taxpayers in different geographic locations with regard to where the taxpayer's capital is invested.[67] The Grand Chamber advised that for legislation that distinguishes between national entities and entities established in another Member State to be compatible with article 63, the difference in treatment must not go beyond what is necessary to attain the objective of the legislation at issue.[68] Further, the court also stressed that to comply with article 63 of the TFEU, the legislation at issue can only differentiate between entities in situations that are not objectively comparable or the differentiation must be justified by an overriding public interest.[69] Regarding public interest, the Grand Chamber stated a need to prevent the reduction of tax revenues was not an overriding public interest that could justify a restriction on the movement of capital.[70] However, the court did acknowledge that the need to safeguard effective fiscal supervision was a sufficient public interest that could override the TFEU.[71] Regarding the objectively comparable component, the court emphasized the only permissible difference in treatment between charitable entities for tax deduction purposes was if the foreign charitable entity "pursue[d] objectives" not recognized as charitable by the deduction-granting Member State.[72]

The Grand Chamber concluded by explaining that the difficulty of verifying the foreign charitable entity's work as sufficiently charitable is not a justification for denying a tax deduction for a gift made to that foreign entity.[73] To this end, the court noted that the taxpayer is in a position to "clearly and precisely" provide relevant documentation that the tax authority of the Member State deems necessary to authenticate the nature and genuineness of the deduction.[74] Citing to *Centro di Musicologia*, the court noted that before granting a tax exemption to a foreign charitable entity operating *within* its borders, a Member State is authorized to require annual accounts and an activity report from the foreign entity so that the Member State can determine that the foreign entity satisfies charitable conditions under its national law.[75] The court, analogizing to *Centro di Musicologia*, explained that the procedure should be no different when a taxpayer makes a foreign grant, even

67. *Id.* para. 40.
68. *Id.* para. 41.
69. *Id.*
70. *Id.* para. 46.
71. *Id.* paras 41, 52.
72. *Id.* para. 47.
73. *Id.* para. 51.
74. *Id.* paras. 53-54.
75. *Id.* para. 55.

though the taxpayer is the donor and obviously not the entity that received the gift.[76] In this light, the court explained that even though a donor would not be immediately privy as to how the foreign charitable body managed funds or directed its objectives, a donor could obtain documents from the foreign entity confirming the nature and amount of the gift, objectives pursued, and certification of the propriety of management of the gift.[77] The Grand Chamber stated it was ultimately for the Member State's competent national authorities, including its courts, to determine whether its tax law requirements for a deduction on gifts to charitable entities have been proven.[78]

As a final note, the Grand Chamber outlined an additional and supplementary option where tax authorities of one Member State can request from the tax authorities of another Member State all information that may be necessary to produce a correct assessment of a taxpayer's liability.[79] Even though this request is mandated under Council Directive 77/799/EEC, the court explained the tax authorities need not resort to the directive each time the information provided by the donor is insufficient.[80] The Grand Chamber focused on the permissive aspect of the directive due to the word "may," noting that requesting information from another Member State's tax authorities is not an obligation, and is for the Member State to determine whether such a request is warranted on a case-by-case basis.[81]

D. Donor's Burden and the Elastic Scope of Public Benefit Under Persche

The Court's decision redistributes responsibility in the philanthropic field in two key ways. First, the EU community as whole is implicated as a cohesive region of public benefit that no single Member State can impede by citing to lost tax revenue. Indeed, this idea aligns with and emphasizes the purposes of the four freedoms of the original founding treaty of the EU.[82] Unfortunately, the Court of Justice's implication of

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76. *Id.* para. 56.

77. *Id.* para. 57. The court placed the costs for such documentation on the foreign charity by noting it was the entity's decision if the burden of establishing, distributing, and translating such paperwork was worth facilitating the receipt of cross-border grants. *Id.* para. 59.

78. *Id.* para. 63.

79. *Id.* para. 61.

80. *Id.* para. 64. While Directive 77/799 is primarily concerned with stopping tax evasion among Member States, the Grand Chamber held that it is equally applicable in the cross-border gift context. *Id.* paras. 61-62.

81. *Id.* para. 65.

82. *See* TFEU art. 26.

this notion, rather than express declaration, has caused at least one country to act contrary to the spirit of its ruling in *Persche*. For example, Germany has changed its tax law to ensure that the scope of public benefit for tax deductions inures only to its own citizens.[83] Second, the burden of proving the equivalency of a foreign CSO was placed primarily on the donor desiring the tax deduction. This burden has many implications depending on donor motivations, the type of donor, and the cooperativeness of the tax authority requiring the information. Further, depending on this list of variables, the administrative burdens on certain CSOs may or may not be lessened.

1. Donor's Burden

Considering the donor's burden first, a donor need not bear any burden at all if the donor does not desire a tax deduction. However, the donor could be left stranded if a foreign CSO provides documentation that the relevant tax authority deems unacceptable, or if the CSO provides none at all. In this situation, though, it is in the foreign CSO's best interest to work with the donor if it wishes to receive further contributions. Of course, in the EU, very few (if any) CSOs will be so small as to lack the capacity or resources for providing proper documentation of gifts—at least not to the extent that a small grassroots CSO working in Laos or Nepal would be, for example. For sophisticated donors who possess an intimate knowledge of the CSO that they are supporting and the requirements of the relevant tax authority, obtaining the proper documents and providing any necessary translation is less of a burden than for a donor providing a small, one-time donation. The taxpayer in *Persche* fits the sophisticated donor category, considering the size of the contribution (over €18,000), his career as a tax advisor, and the fact that he owned a second residence in Portugal near the CSO he was funding.[84]

If a scale were produced, the sophistication of one party in the equation is inversely proportional to the need for the sophistication of the other. For example, if a foreign CSO provided tax deduction kits for each EU Member State, then it would be highly convenient for those wishing to give small amounts to receive tax deductions.[85] Of course, this means greater cost for the CSO to maintain its status in each country by complying with each respective law, paying any registration fees, and

83. *See infra* Part III.E.

84. *See* Case C-318/07, *Hein Persche*, 200 E.C.R. I-359, para. 12.

85. *See Where To Donate to Friends-International*, *supra* note 8 (explaining Friends-International's tax deductible status in the United States, Switzerland, and Germany).

keeping abreast of any changes in respective tax laws. Subsequently, this upkeep may mean costs wasted that could otherwise have gone to charitable programs or beneficiaries, or, alternatively, a surge in donations from sources abroad. Accordingly, the more sophisticated the donor and the more willing the donor is to bear costs, the less sophisticated the CSO need be. Exerting some effect on how CSOs and donors interact, Members States, in response to *Persche*, have legislated different requirements for taxpayers in fulfilling equivalency determinations of foreign CSOs.[86]

In a more pragmatic light, the donor's requirement articulated by the Court of Justice may be nothing more than a filing requirement. Here, a taxpayer would not be entitled to merely mark a deduction on their return and then point their finger at a foreign CSO, leaving it to the tax authority to sort out the details. In this sense, the burden rests on the party initiating the administrative request and to whom it monetarily concerns the most.

2. The Elastic Scope of Public Benefit

An intriguing aspect of the Court of Justice's ruling was that the protection of tax revenues was not an overriding public interest for any one Member State that could restrict the free movement of capital provision of article 63.[87] This would come as a shock to most national governments and, indeed, is part of the reason why the governments of Germany, Spain, France, Ireland, and the United Kingdom opposed granting tax deductions to equivalent CSOs in other Member States.[88]

However, the court noted a symbiotic relationship between CSOs and national governments that should give these governments pause to reconsider their opposition. Citing *Centro di Musicologia*, the court intimated that it was imprudent policy to limit the tax benefits of a foreign charity that was working within the Member State's domestic borders.[89] Under these circumstances, the court insisted that the foreign CSO conducted activities that potentially absolved the Member State of

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86. *See infra* Part III.E.

87. *See* Case C-318/07, *Hein Persche*, 2009 E.C.R. I-359, para. 46 ("[T]he need to prevent the reduction of tax revenues is neither among the objectives stated in Article [63] nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty." (article number updated to reflect renumbering)).

88. *Id.* para. 42; *see also How Changes in Tax Rates Might Affect Itemized Charitable Deductions*, *supra* note 26, at 2 (noting that over $180 billion were lost in charitable deductions to U.S. tax revenue in the given year).

89. *See* Case C-318/07, *Hein Persche*, 2009 E.C.R. I-359, para. 44.

some of its public benefit responsibilities.[90] In other words, the Member State involved in a quasi-barter transaction where the tax benefit was given for work that the Member State was fully, partially, or minimally relieved from performing upon its populace. As noted by the court in *Persche*, "by encouraging taxpayers, with the prospect of a tax deduction for gifts made to bodies recognised as charitable in support of their activities, a Member State encourages such bodies to develop charitable activities for which, usually, it would or could take responsibility itself."[91] Based on this wording, the court appeared more concerned with the principle than actual effects. Consequently, another way to view the Court of Justice's ruling in *Persche* is that the court found it unfair that a Member State would be receiving benefits from a foreign CSO and thereby not be relieving that CSO of some tax burden.

Indeed, the court also made this assertion under the facts of *Centro di Musicologia* where the Italian CSO was stationed in Munich, Germany, and provided scholarships to Swiss individuals in Bern, Switzerland, to stay in Cremona, Italy, and train in the classical production methods of certain stringed instruments.[92] While this activity fails to immediately implicate German citizens, the CSO also provided education on the history of music and musicology in general.[93] From this perspective, Germany was required to give favorable tax treatment to the Italian CSO operating within German borders because that CSO "potentially" enriched the lives of German citizens through music appreciation. In defense of its position, the court noted that it was the Member State's choice to even provide tax incentives for charitable activities in the first place, and, if this general policy was embraced, the Member State could not then deny it to a foreign CSO that fits the same charitable parameters as a domestic CSO.[94]

Critically, the court looked to the Member State's law to determine where benefits shall inure and allowed for various forms of public-benefit territoriality.[95] In other words, if the Member State's tax laws provide that domestic CSOs must benefit only that Member State's citizens to receive favorable tax treatment, then a foreign CSO must do the same. Of course, if Greece possessed such a law, satisfaction of this

90. *See id.*

91. *Id.* para. 45.

92. Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8203, para. 9.

93. *Id.*

94. Case C-318/07, *Hein Persche*, 2009 E.C.R. I-359, para. 44; *see also* Wilkinson, *supra* note 23 (recognizing that Sweden provides no such tax benefits for charitable activity).

95. *See* Case C-386/04, *Centro di Musicologia*, 2006 E.C.R. I-8203, para. 57.

hypothetical law for a CSO based in Finland would be difficult to achieve, unless the Finnish CSO catered to Greek expatriates or Greek students studying abroad, for example. Along these lines, in *Centro di Musicologia*, the court reasoned that "public benefit" meant the EU community as a whole because Germany did not possess any language in its tax laws that the benefits wrought by a CSO must affect German citizens.[96] Consequently, unless a Member State is magnanimous enough to feel the entire EU is its ward, little incentive exists to keep tax legislation open to include the entire EU. However, comity among Member States may play a role in keeping public benefit relegated to the greater EU, and, if tax incentives are kept open, benefits can flow more freely between Member States' citizens and their governments.

Ultimately, although the Court of Justice has laid further foundation upon the founding Treaty of the EU and its subsequent amendments, it remains with the respective EU Member States to determine if they wish to embrace this new call to further integration by allowing their tax laws to touch all corners of the EU. Many Member States have; Germany, unfortunately, decided it will not.

E. Ramifications of Persche *Throughout the European Union*

Nations within the EU were quick to react to the *Persche* decision by the Court of Justice as most nations treated donations to domestic CSOs and foreign CSOs differently.[97] Now, despite legislative possibilities to the contrary, most countries in the EU have changed their laws to allow donors to claim deductions for gifts to qualifying foreign organizations that reside in other Member States within the EU.[98] Of course, Sweden remains an outlier by providing no tax benefits for charitable giving and requires no new legislation on its part to comply with the Court of Justice's ruling.[99]

The challenge for the countries who adapted their laws became how to determine whether the foreign CSO was sufficiently equivalent to a domestic entity.[100] For example, in France, the foreign CSO must either be accredited by the French fiscal authority or comparable to a French CSO; in this second requirement, the donor must file evidence that the

96. *See id.*
97. LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY, *supra* note 10, at 6.
98. *Id.* These countries include Austria, Bulgaria, Belgium, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Slovenia, and the United Kingdom. *Id.* at 35 n.35.
99. *See* AULT & ARNOLD, *supra* note 25, at 234.
100. *See* Case C-318/07, *Hein Persche*, 2009 E.C.R. I-359, paras. 57-59.

foreign CSO is a domestic French equivalent.[101] Bulgaria's new law offers one example of the strength of such evidence: the donor must prove the foreign CSO is equivalent to a Bulgarian CSO by presenting the Bulgarian revenue authority with a notarized document issued and verified by the relevant foreign national authority proving the status of the foreign CSO accompanied by a Bulgarian translation.[102] Undoubtedly, this is a time-consuming and costly burden for donors, but as noted by the Court of Justice, such a burden may be placed on donors if they wish to seek such a deduction—or, alternatively, placed on the foreign CSO if the entity wishes to absorb the cost so as to facilitate the receipt of foreign grants.[103]

Apparently unsatisfied with the broadness of the Court of Justice's ruling in *Persche*, Germany requires that where the foreign CSO pursues public benefit activities outside of Germany, in order to qualify for tax benefits, that CSO must either support German permanent residents or conduct activities that could benefit Germany's reputation.[104] Indeed, this legislation enters the very exit door that was pointed out to the Federal Finance Court in both *Centro di Musicologia* and *Persche*.[105] Given this requirement by Germany, it is uncertain whether another suit by a German taxpayer has merit under article 63(1) of the TFEU regarding the chilling effect such a requirement would have on a domestic taxpayer contributing funds to a foreign CSO that did not benefit German residents or Germany's reputation.[106] However, this appears to be the very territoriality that the court permitted as long as a Member State's tax law does not discriminate between foreign CSOs and domestic CSOs.[107] Indeed, it would be difficult to distinguish between permitting Sweden's position of not allowing any tax incentives for charitable giving yet finding fault with Germany's citizen- or reputation-benefit requirement. However, Germany's requirement seems more subversive than an across-the-board lack of incentives for the singular reason that the taxpayer in *Persche* would now lose.

In all, Germany's requirement is very effective at retaining lost tax base within the bounds of German public interest. Unless the foreign CSO works with German citizens abroad or promotes German culture,

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101. LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY, *supra* note 10, at 6-7.
102. *Id.* at 7.
103. Case C-318/07, *Hein Persche*, 2009 E.C.R. I-359, para. 51.
104. LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY, *supra* note 10, at 7.
105. *See, e.g.*, Case C-318/07, *Hein Persche*, 2009 E.C.R. I-359, para. 40.
106. *See id.* paras. 37-38.
107. *See supra* Part III.D.2.

tax deductions will not be forthcoming. Essentially, Germany is ensuring that it receives the benefits that it is paying for in tax deductions given.

IV. *PERSCHE* IN CONTEXT: CROSS-BORDER GIVING IN THE UNITED STATES

The United States has placed geographic restrictions on donations made by U.S. citizens and U.S. entities since World War II.[108] Under U.S. tax law, section 170 of the Internal Revenue Code provides the rules for charitable deductions for income tax purposes.[109] An individual or corporation is entitled to an income tax deduction for a contribution made to a qualified charitable donee only if the charitable entity is formed under domestic U.S. law.[110] While a U.S. taxpayer is free to make a contribution directly to a foreign charity not formed under U.S. law, such a contribution would not qualify for an income tax deduction.[111] For example, contrary to the Court of Justice's ruling in *Persche*, which allowed the taxpayer a deduction as long as the taxpayer could prove the foreign entity satisfied domestic charity laws, even if a U.S. taxpayer were to make a grant to a foreign entity and present a letter to the Internal Revenue Service (IRS) that the donee entity was the equivalent to a U.S. 501(c)(3) charitable organization, the U.S. taxpayer's contribution would still not be deductible.[112] However, if a U.S. taxpayer wants his or her funds to be used abroad and to receive a tax deduction for his or her contribution, the taxpayer can make a contribution to a U.S. domestic 501(c)(3) charitable organization, who will then in turn use the taxpayer's contribution abroad.[113] By this method, the domestic organization acts as an intermediary or vehicle for the taxpayer's contribution to a foreign CSO entity.[114]

A § 501(c)(3) organization is statutorily defined as being organized and operated for religious, charitable, scientific, or educational

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108. *See* Nina J. Crimm, *Through A Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors*, 23 VA. TAX REV. 1, 44 (2003) (suggesting the legislative history of the geographic restrictions in U.S. tax law does not provide a satisfactory explanation for their enactment).

109. I.R.C. § 170 (2006); *see* Crimm, *supra* note 108, at 24-38 (providing an in-depth discussion of some of the intricacies of IRS Code section 170 in an individual and corporate context).

110. I.R.C. § 170(c)(1).

111. *Id.* § 873(b)(2).

112. *See* Crimm, *supra* note 108, at 32-33.

113. *Id.* at 33.

114. *Id.*

purposes.[115] Further, no net earnings of the organization can inure to the benefit of a private shareholder or individual, nor can the "substantial part of the activities of" the organization be participation in political campaigns or attempts to influence legislation.[116] From this point, a 501(c)(3) organization may either become a public charity or a private foundation. To become a public charity, an organization must satisfy either a functional test, with churches, schools, and medical care institutions often fitting this test, or a financial support test, whereby the charity can demonstrate that it is broadly supported by the general public.[117]

Public charities play a prominent role in U.S. international philanthropy, and many possess overseas branches from which they distribute aid, interact with foreign CSOs and beneficiaries, and perform due diligence on projects underway.[118] Under these circumstances, a contribution can be made to a 501(c)(3) public charity who either uses the contribution itself to conduct work in another country or re-grants the original contribution to other CSOs working in the foreign country. For example, Doctors Without Borders is a 501(c)(3) U.S. public charity with offices in nineteen countries.[119] If a contribution is made to Doctors Without Borders, the organization itself will use the funds to support its own projects around the world.[120] Alternatively, the International Youth Foundation will use contributions received from donors and re-grant these contribution to local CSOs.[121] Through this method, the International Youth Foundation has provided grants to 322 organizations in 86 countries.[122]

For a public charity to retain its tax deductible status, the organization must retain control and discretion over contributions made by donors, whether or not the contributions are specifically solicited by the charity.[123] As with International Youth Foundation, contributions made by a donor are deductible for federal income tax purposes even

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115. I.R.C. § 501(c)(3).

116. *Id.*

117. *Id.* § 509(a); *see* Crimm, *supra* note 108, at 58-65 (providing an outline of charity classifications and requirements under the I.R.C.).

118. *See* Crimm, *supra* note 108, at 64.

119. *See Contact Us*, DOCTORS WITHOUT BORDERS, http://www.doctorswithoutborders.org/offices/?ref=main-menu (last visited May 9, 2011).

120. *See Support Our Work*, DOCTORS WITHOUT BORDERS, http://www.doctorswithoutborders.org/aboutus/activities.cfm?ref=main-menu (last visited May 9, 2011).

121. *See IYF Programs*, INT'L YOUTH FOUND., http://www.iyfnet.org/iyf-programs (last visited May 9, 2011).

122. *Id.*

123. Crimm, *supra* note 108, at 64-65.

though the charity re-grants to foreign CSOs, even if the original donor expresses a desire that the contribution be used in a specific project abroad.[124] The control and discretion requirements are intended to ensure that the contributed funds are utilized to further the domestic public charity's purpose within the meaning of U.S. tax law.[125]

U.S. tax law contrasts sharply with various aspects of *Persche*. For a ruling like *Persche* to occur in the United States, each individual U.S. state would need to stop recognizing the charitable status of entities within other U.S. states (a fairly improbable occurrence) or the United States would have to enter into a treaty with the same strong ties and binding force of the TFEU under the Treaty of Lisbon within a regional context. Indeed, the United States has entered into a number of bilateral tax treaties that possess similar force to the EU umbrella as articulated in *Persche*.[126] However, a U.S. citizen would obtain little sympathy in suing the Commissioner of the IRS for a denial of a tax deduction for a contribution made to a U.S.-equivalent CSO in the Philippines, for example.

This seems odd given that the United States would allow tax deductions for contributions made by U.S. taxpayers to an organization such as International Youth Foundation, who conducts nearly all of their activities outside the United States in developing countries. In light of Germany's new requirements, International Youth Foundation's charitable purpose has little to do with U.S. citizens, though it does benefit the United States' reputation. One scholar propounds that promoting philanthropy is a primary component to U.S. national security and that U.S. philanthropy assists in fighting terrorism by promoting a positive image of the U.S. abroad.[127] Under *Persche* considerations, perhaps the public service being fulfilled is international development aid that the United States need not pay, or at least that can be supplemented by a U.S. entity in exchange for favorable tax treatment. However, U.S. tax law, as the Court of Justice in *Persche*, stretches the notion of public benefit without explicitly stating it. While regulation and oversight of a U.S. domestic 501(c)(3) charitable institution may be easier when such an organization possesses a domestic office and U.S. employees, a U.S. public benefit argument fails if the charity is using all of its funds abroad

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124. *See id.*

125. *Id.* at 67.

126. *See id.* at 51-56 (discussing the U.S.-Canada Income Tax Convention, the U.S.-Mexico Tax Convention, and the U.S.-Israel Income Tax Convention).

127. *See* Garry W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 844-46 (2007).

as with Doctors Without Borders. Even though U.S. tax policy has been firm not to allow tax deductions for contributions made to foreign CSOs unless the foreign CSO undergoes an extensive registration process with IRS, the United States should consider adopting a more lenient policy in allowing deductions to foreign CSOs considering some U.S. domestic organizations use all of their funds abroad anyway. Or, at least, allow the donor to prove that a foreign CSO meets a certain set of equivalency requirements set by the IRS.

V. CONCLUSION: WHOSE PUBLIC BENEFIT IS IT?

It seems unlikely that a supranational public benefit region will be created any time soon.[128] However, even under the strong and unique ties of the EU at large and the TFEU, the inability for a country to claim lost tax revenue as a public policy reason for not giving a foreign CSO equal treatment is large step. Given the *Persche* ruling, and a few more years of integration within the EU, perhaps Member State citizen benefit requirements like the one passed by Germany will be challenged and held to be in violation of the free movement of capital under article 63. In the meantime, cohesive regional or bilateral treaties will be the norm.

Indeed, attempts at an international tax treaty addressing global philanthropy have so far failed, and, as one scholar noted: "Although an important number of international institutions have supported these calls for solutions, all initiatives in this direction came to naught. One explanation for this lack of success has been the assertion that the initiatives were too ambitious and too idealistic."[129] Perhaps this is true; however, in times of disaster, nations have seen fit to temporarily extend their concept of public benefit outside their own borders. For example, after the earthquakes in Haiti and Chile in 2010, the United States Congress passed legislation allowing taxpayers to claim certain deductions on their 2009 and 2010 tax returns for contributions made to relief efforts in those areas.[130]

Of course, if governments still want to question why the policies discussed in *Persche* should be embraced on a larger, more permanent scale, perhaps they should seek advice from their own domestic

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128. For an exploration of this option, see LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY, *supra* note 10, at 31-32.

129. INEKE ALIEN KOELE, INTERNATIONAL TAXATION OF PHILANTHROPY: REMOVING TAX OBSTACLES FOR INTERNATIONAL CHARITIES 9 (2007), *available at* http://igitur-archive.library.uu.nl/dissertations/2007-1112-200617/index.htm.

130. LEGAL FRAMEWORK FOR GLOBAL PHILANTHROPY, *supra* note 10, at 21-22.

taxpayers who want tax deductions for international contributions made to foreign CSOs in the first place.