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The Taxation of Philanthropy in Switzerland: Current Status and Suggestions for Improvement

In this contribution, the author describes the current rules with regard to the taxation of philanthropic activities in Switzerland and makes various suggestions for improvements to the current regime. In this respect, the developments in EU law with regard to cross-border giving are also taken into account.

1. Introduction

Until recently, tax treatment of philanthropic activities in Switzerland was not attractive. The Federal Tax Administration (FTA) took a long while to recognize the fact that encouraging patronage would not only relieve it of considerable expense, but would also alter taxpayer behaviour. In other words, taxpayers could be encouraged to direct a portion of their assets towards actions or institutions serving the public to benefit the community. Recent reforms, in particular, a growing awareness of the subject, have gradually improved the fiscal landscape. The recent reform of the federal law on foundations resulting from the *Schiesser* Motion,[1] as well as partial changes to Geneva tax legislation, which were approved by a popular vote on 1 June 2008, are further signs of improvements.

The objective of this article is to provide an overview of the current Swiss rules on the taxation of philanthropic activities, while, at the same time, referencing certain aspects of comparative law, and to propose some actions to improve the current situation.[2] First, the article analyses Swiss national law by describing the position of the three main protagonists, i.e.: (1) the patron, or donor; (2) the beneficiary, for example, a foundation; (3) and the various tax administrations (*see* section 2.). The article then discusses certain aspects of international tax law (*see* section 3.). In this regard, it should be noted that VAT is not included within the scope of the article. Section 4. concludes the article.

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1. *See* CH: Federal Law of 8 October 2004 on Reform of the Foundation Law (*Schweizerisches Zivilgesetzbuch (Stiftungsrecht) Änderung vom 8. Oktober 2004*), effective 1 January 2006, RO (Official Compilation) 4545 (2005).
2. For comparison, *see* the Federal Council Report, *Fondations. Renforcer l'attractivité de la Suisse* (*Foundations – Enhancing Switzerland's Attractiveness*) (27 Feb. 2013), which proposes abandoning the *Luginbühl* Motion, Federal Gazette 2013, 3094 (cited in Rapport 2013 of the Federal Council).

2. National Tax Law

2.1. Direct taxes

2.1.1. Beneficiary

2.1.1.1. Conditions for exemption

In general, a legal entity receiving funds or donations for a public purpose is a foundation. In its usual form, the foundation is normally subject to a profit tax at the federal,[3] cantonal and municipal levels.[4] The federal tax rate on net profits is 4.25%. Profits of less than CHF 5,000 are exempt.[5] Likewise, contributions to foundation assets are not taxable.[6] Cantonal rates vary from canton to canton. For instance, in Geneva, there is a progressive rate with a cap of 23%.[7] Foundations are also subject to a cantonal and municipal tax on capital.[8] The tax rate on capital is determined by each canton and applies to net assets, generally determined according to the provisions applicable to natural persons.[9]

However, and this is an essential point, insofar as a foundation has a public purpose, it is exempt from tax on the profits and capital that are exclusively and irrevocably intended for this purpose.[10] From 1 January 2006, the exemption has been available to legal persons who simply serve a public purpose. As the word "pure" was deleted, it is not necessary to purely have a public purpose. The exemption is granted only on request and the applicant must demonstrate compliance with legal requirements. Public purpose means an altruistic activity that serves the public good exclusively and directly. The purpose of the institution must be of interest to the whole community and this purpose must be achieved through the disinterested sacrifices of its members.[11]

In essence, the following four conditions must be met for the exemption to apply:[12]

3. CH: Federal Direct Tax Law (*Bundesgesetz über die direkte Bundessteuer/ Loi fédérale sur l'impôt fédéral direct*, DBG/LFIFD) art. 49 para. 1 ltr. b.
4. CH: *Federal Law on the Harmonization of Direct Cantonal and Communal Taxes* (*Bundesgesetz über die Harmonisierung der Direkten Steuern der Kantone und Gemeinden/Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes*, StHG), art. 20 para. 1.
5. Art. 71 DBG.
6. Art. 66 para. 1 DBG and article 26 StHG.
7. CH: Taxation of Legal Persons Law (*Loi cantonale sur l'imposition des personnes morales*, LIMP), art. 25.
8. Art. 29 StHG.
9. Id., at art. 29 para. 2 ltr. c.
10. Art. 23 para. 1, ltr. f StHG and art. 56 ltr. g DBG.
11. CH: FTA, Circular No. 12, p. 3 (8 July 1994).
12. *See*, in particular, the Swiss Tax Conference Circular, *Exonération des personnes morales qui poursuivent des buts de service public, d'utilité publique ou*

(1) Pursuing a purpose of general interest. In practice, charitable, humanitarian, health, environmental, educational, scientific and cultural activities are considered to be for public purposes. The general interest of an activity is determined by the general perceptions of the population. For the purpose to be considered of general interest, the activity must be addressed at an indeterminate circle of people, i.e. a wide circle. However, the general interest is not limited to activities in Switzerland. A Swiss foundation that performs activities worldwide may also be exempt if the condition of generality is met.[13]

(2) Disinterest. For an activity to be exempt, it must not only serve the public interest, i.e. the objective condition, but it must also be based on altruism in the sense of dedication to the community, i.e. the subjective condition. The activity of the legal person must require a sacrifice from the members of the corporation or third parties benefiting the general interest that overrides their own interests. This purpose is lacking in mutual aid societies and leisure associations. The exemption implies the absence of a profit motive. However, an exempt institution may practice a profit-making activity, provided that the activity is not the institution's ultimate objective. It may, at most, be a means of obtaining its objective. The foundation's board members must also be volunteers.[14]

(3) Actual activity. The statutory reference to a purpose of general interest is clearly insufficient. The activity must be real. For instance, legal persons accumulating profits for a hypothetical future activity are not pursuing an objective of general interest. In practice, the relevant authority usually requests a description of the activities planned and a draft budget to ensure that an actual activity is involved.

(4) Irrevocable contribution of the donation of funds. The funds contributed to the legal person must be irrevocably contributed to pursue a foundation's purpose. This is the case if the foundation's bylaws state that funds may not be returned to founders or donors. In addition, if the foundation is dissolved, its assets are to be given to an institution pursuing a similar purpose.

If these four conditions are met, the foundation is exempt. This scenario has the added advantage of giving potential donors, at least those residing in Switzerland, the possibility of deducting their gifts under certain circumstances (*see* section 2.1.2.).

2.1.1.2. Proposals for improvement

It may be advisable to loosen the practices involved in the status of public purpose to further encourage patronage. In order to do so, it may be necessary to amend the Federal Direct Tax Law *(Bundesgesetz über die direkte Bundessteuer/Loi fédérale sur l'impôt fédéral direct*, DBG/LFIFD) and the Federal Tax Harmonization Law *(Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden/Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes*, StHG), as well as the FTA's Circular of 8 July 1994 (No. 12).

In this context, it would be permissible to allow foundation board members to receive compensation. It should be noted that, although a non-profit organization pursues an altruistic purpose, this does not necessarily mean that its boards and committees must behave in an exclusively altruistic manner. In recent years, regulations have been enhanced and responsibilities have increased. This trend requires an adjustment to the system of fair compensation, potentially overseen by the supervisory authority. Consequently, with the trend towards greater professionalization, it may be the right time to accept compensation for foundation board members, subject to full transparency. At the same time, and in order to allow for better resource management, the author feels that it is appropriate to authorize accumulation of at least some profits, without jeopardizing an organization's public purpose status.

2.1.1.3. Federal Law on the host state

On 1 January 2008, Switzerland adopted the new Federal Law on the host state. The objective of this law was to consolidate all legal provisions involving the privileges and immunities that Switzerland grants to intergovernmental organizations, international institutions, quasi-governmental international organizations, diplomatic missions and other entities covered by article 2 of the host state law. It should be noted that these privileges and immunities may include, specifically in relation to tax matters, exemption from direct or indirect taxes, and from customs and import duties.[15]

Four of the general terms of note for granting a privilege, immunity or facility are that: (1) the entity must have its main or subsidiary headquarters in Switzerland; (2) it must be a non-profit entity with an international purpose; (3) it must operate in the area of international relations; and (4) its presence in Switzerland must be of particular interest for Switzerland.[16] Additional terms are set for each type of institution or organization.

The new law offers an attractive framework and especially a welcome coordination of applicable legislation in the area. It also appears to have had a favourable effect, as many international institutions and foundations have set up in Switzerland, especially in Geneva.

des buts culturels/Déductibilité des libéralités (Exemption of legal persons pursuing goals with a public service, public purpose, or cultural purpose/ Deductibility of gifts) p. 38 et seq. (18 Jan. 2008). *See also* FTA, *supra* n. 11.

13. Federal Council Report, *supra* n. 2, at no. 3.2.2.
14. Swiss Tax Conference, *supra* n. 12, at p. 38.
15. CH: Federal Law on the host state (*Loi fédérale sur l'Etat hôte*), RS 192.12, art. 3.
16. Id., at art. 6.

2.1.2. Donor

2.1.2.1. Initial comments

In discussing the position of the donor domiciled in Switzerland, it is useful to distinguish between natural persons (*see* section 2.1.2.2.) and legal persons (*see* section 2.1.2.3.).

2.1.2.2. Gift deductions for natural persons

Current law

Under the current legislation, natural persons domiciled in Switzerland can, under certain conditions, deduct gifts of cash and other assets made to legal persons pursuing a public purpose with seat in Switzerland.[17] "Other assets" encompasses real and personal property, capital and claims and rights of intangible property, provided that these assets can be valued.[18] Gifts are deductible subject to the following two conditions: (1) the recipient entity has public purpose status; and (2) its head office is in Switzerland.[19]

According to federal law, the DBG limits the deduction to 20% of net taxable income. Under cantonal law, the StHG leaves it for the cantons to determine the amount of the allowable deduction.[20] Consequently, as for natural persons, the amount of the deduction can vary considerably from one canton to another.

Although legislators allow cantons to decide, the deduction is limited to 20% in most cantons. In the canton of Geneva, following a partial reform of tax law, the threshold increased from 5% to 20% with effect from 1 January 2009. However, significant differences remain. To cite the two extremes, in the Basel *Landschaft*, there is no limit on deductions but, in Neuchâtel, the deduction is limited to 5% of net income.

Proposals for improvement

In order to further encourage patronage, it may be advisable to increase the thresholds for deduction in the DBG, currently set at 20%, and to encourage cantons to use the freedom given by the DBG and also increase their thresholds. However, it should be noted that, in the course of the revision of the foundation law, the Federal Council, in response to the *Schiesser* parliamentary initiative in 2003, felt that increasing the threshold for deduction to 40% of net income for natural persons or of net profits for legal persons was too generous. The Federal Council was of the same opinion regarding a deduction of up to 100% of net income for natural persons or net profits for legal persons in respect of federal direct tax under very specific conditions, specifically, important public interest, sustainable financing, and at least equal participation by cantons and municipalities in the name of "symmetrical sacrifices".[21] According to the Federal Council, the proposals to increase deduction limits were contrary to the principle of taxability depending on fiscal capacity. Extending the ability to claim a deduction too broadly would also seriously harm the fundamental fiscal nature of taxes in using the tax proceeds to finance state duties, regardless of what these were.[22] However, this position has evolved slightly. In its 2013 report in response to the *Luginbühl* Motion, the Federal Council noted that it would certainly be "possible to once again raise" the deduction percentage to enhance Switzerland's attractiveness, but again ultimately rejected this proposition.[23]

The author, however, feels that values have changed and that Swiss society is currently more willing to accept an increase in the deduction level. Both the public and politicians are also showing an increased interest in patronage, which has resulted specifically in growth in the philanthropy sector in Switzerland over the last few years. Consequently, an increase in the threshold for deduction can be envisaged and the author thinks that less reluctance regarding this would be expressed today than in 2003.

Raising the deduction threshold would require an amendment of the DBG and the relevant cantonal laws. However, the StHG already grants the cantons sufficient leeway so that no changes would be necessary. The amendment proposal could most likely come from parliamentary action or a popular initiative.

2.1.2.3. Gift deductions for legal persons

Current situation

As with natural persons, gifts of cash or in kind by legal persons to entities with a public purpose with seat in Switzerland are deductible within the limits set by the various applicable laws. Federal law sets the limit at 20% of net profit.[24] Just as for donations by natural persons, the DBG does not set a threshold for donations by legal persons and leaves for each canton to decide the allowable deduction amount.[25] The amount under Geneva law is currently 20%.[26] Once again, the Basel *Landschaft* allows an unlimited deduction.

Proposal for improvement

Given the similarities among laws on deductions for natural and for legal persons, the author reiterates, mutatis mutandis, the comments and suggestions in section 2.1.1.2.

2.1.2.4. Deductions for corporate sponsorship

Current situation

Companies organized as stock corporations, limited liability companies or partnerships can have major sponsorship

17. Art. 9 para. 2 ltr. i StHG; and art. 33a DBG.
18. X. Oberson, *Droit fiscal Suisse* (*Swiss Tax Law*) 4th ed., p. 186 (Helbing & Lichtenhahn 2012) and D. Yersi & Y. Noël. (ed.), *French-speaking Swiss commentary*, No. 6 to Art. 33a. (Helbig & Lichtenhahn 2008).
19. Art. 9 para. 2 ltr. i StHG and art. 33a DBG.
20. Art. 9 para. 2 ltr. i StHG, which reads: "up to the amount stipulated by cantonal law..." (author's unofficial translation).
21. Federal Council Opinion of 5 December 2003, concerning the parliamentary initiative "Revision of Foundation Law" *(Schiesser)*, Federal Gazette 2003, p. 7463 et seq., n. 7466 et seq.
22. Id., at p. 7466.
23. Federal Council Report, *supra* n. 2, at no. 3.2.3.
24. Art. 59 para. 1 ltr. c DBG.
25. Art. 25 para. c StHG.
26. Art. 13 ltr. c LIPM.

activities. It is, therefore, critical to distinguish between sponsorship and donations, i.e. patronage.

In sponsoring, the sponsor essentially assumes the payment obligations in the form of cash or in kind in exchange for the beneficiary's participation in the sponsor's advertising or public relations activities. Sponsorship is, therefore, a means of allowing a company to promote its image to the public. Consequently, in contrast to a donation, sponsorship is characterized by the supported entity offering its patron publicity services or image enhancement.[27] The amounts paid in this context are deductible expenses if they can be demonstrated to be for commercial purposes.[28]

It should be noted that the Federal Supreme Court (*Bundesgericht/Tribunal fédéral*, BGer/TF) has stated that donations made for cultural or social aims are deductible expenses only if they have a direct or indirect publicity purpose. This is not the case for a holding company that has no commercial activity and, therefore, has no need of publicity support.[29] In other words, patronage is of an altruistic nature and is not done in exchange for a consideration. Sponsorship, in contrast, is undertaken for commercial reasons.

Proposals for improvement

In practice, great confusion surrounds this distinction. The author thinks that it is essential to better explain the difference between sponsorship, which is a deductible expense for the sponsor and a taxable profit for the person sponsored, and patronage, which is a deductible gift for the patron, under the terms set by law, and non-taxable revenue for the beneficiary. If necessary, consideration for the greater encouragement of patronage could be given by delineating the limits more clearly and providing a simple framework so that companies can further develop their philanthropic activities, i.e. patronage, and differentiate their sponsorships more clearly.

A company's image is further enhanced if its contributions are disinterested and altruistic with no expectation of compensation or reward. It is, therefore, critical to distinguish very clearly between sponsorship, which retains a highly commercial aspect, and philanthropy.

2.1.2.5. Deferring gifts over time

Under current federal and cantonal law, a donation carries no tax advantages for a legal or natural donor if there is no taxable income or profit. In fact, with no income or profit, there is no donation deduction to claim. Consequently, a taxpayer whose taxable income or profit is zero, i.e. one that realizes losses, and who made donations in the same year cannot deduct such donations due to the lack of taxable income or profit.

In order to encourage taxpayers to make gifts, even if they do not have taxable income or profits, legislation could be enacted that would allow unlimited gift deferment over time. In this way, a taxpayer could benefit from the deduction when the taxpayer realizes income or profit. It should be noted that, in its 2013 report, the Federal Council decided against such a measure, as it felt that the change would give rise to unequal treatment compared to other deductions.[30]

Initiating such a gift deferment system could also prove to be difficult in practice for natural persons, insofar as such taxpayers do not keep financial records. As a result, it could be hard to keep track of donations year after year that had not yet been "used" as an income deduction. A suitable means of recording gifts would have to be established so that they could be deferred for tax deduction purposes.

For instance, systems could be established within cantonal tax administrations so that, when each tax administration levies tax, it records in a centralized federal database the donations made by each taxpayer. In this way, donations could be deferred and the process could be checked by authorities. The DBG and the StHG would have to be amended to introduce such a system of delaying gifts over time.

2.2. Gift and estate taxes

2.2.1. Reciprocal agreements and tax treaties: proposals

Currently, institutions with a public purpose are not uniformly tax exempt in all cantons. Gifts and estates that straddle cantons are also treated in different ways. Reciprocal agreements exist in some cases, of course, but not all. In order to ensure that taxpayer generosity can transcend canton borders unimpeded, it would be advisable to further harmonize practices between cantons and the cantons should sign more reciprocal agreements.

Another solution that might result in a quicker and slightly more consistent reform would be to negotiate an intercantonal reciprocity tax treaty. The Swiss Tax Conference, which consists of the FTA and cantonal tax administrations, could lead such a project. In this way, the effect could be felt more quickly and more consistently throughout Switzerland.

In this context, it should be noted that an obligation of mutual aid and collaboration between cantons is enshrined in the Swiss Constitution and represents the principles of confederate loyalty and cooperative federalism.[31] Consequently, this solution seems to be appropriate.

2.2.2. Treatment of beneficiaries

As the recipient of a gift or of an inheritance or bequest, a foundation may encounter the additional problem of gift and estate tax. These taxes exist only under cantonal law

27. P.-M. Glauser, *Sponsoring et TVA Une analyse de la jurisprudence du Tribunal fédéral et de ses conséquences (Sponsorship and VAT, an analysis of Federal Supreme Court case law and its consequences)* Swiss CPA 11, p. 887 (2005).
28. Oberson, *supra* n. 18, at p. 229.
29. Archives 64,224 = RDAF (Journal of Administrative and Tax Law) II 153 (1997).
30. Federal Council, *supra* n. 23.
31. P. Moor, A. Flückiger & V. Martenet, *Droit administratif (Administrative law)* vol. 1, p. 176 (Stämpfli 2012).

and their structure and exemptions vary greatly from one canton to another.

Generally, gifts or estates given by Swiss residents to foundations with an acknowledged public purpose located in Switzerland are tax exempt. It should be noted that the federal popular initiative on estates, which is likely to be submitted to a vote in June 2015, does not provide for a special treatment of this matter. As a result, there is a risk of the imposition of a tax of 20% if the initiative is passed.

3. International Tax Law

3.1. Direct taxes

3.1.1. Evolution of EU law

With regard to international tax law, the treatment of cross-border donations raises numerous issues and it is often difficult to have deductibility recognized.[32] In EU law, three important decisions of the Court of Justice of the European Union (ECJ or the "Court") have considered the implications of the principle of the free movement of capital regarding cross-border giving.[33]

In *Stauffer* (Case C-386/04), a musicology centre operating as a tax-exempt foundation in Italy received rent for a building it owned in Germany. Germany refused the exemption in respect of the rental income on the grounds that the beneficiary did not reside in Germany. The ECJ held that such discrimination was not justified, being contrary to the principle of proportionality.[34]

Having examined the scope of the rules on exemptions in respect of the beneficiary, the ECJ then had to address treatment of the donor, who was a resident of an EU Member State making a gift to a party in a third state. In *Persche* (Case C-318/07), a German citizen had made a gift to a charitable organization in Portugal. The German tax authorities had disallowed the deduction, as the beneficiary did not reside in Germany and the proof provided did not meet German law requirements. The ECJ was approached to give a preliminary ruling, in respect of which the Court stated, in essence, that, when a taxpayer requests a tax deduction in one Member State in respect of gifts made to established organizations of acknowledged general interest in another Member State, such gifts are covered by the provisions of the free movement of capital,[35] even if they are made in kind in the form of common consumer goods. As the Treaty of Rome contains no definition of the movement of capital, the ECJ referred to the text in Directive (88/361),[36] which expressly envisaged certain operations, such as gifts, as being protected by the free movement of capital, even when these have no relation to economic activity.

The ECJ, therefore, held that tax deductions in respect of cross-border gifts fall under the free movement of capital, which is guaranteed by Community law. Germany's disallowance of the deductions for gifts to organizations of acknowledged general interest established in other Member States constitutes a restriction on the free movement of capital. The ECJ felt, however, that it is not contrary to the principle of proportionality to require that the donor's Member State verify or ensure verification that the organization of acknowledged general interest receiving the gift meets the conditions set by the donor state's laws. Nevertheless, if the organization of acknowledged general interest receiving the gift meets the conditions set by the donor state's laws, it may not be discriminated against solely on the grounds that it is not established in the territory of that state. Since *Persche*, gifts given by a taxpayer of one Member State to an institution with a public purpose in another Member State are governed by the principle of the free movement of capital and, therefore, cannot be the subject of discrimination when the recipient is established abroad.[37]

Finally, *Missionswerk* (Case C-25/10) involved a bequest by a Belgian resident on her death to an association with a public purpose in Germany. The Belgian tax authorities wanted to apply an 80% tax rate to the bequest, whereas the same bequest would have been taxed at 7% under national law. Once again, in keeping with its previous judgements, the ECJ held that the Belgian inheritance and gift rules were discriminatory.[38]

3.1.2. Deductions for international gift giving

The ECJ case law on the free movement of capital can have an effect in Switzerland. In fact, article 56 of the Treaty on the European Union prohibits restrictions on the free movement of capital not only between Member States but also between Member States and third states. Consequently, a gift derived from an EU Member State to Switzerland should be able to benefit from this case law.

In addition, even though Switzerland is not an EU Member State, it has adopted a European policy based on bilateral sectoral agreements. These agreements create broad, reciprocal access to markets and form the basis of close collaboration in several areas. As a result, despite the fact that Switzerland is not part of the European Union, it includes in its fiscal practices the principles involved in the prohibition of double taxation and discriminatory treatment. These are based either on case law derived from the prohibition on double taxation between cantons or on bilateral tax agreements.

In the author's opinion, gifts from a donor resident in a Member State to institutions with a public purpose in Switzerland should be subject to the legal precedent of the ECJ

32. In this regard, *see* S. Heidenbauer et al., *Cross-Border Charitable Giving and Its Tax Limitations*, 67 Bull. Intl. Taxn. 11 (2013), Journals IBFD and I.A. Koel, *How Will International Philanthropy Be Freed from Landlocked Tax Barriers*, 50 Eur. Taxn. 9 (2010), Journals IBFD.
33. *See* European Foundation Centre, *Taxation of Cross-border Philanthropy in Europe after* Persche *and* Stauffer (2014) and B. Merkt & E. Zysset, *Cross-border Donations*, STEP Journal, May, p. 34 (2009).
34. DE: ECJ, 14 Sept. 2006, Case C-386/04, *Centro de Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, ECJ Case Law IBFD.
35. Treaty on the European Union, art. 56, OJ C 80 (2001), EU Law IBFD.
36. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178 (1988).
37. DE: ECJ, 27 Jan. 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, ECJ Case Law IBFD.
38. BE: ECJ, 10 Feb. 2011, Case C-25/10, *Missionswerk Werner Heukelbach eV v. État Belge*, ECJ Case Law IBFD.

as developed in *Persche*.[39] In light of this ECJ legal precedent, the state in which the donor resides should still be able to obtain the relevant information from the recipient state. This point seems much less problematic now than in the past, as Switzerland, in accordance with policy in force since 13 March 2009, grants exchange of information on request according to the OECD standard based on its tax treaties.[40] Consequently, under these conditions and based on the principle of the free movement of capital, an EU resident taxpayer should be able to claim a deduction for gifts according to his national law if these are made to legal persons with a public purpose located in Switzerland.[41]

The question becomes more difficult whether the same treatment can apply in the other direction, i.e. to gifts from Switzerland to an institution established in an EU Member State. In these circumstances, the principle of the free movement of capital is not part of the bilateral agreements concluded to date between Switzerland and the European Union.

It may be asked as to whether or not a similar rule might not be derived from the principle of non-discrimination under a tax treaty that incorporates article 24 of the OECD Model[42] with the EU Member State in question. However, the historic interpretation of the OECD Model seems to confirm that the authors of article 24 did not intend to offer non-profit organizations of other states the same advantages as comparable local establishments.[43] The Commentary on Article 24 of the OECD Model is in the same vein.[44] To date, case law would not appear to have interpreted the principle in this way either. Only an evolving interpretation of article 24 of the OECD Model in the light of the ECJ case law could justify such a development.

3.1.3. *Proposal for improvement*

Nevertheless, the author feels that, in order to encourage cross-border philanthropic giving, Switzerland would be well advised to insert clauses in its tax treaties that would allow for recognition of a deduction for gifts to entities that have an acknowledged public purpose under the same conditions as those of the donor's state of residence. The Netherlands, admittedly in a fairly isolated case, and the United States, with some states that are tightly linked geographically, have included such clauses in their tax treaties.[45]

3.2. Gift and estate taxes: The current situation

According to the Commentary on Article 3 of the OECD Model, the term "person" as used in article 3 of the OECD Model, which provides general definitions, should be interpreted broadly. As a result, according to the OECD Commentary on Article 3, a foundation may be covered by the definition of the term "person".

Under current practice, the presence of a tax treaty does not admit exemption for donations to foreign institutions with a public purpose. It may, therefore, be wondered whether or not a less favourable treatment of gift-giving to foreign institutions with a public purpose is compatible with the prohibition on discrimination contained in most of the tax treaties concluded by Switzerland.

Non-discrimination clauses apply, in principle, to taxes "of all kinds or titles" and, therefore, also to taxes falling outside of the scope of the convention in question.[46] As a result, it should be possible to rely on the non-discrimination clauses contained in tax treaties on income and wealth taxes to reject the levying of a discriminatory tax on estates and gifts.

In actual terms, the non-discrimination principle means that:

> the tax applied to nationals and foreigners in the same situation should be in the same form, its payment and calculation basis methods should be similar, its rate equal, and, lastly, taxation formalities (filing, paying, time periods, etc.) cannot be more burdensome for foreigners than for nationals.[47]

In the situation in question, partial or total exemption means a rate reduction that would be refused to foreign institutions due to their state of incorporation. Consequently, the compatibility of a reduced exemption for institutions whose headquarters are in a state that has concluded an income and wealth tax treaty with Switzerland that includes a non-discrimination article, can be questioned. It should, however, be noted that current interpretation of article 24 of the OECD Model tends not to demand that a state extend the same advantages to a foreign non-profit organization as it does to its own organizations.

4. Conclusions

It appears that the Swiss taxation of philanthropy has improved over the last years. First, gifts to charitable entities are more generously deductible, subject to a certain threshold. Second, the practice with regard to the condition to benefit from a tax-exempt status for non-profit purposes has been clarified and slightly broadened. There is, however, room for improvement, notably as regards the transcantonal recognition of gifts. As far as the transnational giving is concerned, the evolution of EU law, notably in the "*Stauffer* and *Persche*" cases could have a positive impact on Switzerland. In the

39. In this regard, *see* Merkt & Zysset, *supra* n. 33.
40. In this respect, *see* X. Oberson, *Précis de droit fiscal international* (*Summary of international tax law*) 4th ed., p. 349 et seq. (Stämpfli 2014).
41. In this regard, *see* Federal Council, *supra* n. 2, at No. 3.2.4., p. 2005, which states, however, that it is not certain in practice that the corresponding deductions are actually granted.
42. Most recently, *OECD Model Tax Convention on Income and on Capital* (15 July 2014), Models IBFD.
43. K. van Raad & C. Landim, *Art. 24 n. 62* in *Commentaire du Modèle OCDE de Convention fiscale concernant le revenu et la fortune* (*Commentary of the OECD Model Tax Convention concerning income and wealth)* (R. Danon et al. eds., Helbig Lichtenhahn 2014).
44. *Model Tax Convention on Income and on Capital: Commentary on Article 24* para. 10 (15 July 2014), Models IBFD.
45. Heidenbauer et al., *supra* n. 32, at sec. 4.
46. Oberson, *supra* n. 40, at p. 282.
47. Para. 15 *OECD Model: Commentary on Article 24* (2014).

author's view, a gift made from an EU Member State to Switzerland should be able to benefit from the free movement of capital. Consequently, the EU resident taxpayer should be able to claim a deduction for gift, according to his national law if the gift is made for a legal person with a public purpose located in Switzerland.

The question is more difficult, however, whether the same treatment can apply in the other direction, i.e. gift from Switzerland to an institution established in an EU Member State. Therefore, it is the author's opinion that Switzerland would be well advised to insert clauses in its tax treaties that could allow, under the same conditions as those of the donor's state of residence, for recognition of a deduction for a gift to entities that have an acknowledged public purpose.