A STATE OF FLUX IN PUBLIC BENEFIT ACROSS THE UK, IRELAND AND EUROPE

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The term 'public benefit' has generated lively parliamentary, legal and journalistic debate in recent years, not least in relation to the tax privileges enjoyed by fee-charging independent schools and the merits or otherwise of religious organisations. One might be forgiven for believing that it describes a brand new quango-administered test of charitable status, which puts relief of poverty at the heart of charity and which must be passed by prospective and established charities alike.[2] Comprising words which are easy enough to understand, the term might also be seen as a rare but welcome piece of 'plain English' in an often alien legal language, but appearances can be misleading. 'Public benefit' is a term which deserves to be taken seriously.

The term is not unique to England and Wales,[3] but also has a defining role in charity law in other jurisdictions, many of which have joined the growing wave of legislative reform by introducing statutory definitions of charity based on 'public benefit'.[4] This paper will first explore the meaning of the term in England and Wales and then ask whether it bears the same meaning in the jurisdictions of Scotland, Northern Ireland and Ireland, before looking further afield to the European Commission's proposal for a new legal entity for public benefit

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2 'Quango' is the term commonly, but often derogatorily, used for a quasi-autonomous non-governmental organisation. The Charity Commission survived when the government axed 192 quangos in October 2010.

3 Nor solely to questions of charitable status. 'Public benefit corporations', for example, were introduced by the Health and Social Care (Community Health and Standards) Act 2003.

4 Recent examples include Australia, where a new Act received Royal Assent in June 2013, and Jersey, where an extended public consultation on draft legislation is due to begin in January 2014.

purposes, the 'European Foundation'.[5] Whilst a consistent definition and integrated approach to charitable status and regulation undoubtedly has its merits, not least for charities active in more than one jurisdiction, it seems that fragmentation, or disintegration, may better describe the present landscape in the UK and Ireland. We must wait and see whether the European Foundation can unite those jurisdictions by delivering a coherent alternative.

England and Wales

The meaning of 'public benefit' in England and Wales is far from clear. Although it is a central part of the long-anticipated[6] statutory definition of charity, introduced by the Charities Act 2006,[7] no definition of the term is given, beyond stipulating that 'public benefit' is to be understood according to the meaning attributed to it in centuries of case law.[8] This undermines arguments that the Act reformed and modernised charity law by its focus on public benefit[9] and the absence of any straightforward definition in case law inevitably paves the way for varying legal interpretations.[10] This scope for uncertainty is demonstrated below, by considering some of the differences in interpretation according to the author, the Charity Commission and the Upper Tribunal (Tax and Chancery) ('the Tribunal').[11]

5 Proposal for a Council Regulation on the Statute for a European Foundation, European Commission February 2012 (COM (2012) 35 final). The Proposal is currently being reviewed by the Council of Ministers, where unanimous agreement is required in order for it to become law. Further negotiations are expected to be conducted during the presidencies of Greece and Italy during 2014.

6 Various inquiries had been conducted into the merits of introducing a statutory definition. See, for example, the *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmd 8710, 1952) (Nathan Report).

7 The 2006 Act has since been (largely) consolidated in the Charities Act 2011.

8 Charities Act 2011, s 4(3).

9 The Labour government's Strategy Unit Report (*Private Action, Public Benefit: A review of Charities and the Wider Not-for-Profit Sector* (HMSO 2002)), which preceded the 2006 Act, had signalled a clear intention that public benefit should be measured (in part) by proven benefit, the impact of fees and opportunities for the poor.

10 The statutory list of charitable purposes, itself an innovation, also represented little change, broadly codifying those purposes already recognised by the courts as charitable: Charities Act 2011, s 3. (A small number of changes were made, such as adding the promotion of amateur sport.)

11 *ISC v Charity Commission* [2011] UKUT 421, [2012] Ch 214.

'Public Benefit' in Case Law

A review of well over a hundred cases[12] suggests that the term can best be described as a convenient (and self-explanatory) shorthand for describing the two-limbed test of charitable status which had been developed by the courts over hundreds of years, namely that an institution's purposes must be (i) beneficial in a way the law regards as charitable and (ii) for the benefit of the public or a section of the public.[13] Interestingly, it was not a term that was always used and, even where it was used, it was not used consistently, sometimes referring to the first[14] or second[15] test alone, depending on which was in issue before the court, or sometimes charitable status generally,[16] or synonymously with purposes of general public utility[17] or, more broadly, with the fourth head of charity.[18]

It becomes necessary, therefore, to discover the meaning of 'public benefit' by extrapolating principles from case law, which can be stated generally but applied specifically.[19] It is not necessary, for the purposes of this paper, to enumerate or explain each principle, but a few general points of fundamental importance might be made.[20]

First, if the term 'public benefit' is understood to describe the test for determining what is or is not a 'charity', it follows that it should be interpreted within the confines and elucidation of the very specific and technical meaning ascribed to

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12 Undertaken by the author as part of her PhD research.

13 e.g. *Williams Trustees v IRC* [1947] AC 447 (HL) 455. A failure of either test could be explained by saying that the purposes were not for the public benefit and it was not always clear, or necessary to state, which test was failed (*Gilmour v Coats* [1948] Ch 340 (CA) 343, 344).

14 e.g. *Re Pinion* [1965] Ch 85 (CA).

15 e.g. *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL) 305, 306.

16 e.g. *Re Hummeltenberg* [1923] 1 Ch 237 (Ch) 240.

17 e.g. *Townley v Bedwell* (1801) 6 Ves Jr 194, 31 ER 1008.

18 e.g. *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) 42, 47 (referring to the fourth head of charity as identified by Lord Macnaghton in *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 (HL) 552, 583).

19 *IR v Falkirk Temperance Café Trust* 1927 SC 261 (CSIH) 267.

20 For an extensive review of principles of public benefit arising from case law, see Garton, 'Public Benefit in Charity Law', OUP 2013. The author's forthcoming publication (anticipated 2014, Hart Publishing Ltd) will also offer a framework of rules and principles which explain 'public benefit' and contrast this framework both with the Charity Commission's interpretation and implementation of the term and the position in Scotland.

'charity' by the courts.[21] This special meaning has not simply been commented upon, but vigorously stressed by senior members of the judiciary, at pains to make clear that popular notions of what is charitable are irrelevant. Thus Lord Wrenbury described the legal and popular meanings of 'charity' as 'so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning'[22] and Lord Justice Sachs spoke of the 'natural allergy, stemming simply from the popular meaning of "charity", that would need to be eliminated in order to accept that the business of producing and selling law reports could be charitable'.[23] To the extent that charity is popularly associated with alleviating poverty,[24] this means acknowledging the many occasions on which the courts have spelt out that poverty is not an essential element of charity, with the result not only that not *all* beneficiaries need be poor, but also that there is no legal requirement to ensure that *some* of the beneficiaries are poor, or even that opportunities to benefit are extended to the poor.[25]

Secondly, it is important to appreciate that the courts' first inquiry[26] was not whether purposes were, in fact, beneficial or 'charitable', but whether they were beneficial *in a way the law regards as charitable*. This recognised the well-established principle that not all beneficial purposes are charitable in law[27] and required the purposes to be located within previously recognised heads of charity,[28] the inherent fact of their being beneficial being assumed as a result,[29] with no further inquiry or explanation as to why that quality had been attached to them.

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21 eg *Morice v Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947 where Lord Eldon explained, in no fewer than a dozen references, that the courts had formed their own understanding of charity according to a 'technical sense'.

22 *Verge v Somerville* [1924] AC 496 (PC) 502.

23 *Incorporated Council of Law Reporting v AG* [1972] Ch 73 (CA) 90.

24 This was the view of Lord Halsbury in *Pemsel* (n 18) 552, although the popular meaning of charity has also been described as incapable of definition: *Ashfield Municipal Council v Joyce* [1978] AC 122 (PC) 134.

25 For a fuller analysis of this proposition (and the question of fee-charging), see Synge, 'Poverty: an essential element in charity after all?' [2011] 70 CLJ 649.

26 Referring here to the first limb of the test of charitable status (see text to n 13), although sometimes the courts noted that the first inquiry was the second limb: *Verge* (n 22) 499.

27 *Re Strakosch* [1949] Ch 529 (CA) 536.

28 Set out by Lord Macnaghten in *Pemsel* (n 18), but still with reference to the purposes set out in the Preamble to the Statute of Charitable Uses Act 1601 (43 Eliz 1 c 4). The statutory list of purposes should be taken as the new heads of charity.

29 *National Anti-Vivisection* (n 18) 42; and not just in the first three heads, but in all previously recognised heads: Luxton, 'Making law? Parliament v Charity Commission' (Politeia, 2009) 10.

The advancement of religion, the relief of poverty and the advancement of education[30] were readily accepted as categories of charity, the first of these essentially forming the original basis for charity law[31] and the second and third being prominent in the Preamble to the Statute of Elizabeth.[32]

In the case of new purposes beneficial to the community,[33] the courts appeared to reach a decision as to whether purposes were beneficial by forming an opinion based on their own knowledge or their perception of generally accepted opinion,[34] only requiring evidence where the nature of the purposes were unknown to them[35] or, more particularly, where it was being argued that purposes were not beneficial[36] or where evidence of benefit or disbenefit was being adduced in order to argue against precedent.[37] Once 'classified' as purposes falling within an accepted nomenclature, however, the courts made no further inquiry into the benefit actually delivered. On the contrary, they made it clear that this was not an examination which had to be made.[38]

The courts' benevolent attitude towards charity was manifest, although charitable status would be denied where the purposes were not deemed to be within the parameters of those already recognised as charitable,[39] or where certain disqualifying factors applied. Thus, the courts might recognise purposes as prima facie charitable, but refuse charitable status where they could be seen to be more detrimental than beneficial,[40] illegal, immoral or otherwise contrary to public

30 The first three heads of charity in *Pemsel* (n 18).

31 See, for example, Jones *History of the Law of Charity 1532-1827* (CUP 1969), especially chapters I, II and IV.

32 n 28.

33 The fourth head in *Pemsel* (n 18).

34 The promotion of animal welfare, for example, was considered beneficial, as averting cruelty and improving morality, without any inquiry or need for evidence: *Re Wedgwood* [1915] 1 Ch 113 (CA).

35 For example regarding the training of spiritualist mediums: *Hummeltenberg* (n 16).

36 eg *National Anti-Vivisection* (n 18) where the House of Lords weighed up the improvement of human morality on the one hand and the loss of valuable medical knowledge on the other (and found the purposes to be more detrimental than beneficial).

37 Most notably in *Gilmour v Coats* [1949] AC 426 (HL), where the cloistered religious community was not sufficiently public to be charitable, following *Cocks v Manners* (1871) LR 12 Eq 574 (Ch).

38 *Re Shaw's Will Trusts* [1952] Ch 163 (Ch) 170; *Funnell v Stewart* [1996] 1 WLR 28 (Ch).

39 For example *Pinion* (n 14); *Re Grove-Grady* [1929] 1 Ch 557 (CA).

40 The classic authority being *National Anti-Vivisection* (n 18).

policy, political,[41] or where there was a purpose of making a private gain.[42] Likewise, if a class of beneficiaries was defined by a personal nexus, such as common ancestry[43] or employment,[44] purposes would not be charitable because they lacked public character.[45]

Thirdly, case law shows that charitable status is not a transient quality which depends on a charity's activities, but a near-permanent quality which depends on the purposes for which an institution is established. Lord Simonds described the very limited circumstances in which purposes might be described as no longer for the public benefit, or no longer charitable,[46] such as where purposes become illegal or immoral or contrary to public policy (due to a change in the law or morality or public policy) or where an increase in human knowledge leads to an understanding that purposes, once regarded as beneficial, are actually detrimental. In such cases, at least in the case of a charitable trust,[47] the doctrine of cy-près will operate to channel the charity's assets to other similar purposes.[48] Loss of charitable status is not, or should not be, a consequence of trustees acting outside their purposes or otherwise in breach of trust.[49] Of course a different view might be taken when purposes are considered afresh in respect of a different institution at a later date, but only where there are 'compelling reasons' for a changed perception, based on a 'radical change of circumstances established by sufficient evidence'.[50] This resistance can be explained not only by the need for certainty and predictability in

41 *McGovern v AG* [1982] Ch 321 (Ch).

42 *IRC v City of Glasgow Police Athletic Association* [1953] AC 380 (HL); but charging fees is perfectly acceptable in law: *Law Reporting* (n 23).

43 *Re Compton* [1945] Ch 123 (CA).

44 *Oppenheim* (n 15) 305.

45 Except where the purposes are the relief of poverty: *AG v Charity Commission* [2012] WTLR 977.

46 *National Anti-Vivisection* (n 18) 74 ('A charity once established does not die though its nature may be changed'); and note that Charities Act 2011, s 1 expressly provides for charitable status to be determined on the basis of purposes.

47 Difficult questions arise (which are outside the scope of this paper) as to loss of charitable status and the treatment of an institution's assets, which may turn on whether it is incorporated or not and whether it is considered never to have been charitable or to have become non-charitable.

48 Charities Act 2011, s 62 (and note how the language in s 62(1)(e)(iii) echoes that of Lord Simonds (n 46)); *AG v Marchant* (1866-67) LR 3 Eq 424 (Ch).

49 Breach of trust is a matter of governance and regulatory action. The distinction is often missed.

50 *Gilmour* (n 37) 443.

the law but also by virtue of the practical difficulties which would otherwise ensue.[51]

In view of the courts' conservative attitude (and also of the legal uncertainty surrounding a loss of charitable status), threats or suggestions that charitable status might be lost, whether on the grounds of a lack of public benefit or otherwise, should not be made lightly.[52]

The Meaning of Public Benefit According to the Charity Commission

In response to its statutory duty 'to promote awareness and understanding of the operation of the public benefit requirement,[53] the Charity Commission published hundreds of pages of guidance in 2008,[54] in which it set out legal principles 'distilled...from the relevant case law'[55] and which it explained in a separate publication.[56] Since the meaning of public benefit was to be found in abundant and often complex case law, it is surprising that this guidance was written by 'staff in the Policy Division with input/assistance from legal',[57] and not by charity law experts, or even the Commission's own lawyers. It is consequently less surprising, however, that the guidance may have misinterpreted the law, or that it might be described as excessively lengthy, repetitive and poorly written, or that it has been challenged in the courts.[58]

Time does not permit a full enquiry here into the Charity Commission's interpretation of the term 'public benefit' in its 2008 guidance, but attention will be drawn to four fundamental ways in which it differed from the interpretation given above. It should be noted that the Commission has no law-making powers of its

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51 *Pemsel* (n 18) 587; *Compton* (n 43) 139.

52 Such threats have been a hallmark of the Charity Commission's explanation and implementation of the public benefit requirement.

53 Charities Act 2011, s 14.

54 It issued general guidance (*Charities and Public Benefit*, January 2008) and supplemental guidance in relation to individual heads of charity. Much of the guidance was withdrawn following *ISC* (n 11) and revised guidance was published in September 2013.

55 Foreword to *Charities and Public Benefit* (ibid). The guidance does not have force of law but charity trustees are required 'to have regard to it': Charities Act 2011, s 17(5).

56 *An analysis of the law underpinning Charities and Public Benefit* (December 2008).

57 Information communicated by the Charity Commission to the author in an exchange of emails, 11 August 2010.

58 See nn 11 and 45.

own, but a duty to determine charitable status according to the law which has been made by the courts and the legislature.[59]

First, the Commission extrapolated a legal principle from case law that the poor should not be excluded and concluded that, in the case of fee-charging charities, this requires opportunities to benefit to be given to those who cannot afford the fees, including the poor. The proposition that the poor should not be excluded is not contested so far as it is confined to express exclusions of the poor,[60] but there is no authority in case law for the proposition that charitable status should be denied in the absence of such opportunities being given.[61] The courts have considered such arguments but rejected them, most notably in relation to charities for the relief of the infirm or aged,[62] but also in relation to fee-charging schools.[63] Nor is there any logical justification for restating a principle that the poor must *not be excluded* as one which dictates that they must be positively *included* (rather than eligible to be included).

Secondly, and amply demonstrated by the Charity Commission's implementation of the public benefit requirement through its 'public benefit assessment programme',[64] the Commission differed from the courts by concentrating on a charity's activities and measuring the benefit actually delivered to the public, in assessing whether or not the public benefit requirement was met.[65] This was despite its acknowledgement that the test of charitable status is purposes-based and

59 Charities Act 2011, s 15(1).

60 Which is supported by judicial authority (obiter) and public policy considerations: (n 25).

61 The Charity Commission cited six cases in its *Analysis* (n 56), but these did not provide legal authority for the proposition. The Tribunal acknowledged the absence of legal authority, but considered the proposition 'right in principle': *ISC* (n 11) [89] [178].

62 Perhaps because the words 'aged, impotent and poor' appeared together in the Preamble (n 28), without indicating whether a conjunctive or disjunctive interpretation was intended: eg *Re Robinson* [1951] Ch 198 (Ch); *Re Lewis* [1955] Ch 104 (Ch); *Joseph Rowntree Memorial Trust Housing Association Ltd v AG* [1983] Ch 159 (Ch).

63 *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728 (Ch); *R v Special Commissioners of Income Tax ex p University College of North Wales* (1909) 78 LJKB 576 (CA). The House of Lords clearly viewed Brighton College (which charged 'substantial fees') as a charity: *Brighton College v Marriott* [1926] AC 192 (HL).

64 In which it assessed the public benefit of a number of registered charities, including five fee-charging schools: *Emerging Findings for charity trustees from the Charity Commission's public benefit assessment work 2008-09, 2009-11*.

65 See the individual reports in the Charity Commission's public benefit assessment programme, available at http://www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/public-benefit-assessment-reports/ (last accessed 14 January 2014).

that activities are relevant only in very limited circumstances.[66] In considering five independent schools, for example, it listed a range of activities (and benefits), from badminton clubs to luncheon clubs for pensioners, and also identified benefits which it considered irrelevant, such as permitting use of the school's grounds for local councillors' meetings.[67]

Thirdly, the Commission's publications gave the impression that charitable status can be lost or removed with relative ease, including as a result of a change in 'social and economic circumstances'. On reaching a conclusion that certain charities had failed the public benefit requirement, however, it failed to explain whether the institutions had never been charities or whether they had become non-charitable (and, if the latter, on what basis)[68] and, instead, proceeded on the basis that charitable status had been neither wrongly attributed nor lost.[69]

The fourth difference, which continues to have significant impact, was the Charity Commission's insistence that the effect of the 2006 Act was to abolish, or reverse, a presumption of public benefit which had previously existed and according to which purposes for the relief of poverty or the advancement of education or religion were presumed to be for the public benefit. The relevant statutory provision[70] states that it is not to be presumed that a purpose of a particular description is for the public benefit (the 'no-presumption provision'). In part on the strength of this,[71] the Commission directed that institutions for such purposes (including those already registered) are now required to demonstrate, by 'factual and positive evidence',[72] the benefits conferred on the public from the 'way in which' the purposes are carried out.[73] The purported 'removal' of this

66 eg *Analysis* (n 56) 4.4, 4.10, 4.11; cf 4.1.

67 See n 65.

68 See the reports for Highfield Priory and S. Anselm's School (n 65), which were unable to appeal (due to the constraints of Charities Act 2011, schedule 6) and so had little choice but to improve their offering of public benefit according to the Commission's interpretation of that term.

69 This was inconsistent with the Charity Commission's own guidance, which stipulated that the tests outlined (which were failed in these cases) would need to be satisfied in order to merit charitable status.

70 Charities Act 2006, s 3(2) (now Charities Act 2011, s 4(2)).

71 The Charity Commission also relied on *Gilmour* (n 37) in requiring evidence of benefit, sometimes indicating that evidence of the 'demonstrable impact on the community' would be required. Although the Commission acknowledged that such proof might not always be necessary, its focus on identifying and evaluating benefits provided by independent schools, for example, revealed a marked unwillingness to view certain benefits as 'obvious'.

72 Analysis (n 56) 2.4.

73 Analysis (n 56) 2.10.

presumption is also the basis on which the Commission seems prepared to dismiss binding precedents, because it might be said that they were decided on the basis of a presumption or without regard to the requirement for public benefit.[74] Thus, for example, in its initial refusal to register the Preston Down Trust with charitable status, the Charity Commission expressed its 'doubts' and 'concerns' that legal principles 'may well be affected' and continued on the basis that they were no longer relevant.[75]

These consequences which are said to flow from the no-presumption provision are far-reaching and it becomes necessary to question whether the provision does, in fact, change the law in the way suggested or whether it merely affirms the previous case law. If it is the case either that no presumption did exist or that it was not applied previously, then precedent should be unaffected.[76] Even if a presumption did exist and was applied, it might still be argued that the provision did not change the law of evidence, so that the courts' ability and willingness to make assumptions and to make findings of fact without inquiry is unaffected. It is beyond the purpose of this article to explore this question fully, but it is the author's view that there is sufficient doubt over the existence and application of such a presumption, and the consequences so significant, that the Charity Commission's reliance on the purported removal of a presumption should be carefully explained and supported by legal authority, so that the stated consequences can be justified.[77]

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74 e.g. *Thornton v Howe* (1862) 31 Beav 14, 54 ER 1042, *Holmes v AG* Times, 12 Feb 1981. The Tribunal also hinted that cases relevant to education litigation might be disregarded on this basis, but without detailing whether that was the case: *ISC* (n 11) [92].

75 See the Charity Commission's letter of refusal, 7 June 2012 (available at http://www.parliament.uk/documents/commons-committees/public-administration/LetterfromKennethDibble.pdf) (last accessed 14 January 2014). On 9 January 2014, shortly before publication of this article, the Commission published its Decision (dated 3 January 2014) which recognises the charitable status of the Preston Down Trust on the basis of a revised trust deed.

76 Academic opinion is divided as to whether a presumption existed: see, for example, Hubert Picarda QC ('Mere reversal of the "presumption" of public benefit cannot change the declared law on this point', Memorandum to the Joint Committee (DCH 297, July 2004)); Luxton (n 29); cf Harding, 'Trusts for religious purposes and the question of public benefit' (2008) 71(2) MLR 159; J Warburton, 'Charities and public benefit – from confusion to light?' (2008) 10(3) CL&PR 1.

77 As noted below, the Tribunal took the view (in *ISC* (n 11)) that no such presumption had existed (at least in relation to the advancement of education). This would seem to be a suitable question for a reference to the Tribunal by the Charity Commission or the Attorney General (see text to n 88 below).

The Charity Commission relies on the following passage, from Lord Wright's judgment in *National Anti-Vivisection*,[78] as authority for the existence of a presumption of public benefit:

> Even societies coming within the first three heads of Lord Macnaghten's classification would not be entitled to rank as legal charities if it was seen that their objects were not for the public benefit. … *The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears*.

His Lordship did not refer to a presumption and it is clear from the passage from which these words are taken (where the public character test was not in issue), that the purpose was to emphasise and illustrate the principle that not all purposes, including ones which ostensibly appear to be for religion or education or poverty, are necessarily charitable. Thus, for example, the test of public benefit would be failed by religious objects which are unlawful, or by trusts which might be educational but which have no public value. His Lordship was saying no more than that it is a reasonable inference that purposes which, as a matter of construction, are for the recognised purposes of relieving poverty, advancing education or advancing religion, are most likely to be beneficial in a way the law regards as charitable. Nor was any presumption made as to public character.[79]

The language of presumptions is often carelessly used, however, and this may be another case in point.[80] When even 'presumptions' which are not true presumptions, such as a presumption of innocence,[81] are referred to as such, the use of the word 'assumed' by such an eminent judge should not be overlooked. Nor have other courts, with very few exceptions,[82] referred to a presumption of public benefit (or its rebuttal), as one might have expected had such a presumption been recognised in law. It might also be worth noting that the removal of a legal presumption often attracts a more explicit form of legislative wording which is not present here: the presumption of advancement, for example, 'is abolished' by the Equality Act 2010.[83] It follows that the arguments based on the 'removal' of an

78 n 18, 42 (italics added).

79 A proposition clearly supported by the Tribunal in *ISC* (n 11) [63]; *Oppenheim* (n 15); *Gilmour* (n 37).

80 Swadling explores the inappropriate use of 'presumptions' in 'Explaining Resulting Trusts' (2008) 124 LQR 72.

81 Which is essentially no more than a statement of the burden of proof.

82 e.g. *Funnell* (n 38). In *Holmes* (n 74), Walton J uses the language of presumption three times, but each time identifying a different fact (or proposition) which might be presumed.

83 Section 199 (not yet in force).

alleged presumption, namely that legal precedents might now be considered unreliable and that the status of existing charities should henceforth depend upon demonstration of benefit, are unwarranted or at least open to doubt. The no-presumption provision may not change the law at all but simply affirm the need for the court to be satisfied that the purposes fall within accepted categories of charity and that they have a public character. It might result in the public benefit requirement being addressed rather more specifically, but the courts remain entitled to find that purposes are beneficial in a way the law regards as charitable because precedent requires them to do so or because it assumes them to be beneficial. And precedent cannot be circumvented lightly.[84]

The effect of the Decisions of the Upper Tribunal

The Charity Commission's guidance, and the implementation of that guidance by the Commission, were controversial and resulted in judicial review proceedings,[85] two Attorney General's references[86] and an appeal.[87] The Attorney General has refused to file a further reference in respect of institutions for the advancement of religion, despite the lack of clarity and questions of public importance which arise.[88]

The Tribunal's judgments in relation to the meaning of public benefit may lack succinctness,[89] but certain conclusions can be drawn. To be welcomed is the

84 Mention of a presumption is not itself enough to render a decision *per incuriam*: *Morelle v Wakeling* [1955] 2 QB 379.

85 *ISC* (n 11).

86 The first (in respect of education) was heard in conjunction with the judicial review proceedings (ibid), the second (in respect of benevolent funds) was *AG v Charity Commission* (n 45).

87 Lodged by the Preston Down Trust, following the refusal to register it with charitable status but recently withdrawn (n 75). (It is not suggested that this is the only appeal to have been lodged against the Charity Commission's decisions relevant to the public benefit requirement, but it is the only one referred to here.)

88 Further supplementary written evidence submitted by the Charity Commission to the Public Administration Committee ((CH 63), December 2012) explains why no reference was made by the Attorney General and why a request for a reference was not pursued by the Commission.

89 The *ISC* judgment ran to 116 pages. Lord Hodgson's 5-year review of the Charities Act 2006 included a plea that the Tribunal should 'reconsider the structure, length and language of some of its judgments': *Trusted and Independent: Giving charity back to charities*, para 7.28. For a more detailed analysis of this judgment, see Synge [2012] 75 MLR 624; Luxton, 'Opening Pandora's Box: the Upper Tribunal's decision on public benefit and independent schools' (2012-13) 15 CL&PR 27.

rejection of the proposition that purposes for the advancement of education were presumed to be for the public benefit.[90] The Tribunal declared that the courts had formed a view on whether a trust was for the public benefit, not by way of assumption (or presumption), but by way of decision, taking judicial notice of facts and following precedent as appropriate. This approach, it said, was 'far from a "presumption" in the usual sense'.[91] It might be surprising, therefore, to find continuing reliance on such a presumption[92] and its 'removal'.[93]

The Tribunal's judgment was also noteworthy for shifting the emphasis from charitable status to trustees' duties in relation to the provision of opportunities for the poor to benefit (although it did not remove the risk of charitable status being lost altogether, even in the absence of an express exclusion).[94] The Tribunal reasoned that such a duty had always existed, apparently on the somewhat circular basis that this was because of a provision in a charity's constitution that such a duty would be fulfilled, such a provision being implied because the duty exists.[95] This change of emphasis is important, and avoids some of the difficulties which were inherent in the Commission's legal interpretation,[96] but it is most regrettable that the Tribunal was unable either to point to legal authority where such a duty had been imposed or discussed or to give the clarity which trustees needed in order to be confident of performing the duty. Even more regrettable was the Tribunal's failure to deal adequately with legal authority which tended to show that the poor might lawfully be excluded by implication or by the charging of fees (but not

90 *ISC* (n 11) [61], [67], [83] and [88].

91 ibid [68]. And the courts had never determined the second test by reference to any assumption [63]. (The Tribunal's conclusions regarding a presumption might reasonably be understood to be equally applicable to purposes for the relief of poverty and the advancement of religion.)

92 e.g. Morgan, Baker, Harris and Moran, 'The public benefit requirement for charities in England and Wales: a qualitative study of its impact' (2012-13) 15 CL&PR 107; and see n 75.

93 e.g. in the Charity Commission's letter of refusal to register the Preston Down Trust (n 75).

94 *ISC* (n 11) [194], where it was noted that an inability to 'operate for the public benefit' (meaning providing opportunities for the poor) could prove 'fatal' (suggesting a fatality to the school rather than the trustees); cf [228].

95 See Synge (n 89) 638.

96 The determination of charitable status on the basis of changeable financial circumstances and changeable trustees' policies regarding fee-setting creates uncertainty, not least in respect of tax privileges, reporting and questions regarding loss of charitable status (see n 47).

expressly), preferring to disregard such precedents as not incorporating express exclusions of the poor.[97] This was to miss the point.

Although critical of the Charity Commission's focus on a charity's activities, the Tribunal adopted a similar approach, indicating that (at least in the case of fee-charging charities) satisfaction of the public benefit requirement depended (in part) on the level of provision for the poor. The need for the trustees to act 'properly' in this regard appeared to relate to the making of reasonable or sufficient provision for the poor, rather than to criteria of honesty or integrity. And although much emphasis was laid upon the trustees' discretion, free from the Charity Commission's involvement, the need to consider what any trustee 'acting in the interests of the community as a whole' would do and what provision 'should be made',[98] presumably subject to the normal regulatory overview of the Commission, appeared to give with one hand and take with the other. Nor did the answers to the hypothetical scenarios laid out in the Attorney General's reference provide any clear direction for trustees as to when they might be in breach of this duty.[99] Furthermore, the consequences of breach were hinted at but not elaborated upon, notwithstanding their crucial importance.[100]

The Charity Commission's Revised Guidance

Following the Tribunal's judgments, the Commission republished its guidance in September 2013.[101] For present purposes, it is sufficient to comment that this echoed, to a great extent, the Tribunal's treatment of provision for the poor as a matter of trustees' duties rather than charitable status. Although this author disagrees with this conclusion as to trustees' duties, the indication that the Charity Commission no longer views this principle as a prerequisite of charitable status is to be welcomed.

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97 e.g. disregarding arguments that the poor were excluded in practice in *AG v Earl of Clarendon* (1810) 17 Ves Jr 491, 493; 34 ER 190, 191: [117]; its conclusion that *Abbey Malvern* (n 63) 'was not concerned in any way with the exclusion of the poor' was particularly surprising: [144]. Fuller consideration of the Tribunal's treatment of these authorities is included in the forthcoming publication (n 20).

98 *ISC* (n 11) [215], [216].

99 ibid [237] et seq.

100 ibid [194], including being 'brought to account', being 'compelled to act for the public benefit' and even a charity's assets being reallocated under a cy-près scheme. Regrettably the Tribunal chose to 'say nothing about that aspect' (ibid).

101 The guidance is generally shorter and divided into three publications. Issues concerning poverty and fee-charging are not easily found but form an annex to the second publication, 'Running a charity' (Annex C).

The authority of the Tribunal's decision, which now underlies the Charity Commission's guidance,[102] might also be questionable, however. If the Tribunal's role was to examine the law on public benefit, in order to judge whether or not the Commission's guidance was accurate or ought to be quashed, and if it were the case that the Tribunal erred in interpreting and stating that law, does 'the law' remain as it was before? Arguably, yes, although the impact of a court of record producing a decision with precedent value cannot be ignored. It is a difficult task, most especially for charity trustees, to criticise and challenge the approach taken by the Commission and the Tribunal, but such opposition may be vital if the law is to be upheld and its integrity protected. Without it, it seems inevitable that the Tribunal's interpretation of the law will be taken to be the law, at least until such time as a superior court rules otherwise[103] or new legislation renders it otiose.

In summary, therefore, the meaning of public benefit in case law appears to have been clear enough and capable of application to specific facts. Recent legislation made no material change and yet there has emerged a quite different interpretation, which looks at an institution's activities, asks it to prove what benefits it provides and, if it charges fees, to show how the poor are also given opportunities. 'Public benefit' appears to have been redefined according to a popular notion of charity which has hitherto been emphatically rejected. The new interpretation brings with it the risk of charities being denied or stripped of charitable status, with unknown consequences, and of trustees facing an unclear liability for breach of an unclear duty.

Scotland

Over a year before Westminster passed the 2006 Act, the newly devolved Scottish Parliament passed its own statute, which set out a legal and regulatory framework for charities. Despite historical jurisdictional differences, Scotland had previously followed the definition of charity developed by the English chancery courts.[104] Devolution, however, presented Scotland with the opportunity to forge its own path. And it took it.

The Charities and Trustees Investment (Scotland) Act 2005[105] laid down a new 'charity test', with 'public benefit' at its core. The requirement here, however,

102 References to case law (n 61) have been omitted from the revised legal analysis (*Analysis of the Law relating to Public Benefit*, September 2013).

103 Any opportunity of a superior court hearing a case seems remote.

104 *Pemsel* (n 18) famously rejecting the favoured approach of requiring some element of poverty relief.

105 Statutory references in this section refer to this Act unless otherwise stated.

was to '*provide* public benefit' and not for the purposes[106] to be 'for the public benefit'. The difference might appear slight, but in fact is fundamental: an investigation into the charity's activities and the end benefit was not only merited, it was essential. The term 'public benefit' was untethered from centuries of case law[107] and, instead, the statute set out three factors to which regard must be had in determining whether a body provides public benefit, namely private benefit, public detriment and restrictive conditions, including fees.[108]

This third defining factor marks a clear departure from the position in England and Wales, where attempts to introduce a similar provision had been made but defeated.[109] This Act made it clear that fees and charges might deprive a body of charitable status if 'unduly restrictive',[110] the assessment of which was left to the newly established Office of the Scottish Charity Regulator ('OSCR'), whose guidance described how the regulator's broad discretion would be applied.

OSCR was charged with determining charitable status in accordance with the charity test and also with reviewing every entry on Scotland's register of charities and removing any which failed the test.[111] Unlike in England and Wales, the Scottish register is definitive,[112] registration is voluntary[113] and Scottish law recognises trusts for public purposes.[114] On removal of a charity, therefore (whether voluntarily or otherwise), an institution's charitable status is lost but its continued existence is not necessarily threatened. This is a fundamental difference

106 Which were required to comply with a statutory list similar to (but not identical with) the English list: s.7(2).

107 The Scottish regulator noting that it would apply normal rules of legal interpretation, including 'looking at' the Scottish Act, Scottish case law and, as 'persuasive rather than binding', case law in other jurisdictions including England and Wales: *Meeting the Charity Test: guidance for applicants and for existing charities* (OSCR, August 2011), page 4.

108 Section 8. The first two factors, though specified in the Act and addressed in the guidance (n 107) might not be expected to depart radically from case law. At the same time, the Act moved away from the approach to political purposes in England and Wales, disqualifying only on the grounds of advancing party political purposes or of Ministerial control (section 7(4)).

109 e.g. HL Deb 9 February 2005, vol 669, col GC 63; HL Deb 12 October 2005, vol 674, cols 310-320.

110 Section 8.

111 Sections 3(6), 30. The Strategy Unit Report (n 9) had outlined a similar obligation in England and Wales, but this was not enacted.

112 A charity is defined as a body entered on the Scottish Register: s.106.

113 Section 18. In England and Wales, voluntary registration is permitted only in limited circumstances (s.30 Charities Act 2011).

114 See, for example, *McCaig Trustees v Oban Magistrates* 1915 SC 426; Ford, 'Supervising charities: a Scottish civilian alternative' [2006] Edin LR 352.

between the two jurisdictions and one which means that the public benefit debate in Scotland has remained linked to charitable status rather than to trustees' duties. Although a removed charity will lose benefits associated with the charity 'brand' and business rates relief,[115] entitlement to other tax privileges is subject to determination by HMRC, according to an English definition of charity.

OSCR was also charged with publishing guidance on how the charity test was to be interpreted and applied. In contrast to the Charity Commission's publications, OSCR's published guidance was significantly clearer and more succinct and its reports of its public benefit assessments of existing charities considerably less verbose and self-contradictory. OSCR exercised its discretion and measured the public benefit delivered by each charity (although no specific threshold was set) as it was entitled, and required, to do.[116]

It should come as no surprise that Scotland chose to remodel its public benefit requirement. There was every indication that the intention had been the same south of the border, particularly in relation to fee-charging charities.[117] The stated aim was that the test of charitable status in each of the two jurisdictions should be 'fully compatible'[118] and that the two regulators should reach a 'common position' on matters of public benefit 'wherever possible'.[119] That ambition, however, needs to be set against the different legal tests and frameworks which emerged from their respective legislative processes. The Charity Commission's claim that 'the two sets of legislation...only differ slightly'[120] was simply wrong.

Northern Ireland

Northern Ireland got off to a shaky start. In 2008 it passed an Act[121] which presented a hybrid test of charitable status: the purposes having to be 'for the public benefit', as in England and Wales, but regard being had, as in Scotland, to private benefit, public detriment and unduly restrictive conditions in determining

115 Which depends upon inclusion on the Scottish Register: Local Government (Financial Provisions) (Scotland) Act 1962 (as amended).

116 OSCR continues to make public benefit assessments of charities on the Scottish Register: http://www.oscr.org.uk/managing-your-charity/reviews-of-charitable-status/ (last accessed 14 January 2014).

117 Not least in the Labour government's published strategy report (n 9).

118 HL Deb 20 January 2005, vol 668, col 883 (Baroness Scotland).

119 Memorandum of Understanding (OSCR/Charity Commission, May 2007) annex 3.2.

120 *English and Welsh charities working in Scotland* (Charity Commission, undated) para 7.

121 Charities Act (Northern Ireland) 2008.

whether a body 'provides or intends to provide' public benefit. The two parts of the test were incompatible and amending legislation was needed. It appears that the initial preference for the 'more robust' Scottish test gave way to the 'more straightforward' English test,[122] the Charities Act (Northern Ireland) 2013 providing that 'public benefit' would have the meaning attributed to it in the law of Northern Ireland.[123] Whilst this is broadly comparable to the law of England and Wales, it should not be assumed to be identical in every respect, most notably perhaps in relation to religious purposes, where pre-partition cases apply a subjective test and hence offer a broader legal interpretation than English cases.[124]

Guidance on public benefit, published by the Charity Commission for Northern Ireland (the 'CCNI') following the 2008 Act, was broadly similar in key respects to the 2008 English guidance, although its approach to fee-charging was, of course, to some extent based on relevant statutory provision. The revised guidance, following the amending Act,[125] signals a different approach. The much briefer 'statutory guidance'[126] continues to emphasise the benefit which stems from the purposes, although it struggles to explain how this part of the public benefit requirement is to be satisfied.[127] With regard to fee-charging, the guidance says only that a charity's purposes should not exclude the poor, but fails to distinguish between express and implied exclusions. In its supporting document on running a charity,[128] it is noted only that trustees have a duty to make more than a tokenistic provision for the poor and that this is a matter for their discretion. There is no

122 For an account of the legislative amendment process, see Fiona Marshall, 'The Charities Act (Northern Ireland) 2008 – Cause for concern?' (2012-13) 15 CL&PR 75, 82-85.

123 Section 1(3). Attempts to 'reinstate' a presumption of public benefit in the case of religion (and education and poverty) faltered and, like its English and Scottish counterparts, the Northern Ireland legislation provided only that no particular purpose should be presumed to be for the public benefit. It remains to be seen whether the regulator for Northern Ireland will place the same emphasis on this provision as the Charity Commission has done (see text to nn 70-84). OSCR has no need to do so.

124 e.g. *O'Hanlon v Logue* [1906] IR 247; and see Harding (n 76).

125 *The public benefit requirement* (CCNI, July 2013).

126 Now restricted to ten pages only (ibid, sections 3 and 4). The 'supporting documents' in relation to each of the 12 charitable purposes (November 2013) give no further guidance on the point.

127 The 'benefit...must be beneficial'; it must be 'capable of being demonstrated' but is 'demonstrated by being...definable or capable of description' (section 4).

128 *Running your Charity*, November 2013. Despite the language used and the greater detail that appears (than in the guidance (n 125)), it appears that this document (like the supporting documents) does not constitute statutory guidance.

attempt to rely on the *ISC* judgment or to define the poor (as the Charity Commission does) as including those of modest means.[129]

Ireland

A new Act of Parliament was added to the Statute Book in Ireland in 2009.[130] This Act requires the purposes[131] to be '*of* public benefit'.[132] Further defining provisions stipulate that a gift shall not be of public benefit unless it is intended to benefit the public or a section of the public and that any private benefit should be 'reasonable in all of the circumstances' and 'ancillary to, and necessary for the furtherance of the public benefit'.[133] More generally, in determining whether purposes are of public benefit, account must be taken of limitations imposed by the donor on potential beneficiaries and whether these are justified and reasonable having regard to the nature of the purpose of the gift.[134] As in Scotland, the amount of any charge, and whether the charge is likely to limit the number or class of potential beneficiaries, is also to be considered.[135] A determination of charitable status will not bind the Revenue Commissioners, who retain responsibility for determining tax-exempt status.[136]

As with Northern Ireland, the principal concern appears to have been the treatment of religious charities, but the Irish Act removes many of the doubts which surround the Northern Irish test. First, the Act provides that a gift for the advancement of religion shall be presumed to be of public benefit unless the

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129 Interestingly, in giving examples, the CCNI refers to universities giving means-tested bursaries but only to schools sharing educational and sports facilities. There is every indication of a dilution in the interpretation of public benefit since the first edition of its guidance.

130 Charities Act 2009. Statutory references in this section are to this Act unless otherwise stated.

131 According to a statutory list which is narrower in some respects than its UK counterparts (in omitting purposes relating to human rights and sport, for example).

132 Section 3(2) (italics added). One of the general functions of the Charities Regulatory Authority (the Irish regulator), however, is to promote an understanding of the requirement that charitable purposes 'confer a public benefit' (s.14(1)(e)), suggesting an approach more akin to that in Scotland.

133 Section 3(3).

134 Section 3(7)(a). A 'personal connection' between a significant number of the intended beneficiaries and the donor will not be justified and reasonable: s.3(8), thus retaining the disqualifying factor of a personal nexus which applies in England and Wales and Northern Ireland (and probably to be retained in Scotland).

135 Section 3(7)(b) (but there is no 'unduly restrictive' (or similar) test imposed).

136 Section 7.

contrary is proved.[137] Secondly, any gift for the advancement of religion shall be construed and take effect in accordance with 'the laws, canons, ordinances and tenets of the religion concerned'.[138] This represents a fundamental distinction with the position in England and Wales and avoids the obvious difficulties which surround the Charity Commission's approach to establishing the necessary 'benefit' in that jurisdiction.[139] Thirdly, a gift is not for the advancement of religion if it is made to or for the benefit of an organisation or cult which is principally aimed at making a profit or which 'employs oppressive psychological manipulation of its followers or for the purpose of gaining new followers'.[140]

Although parts of the Act are in force, the provisions relating to public benefit have not yet been brought into force. The Irish government has recently announced, however, that the Charities Regulatory Authority is intended to be established during 2014 after an initial delay caused by the financial crisis in Ireland.[141]

Europe

Against a background of such divergence in four closely related jurisdictions, European attempts to construct a legal framework for public benefit purpose foundations,[142] which is to be consistently applied across the 28 European Member States,[143] appear somewhat refreshing.

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137 Section 3(4); the Attorney General's consent is required to any determination that such a gift is *not* of public benefit (s.3(5)).

138 Section 3(6).

139 Gilmour (n 37). It might also be distinguished from the position in Northern Ireland, at least to the extent that the subjective test (see text to n 124) might not be applied there.

140 Section 3(10).

141 Reported by the Department of Justice and Equality, 10 July 2013: http://www.justice.ie/en/JELR/Pages/PR13000290 (last accessed 14 January 2014). This seems likely to precipitate commencement of the public benefit provisions.

142 A 'functional approach' was taken to identify the meaning of 'foundation' in view of the disparate meanings given to the term by Member States: *Feasibility Study on a European Foundation Statute, Final Report*, Max Planck Institute for Comparative and International Private Law (2008) 13, 103-104. (The term is less commonly used in common law countries, generally (but not exclusively) to describe grant-making charities.)

143 There were 27 Member States at the time of the proposal; Croatia became the 28th member in July 2013.

An extensive research study was undertaken for the European Commission from 2007 to 2008,[144] following various initiatives since the turn of the century.[145] This revealed the major economic significance of the rapidly growing foundation sector[146] and also identified the complex and costly obstacles to inter-state activity caused by the numerous, diverse and uncertain laws and tax regimes which operate across the Member States. As a result of this study, the European Commission proposed a European Foundation Statute,[147] the purpose of which was to introduce an optional and additional legal entity which could operate freely across Member States. It was proposed that the new European Foundation would require registration,[148] a minimum asset value of €25,000 and activities in two or more Member States. It would have separate legal personality, full legal capacity and limited liability and could be founded *ex nihilo* or result from a merger or conversion from an existing vehicle.[149]

Significantly for our purposes, it would have to be established for 'public benefit purposes' and serve 'the public interest at large'.[150] The draft statute sets out a closed list of such purposes, the intention being to arrive at the 'lowest common denominator', ie those purposes which would be recognised by each Member State. Despite broad similarities between this list and the statutory lists of charitable purposes in each of the jurisdictions already considered, the advancement of religion is not included[151] and there is no scope for extending the list to analogous purposes.[152] Trading or other economic activities related to the foundation's public benefit purposes would be permitted, subject to profits being applied exclusively to those purposes, and activities unrelated to public benefit purposes would be permitted up to 10% of the foundation's annual net turnover.[153]

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144 *Feasibility Study* (n 142).

145 *Feasibility Study* (n 142), Introduction.

146 28-40% of all foundations in Germany and France, for example, were founded in the previous decade ((n 142) 27)) and the sector was responsible for expenditure of around €1.5bn (p 24) and nearly one million full-time employees (p 26).

147 Proposal (n 5). References hereinafter appearing are to Articles in this Proposal.

148 Each Member State would appoint a registry for these purposes (Art 22).

149 Trusts present a distinct problem, since they are not familiar to, or recognised by, a number of European jurisdictions. STEP has recommended enabling legislation to provide for conversion from a trust to a European Foundation without the need for a separate transfer of assets (STEP submission to the European Parliament 2012).

150 Art 5.

151 Although a proposed amendment would extend the list to include 'the promotion of interreligious dialogue' (European Parliament Interim Report, June 2013).

152 The list is closed but amendments might be proposed 7 years after the Regulation comes into force (Art 54).

153 Art 11.

Although warmly welcomed by various bodies enthusiastic for prompt action,[154] the draft statute has not received unanimous support[155] and several amendments have been proposed, for example to ensure that the minimum asset base is maintained, and that activities are carried on in at least two Member States, throughout the life of the foundation.[156] Most notably, the European Economic and Social Committee has proposed that the effect of fees and charges should be taken into account, rather along the lines of the Scottish and Irish statutory provisions. Such an amendment would make an organisation's eligibility for European Foundation status less certain and dependent on a highly resource-intensive investigation into activities and fee-charging policies from time to time. Introducing this test alongside an ostensibly purposes-based test of construction risks a level of uncertainty which can only be compounded when applied by 28 supervisory authorities. In particular, to link foundation status with changeable activities and operational decisions requires a workable regime which applies when those activities and decisions do not merit that status.[157] Careful consideration needs to be given to any such amendment if the problems encountered by Northern Ireland and England and Wales are to be avoided. Establishing a voluntary code or statement of practice, or even imposing a duty on the governing board,[158] might offer a more pragmatic and effective approach.

The proposal envisages that each Member State should designate a competent authority to supervise any European Foundations registered in its jurisdiction,[159] with powers to investigate impropriety, to issue warnings, to dismiss (or propose the dismissal of) members of the foundation's governing board and to wind up (or to propose the winding up of) a foundation.[160] It is not clear who or what might take on this duty in the UK, but there would be a concern if this were to be the (English) Charity Commission, given the significant reduction in its operating

154 Generally endorsed by the EESC (September 2012), the Committee of Regions (November 2012), CULT (April 2013) and the JURI Committee (May 2013).

155 The European Scrutiny Committee reports a "lack of support from most Member States": Eighth Report of Session 2013-14, HC 83 –viii (15 July 2013), 4.12.

156 The Committee of Regions proposed substituting 'public interest' for 'public benefit' in order to differentiate the proposed model from existing tax and legal regimes in the Member States.

157 As highlighted by the different positions in Scotland and England and Wales and the Tribunal's attempts to shift the emphasis from an organisation's status to the duties of those running the organisation.

158 Duties currently include acting in the 'best interests of the European Foundation and its public benefit purposes' (Art 29). The consequences of any breach of duty should be made clear (and should not, as a matter of course, include loss of foundation status).

159 Art 45.

160 Art 46.

budget over recent years,[161] quite apart from concerns over its expertise and capabilities.[162]

It is also intended that, for tax purposes, Member States should treat a European Foundation in the same way as other public benefit purpose entities established in that Member State.[163] Clearly this enhances the already attractive proposition of forming a European Foundation, as an alternative to a charity, but it is proving both contentious and problematic.[164] Some jurisdictions, for example (including England and Wales), operate more than one tax regime and it is not clear whether a European Foundation would receive the full privileges enjoyed by a registered charity or some lesser advantage. Indeed, it appears to be the tax elements of the proposal which present the greatest obstacle to the progress of negotiations on the draft statute in the UK. The Minister for Civil Society commented in July 2013, that these elements were 'widely considered to go well beyond the existing non-discrimination principles set out by the European Court of Justice' and that it was 'hard to see how the negotiations will make progress whilst these elements remain.'[165] The automatic entitlement of charities in the UK to generous fiscal privileges has long been recognised as a fundamental obstacle to coherent case law and sensible legislative reform.[166] It is hardly surprising that questions of taxation should cause the greatest threat to this proposal.

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161 From £29.2m in 2010/11 to £20.4m in 2015/16.

162 Even if take-up was not immediate or rapid. Similar concerns might be felt in relation to the regulators of the other UK and Irish jurisdictions.

163 Art 49. Arts 50 and 51 make similar provision in respect of donors and beneficiaries.

164 It was, however, the preferred route: an alternative would have been for the statute to remain silent on the question of tax and for donors and foundations to seek tax privileges in accordance with the appropriate national law and non-discrimination principles established by the European Court of Justice.

165 Eighth Report (n 155) 4.6.

166 See, for example, Gousmett, 'The Charitable Purposes Exemption from Income Tax: Pitt to Pemsel 1798-1891' (ch 6) (University of Canterbury 2009) (available at http://ir.canterbury.ac.nz/bitstream/10092/3448/2/thesis_fulltext.pdf (last accessed 14 January 2014); *Report of the Radcliffe Commission on the Taxation of Property and Income* (Cmd 9474, 1955); Cross, 'Some recent developments in the law of charity' (1956) 72 LQR 187, 202-208; Gravells, 'Public purpose trusts' (1977) 40 MLR 397; HL Deb 9 February 2005 (n 109) col GC69 (where Lord Campbell-Savours described the automatic grant of tax privileges on fee-charging independent schools as 'clearly the most controversial' issue in the Joint Committee's deliberations on the Charities Bill; Garton (n 20).

Conclusion

It has been shown that the term 'public benefit' is a term of great importance and common use, but that differences in its treatment in statute and case law can have significant consequences

There is a positivity, and an attractive simplicity, in the European proposal which echoes the purposes-based two-limbed test of charitable status in UK case law, where fee-charging does not affect charitable status provided 'profits' (or surpluses) are applied to the institution's purposes. At the same time, however, there is inevitably scope for disparity in Member States' interpretations of the parameters of each of the listed purposes and as to whether particular purposes serve the public interest at large. If the proposal is amended to incorporate consideration of activities and fees, the scope for added divergence, cost and complexity becomes quite alarming.

In the UK and Irish jurisdictions, on the other hand, 'public benefit' appears to have, or to have acquired, a rather more negative connotation, which hints at a wish to control the risk of abuse rather than to value and encourage endeavours for the public good. Here, purposes are not 'for', or 'of', or 'do not provide', public benefit if certain circumstances are in place, and that negativity is perhaps emphasised where legislation makes specific provision.[167] In addition, consideration of fees and other conditions requires an investigation into the policies and actions of those responsible for fulfilling the purposes, rather than the constitutional framework of the institution. This has introduced a new dimension to public benefit as a feature of charitable status, expressly in Scotland and Ireland, but as a matter of practice (subject to the duties-based emphasis of the Tribunal) in England and Wales and (potentially) Northern Ireland.

There is clearly an advantage to having a consistent approach to charity law across the jurisdictions of the UK and Ireland. Trustees and prospective trustees would find their task a great deal easier, and funds could be more effectively applied, if the legal frameworks operating in each jurisdiction were the same, or at least consistent at a fundamental level. But that is not the case. England and Wales and Northern Ireland have a purposes test and case law (excepting, for the moment,

167 Although few would advocate a comprehensive definition of charity or public benefit, the practice of specifying what is not within either definition (as Scotland and Ireland do) seems, nonetheless, to be a constructive approach. It also seems likely that case law on European Foundations would develop in the same way (whether or not in the name of 'public benefit'), so that foundation status would not be conferred where purposes are unlawful or more detrimental than beneficial, or where a class is defined by reference to a personal nexus, for example.

ISC v Charity Commission)[168] requires neither proof of the end benefit nor consideration of opportunities given to the poor. Scotland and Ireland, on the other hand, have an activities-based test and both considerations are entirely proper. There are also significant discrepancies in matters of accounting and reporting. Such uniformity, however, would go against the philosophy of devolution and policy-makers cannot have it both ways. Although the intention in Westminster was that the definitions north and south of the Scottish border should be 'fully compatible',[169] the parliament in Edinburgh was more pragmatic and was not prepared to adopt a 'common or compatible definition' unless it was 'also right for Scotland'.[170] It is not acceptable to expect consistent results from the application of inconsistent tests and regimes which newly empowered parliaments have enacted.

For a cross-border charity operating in the UK and Ireland, the challenges set by this incoherent approach are already immense, potentially requiring registration with up to four regulators and compliance with up to four sets of accounting and reporting obligations. Each jurisdiction differs in its approach to charities registered in one of the other jurisdictions.[171] For an institution which satisfies the eligibility criteria, and which intends to carry out activities in the UK and Ireland (or in either jurisdiction and another Member State), establishing a European Foundation, rather than seeking registration as a charity, might seem irresistible.[172] This is even more so if the Scottish-type activities and fees test is rejected and/or if the full and automatic tax privileges are conferred.[173]

An integrated approach is most likely to be achievable across the European Member States if added complex and resource-intensive layers of sophistication are avoided. Europe should not forget that, despite encompassing a large number of disparate legal starting points, it has the distinct advantage that it is seeking to introduce an additional framework, not to harmonise or integrate existing frameworks, which need not be disturbed. By comparison with the UK and Irish jurisdictions, which are laden with centuries of history and four recently

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168 n 11.

169 HL Deb (n 118) col 885 (Baroness Scotland).

170 Policy Memorandum (Scottish Executive, 2004) [65].

171 In simple terms, Scotland and Ireland require full registration, Northern Ireland requires registration as a 's.167 institution', and England and Wales is concerned only with organisations which claim to be 'registered charities'. For a full account, see Breen, Ford and Morgan, 'Cross-border issues in the regulation of charities experiences from the UK and Ireland' (2009) 11(3) International Journal of Not-for-Profit Law 5.

172 If an independent Scotland becomes a separate Member State, the appeal broadens.

173 The basic accounting and reporting requirements are also likely to be attractive (Art 34).

introduced regimes, Europe starts with something of a blank canvas for these purposes. In drawing the detail on that canvas, care will need to be taken in accommodating 28 regulators in 28 jurisdictions, without threatening integration and consistency of approach. But, in the meantime, it seems that all efforts must be focused on matters of taxation if the whole scheme is to succeed at all and if the approach across Europe is not to remain fragmented.