

EFC COUNTRY PROFILE JANUARY 2011: BELGIUM

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I. Legal framework for foundations

- **Does the jurisdiction have a basic legal definition of a foundation (Description where applicable)? What different legal types of foundation exist (autonomous, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations)?**

The term foundation was not defined, recognised or protected under Belgian law, until recently. In 1921 a law (*Loi du 27 juin 1921 accordant la personnalité civile aux associations sans but lucratif et aux établissements d'utilité publique/Wet van 27 juni 1921 waarbij aan de verenigingen zonder winstgevend doel en aan de instellingen van openbaar nut rechtspersoonlijkheid wordt verleend*) was approved to grant legal personality to non-profit associations/*associations sans but lucratif (ASBL)* and public utility establishments/*établissements d'utilité publique (EUP)*.

This law has been amended by the law of 2 May 2002, which introduces in its Chapter II/*Titre II* significant changes to the legal environment of foundations in Belgium, namely by replacing the term “public utility establishment” with the term “public utility foundation” and by creating a new type of foundation: The private foundation.

The new law states in Article 27 that “the foundation is the result of a legal act from one or several individuals or legal entities that dedicate capital to a specific not-for-profit aim”. The foundation has no members.

Foundations can be recognised as being of public utility when they pursue philosophical, religious, scientific, artistic, educational or cultural aims.

With the approval of the King, private foundations can convert into public utility foundations according to Art. 44 of the Law. The legislation also modernises the regulation of the accounting system.

- **What purposes can foundations pursue?**

A public benefit foundation has to serve the general interest. Moreover it can only pursue one of the purposes enumerated by the law i.e. philanthropic, religious, scientific, artistic, educational, philosophical, or cultural purposes.

A private foundation is not required to serve the general interest. It may also pursue private purposes, for instance estate planning for family help enterprises.

➤ **What are the requirements for the setting up of a foundation (procedure, registration, approval)? What application documents are required? Are there any other specific criteria for registration?**

Foundations are established through notary deed or by will. In the case of public utility foundations (PUFs), the deed and the statutes have to be submitted to the competent ministry (Ministry of Justice), which must approve the articles of incorporation (Art. 29.2). PUFs receive legal personality by royal decree. Once the statutes are approved, they must be published in the Belgian Gazette/*Moniteur Belge* (Art. 31.4). Private foundations are created once their statutes of incorporation are communicated to the competent court. The statutes have to be published in the Belgian Gazette (Art. 31.4).

According to Art. 28, the statutes of both types of foundations must contain the purpose, the name and address of the foundation as well as the names, places of birth and addresses of the founders. Furthermore, the procedure for appointment of new board members should be described as well as the conditions when statutes can be changed and the destination of the assets in case of dissolution of the foundation.

➤ **Is State approval required? (approval by a State Supervisory Authority with/without discretion? Registration with a state authority or court? Notarisation by a Notary public?)**

Public benefit foundations: Yes. State approval by Royal Decree

Private foundations: No

➤ **Do foundations have to register? If yes, in what register?**

When a foundation is set up, the notary or the clerk's office at the Court of Commerce has to register the foundation in the register of legal persons of the *Banque Carrefour des Entreprises*, which delivers an enterprise number.

If foundations are registered, what information is kept in the register?

The information to be kept in the register is:

- The statutes and modification thereto; the coordinated statutes following modification
- The decisions concerning nomination, resignation, or termination of directors, persons in charge of the daily management, representatives
- The decisions and deeds on conversion of a private foundation into a public benefit foundation
- The decisions of the general meeting regarding dissolution of the organisation, nullity of the organisation, conditions of liquidation, destination of assets, appointment or resignation liquidators, or closing liquidation
- The decisions and acts concerning the conversion of a private foundation into a public utility foundation, as well as decisions for dissolving or liquidating foundations
- The annual accounts

If foundations are registered, is the register publicly available?

Yes, any interested person can consult these documents free of charge and obtain copies.

➤ **Is a minimum capital required?**

Public utility foundations: The law does not stipulate a minimal amount but the Ministry of Justice requires a minimum capital of €25,000 as the initial contribution.

Private foundations: No minimal contribution is required

➤ **What governance requirements are set out in the law?**

A board, composed of at least three members, manages both types of foundations, according to Art. 34. The board represents the foundation. The nomination, revocation and powers of the board have to be regulated in the foundation's statutes. The daily management can be delegated according to Art. 35.

Very large organisations should appoint a statutory auditor. This is relevant for foundations having 100 workers or more, or exceeding two of the following three criteria:

- 50 workers
- €6,250,000 in normal cash receipts
- €3,125,000 for the total of the balance sheet

Individuals as well as legal entities can be board members. Persons other than founders can also be appointed as board members. The bylaws must set out the procedures and conditions for nomination, resignation and dismissal of board members, the length of their terms, and the powers of the board.

Upon request of the public prosecutor, the board or any interested person, the court of first instance can pronounce the dismissal of a board member who has blatantly been negligent, who did not fulfill the obligations stipulated by the law or by the bylaws, or who has used the assets for purposes other than those for which the organisation was set up, or for purposes which are contrary to law or public policy.

According to the law, the board has the power to carry out any activities necessary to achieve the statutory purpose.

The law does not confer any right on founders, once the foundation has been set up.

Is it mandatory to have a supervisory board?

Belgian law does not foresee the obligation to have a supervisory board.

What are the requirements concerning board members? Is a minimum/maximum number of board members specified? What are the rules concerning appointment of board members? And their resignation/removal?

The minimum number of members is three. The statutes can foresee a higher number. There is no maximum number imposed by the law. The rules for appointing or dismissing the board members should be determined by the statutes. It should be noted that in certain circumstances the court of first instance can dismiss and replace board members who have been blatantly negligent

Upon request of the public prosecutor, the directors or any interested person, the court of first instance can pronounce the dismissal of the directors who have blatantly been negligent, who did not fulfill the obligations foreseen by the law or by the bylaws, or who have used the assets for other purposes than those for which the organisation has been set up, or for purposes which are contrary to law or public policy. The court can subsequently appoint new directors in line with the statutes.

What are the duties and what are the rights of board members, as specified by national legislation?

The board members should undertake all the actions that are necessary or useful for the realisation of the statutory purpose.

What are the rights of founders? Can fundamental decisions, such as change of purpose, be made at the discretion of the founder? What are the legal requirements in such circumstances?

The law does not foresee any specific rights for the founder. From a strict legal point of view, once the foundation has been set up the founder no longer plays a role in the foundation.

However it is not excluded that the statutes would attribute some role to the founder. According to the doctrine, it would not be forbidden to foresee in the statutes that some important decisions could only be taken after favourable advice from certain persons mentioned in the statutes, but who do not serve on the board of directors. This could obviously be applied to the founder(s). The obligation of obtaining their advice should however be limited to certain matters listed in the statutes.

What are the rights of beneficiaries (e.g. right of information)?

The beneficiaries of a charitable foundation do not have more rights than third parties (consulting the file at the clerk office of the court of first instance or consulting the annual accounts of big foundations through the website of the “*centrale des bilans*”), unless more rights would be conferred to them in the statutes, or on a separate contractual basis.

What rules are in place to ensure against conflict of interest? What is the legal definition of a conflict of interest under your legislation? How is self-dealing prohibited?

According to the law on foundations, the statutes should regulate the way in which conflicts of interest should be solved.

The definition of a conflict of interests should be sought in the law on companies. According to that law such conflict exists if a director has directly or indirectly an opposite interest of patrimonial nature in a decision or an operations in which the board of directors is involved. In that case he should mention this fact to the other board members.

Since the law on foundations does not foresee precise rules for solving the problem of conflicting interests, the statutes could provide a solution. Based on the legislation on companies, the declaration of the director who has an opposite interest should be mentioned in the minutes of the board meeting, as well as the decision of the board itself on this issue. If there are auditors, the board should inform them of this situation. A special report on this issue should also be drafted by the statutory auditors outlining the patrimonial consequence for the foundation of the conflicting interests.

Can staff (director and/or officers) participate in decision making? How and to what extent?

The decision belongs exclusively to the board of directors. Of course, the final decision can always be based on preliminary studies, projects, proposals in which staff (officers) can participate.

➤ **Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation?**

It is the law of 27 June 1921 that specifies that the foundation can only be represented by directors. As far as general representation is concerned, it is up to the statutes to organise this representation by conferring it on all directors, some of the directors, or just one of them. If more directors have representation powers, the statutes should specify whether these persons should act collectively or may act separately.

For day-to-day management, a foundation can however be represented by a director or someone else.

Do the director and officers have powers of representation?

As mentioned above, the powers of general representation toward third parties can be delegated by the statutes to one or to more directors, but not to officers. Officers can only have representation powers in the framework of the daily management, as far as the statutes would foresee it.

➤ **Liability of the foundation and its organs**

The foundation is liable for the actions of its organs. Board members are not personally liable for the debts of the foundation. They can be held civilly liable for damages to the foundation.

What is the general standard of diligence for board members? Does your country differentiate between voluntary (unpaid) and paid board members?

The general rule is that the directors are not individually liable regarding the obligations of the foundation. Their liability is limited to the execution of their mandate and the damages caused by their mismanagement.

In certain circumstances, civil liability towards the foundation or towards third parties can occur. Board members have a contractual liability towards the foundation in case they do not respect the rules of the mandate or if they violate the statutes or the law. The foundation can initiate a procedure against these members ("*actio mandati*"). However, since there is no general assembly in foundations, the "*actio mandati*" should be initiated by the board. There would then be a problem if a violation of the statutes (or the law) has been committed by all the board members.

The directors can also have an extra-contractual liability towards the foundation (based on Article 1382 of the Civil Code regarding torts) as well as towards third parties in the event they have caused damage through mismanagement/negligent behavior. In such a case, third parties (for instance, creditors of the foundation and employees) can sue the foundation itself or any board members. Such a scenario can take place if the foundation becomes insolvent.

Whether or not the directors are paid does not in principle make a difference as far their liability is concerned. However, according to some sources of doctrine, as far as extra-contractual liability is concerned, the liability of a non-remunerated director is treated less severely than of a remunerated director.

There is a problem when the liability of all the board members is concerned, since the “*actio mandati*” can only be initiated by the board as far as foundations are concerned. In such a case the court that is the supervising authority can revoke the directors and appoint other members.

Is there a “*business judgment rule*”, giving a board member a “safe harbour”, if she/he (1) acts on an informed basis; (2) acts in good faith, (3) acts in the best interests of the corporation, (4) does not act out of self-interest (duty of loyalty concept plays a role here), and (5) is not wasteful?

The determination as to whether a director has caused damage through negligent behavior should be made on the basis of the attitude of a normally cautious and diligent person acting in similar circumstances. The Supreme Court confirmed (29 June 1989) the principle that a director of an ASBL (non-profit association) can be considered as personally liable for the torts he caused to third parties through lack of cautiousness or diligence in the management. The same reasoning can apply to directors of a foundation.

What is the liability the directors and officers?

As mentioned above, in cases where the director has committed a fault, there is a contractual liability towards the foundation.

There can also be an extra-contractual liability in cases where the fault has caused a tort to third parties. Finally in some matters enumerated by the law (non payment of VAT, professional withholding tax, or social contributions) the directors can be considered as jointly and severally liable.

Can the founder modify the standard of diligence for board members in the foundation’s statutes?

No

Can board members be held **civilly** and/or **criminally** liable in the following cases?

	Yes	Probably yes	Unclear	Probably no	No
The foundation distributes money for a purpose which is a public benefit purpose but not accepted in the foundation’s statutes.	X				
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).			X		
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.					X
The foundation sells immovable property to the spouse of a board member. The board member was unaware that the price was too low.		X			
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.			X		

In all the cases mentioned above, where the liability of board members is involved, it concerns the contractual liability between the foundation and the directors.

The answers in rows 2, 4 and 5 are in the category “probably yes” and “unclear”, because the final answer depends on all the circumstances in which the operation took place and whether the director(s) can be considered negligent or not. These facts obviously cannot be mentioned in such a table. For rows 4 and 5, the fact that the price was slightly or significantly too low can be relevant.

➤ **Are economic activities allowed (related/unrelated)?**

Foundations are not forbidden from undertaking economic activities, even if these activities are not related, provided that they still have a non-profit purpose and that the profits are exclusively used for statutory purposes. In such a case, however, it should be kept in mind that a foundation risks losing its income tax exemption.

➤ **Are there any rules/limitations regarding foundations’ asset management?**

Foundations are not forbidden from owning shareholdings or even major shareholdings, if this “holding” activity is still subordinated to their statutory purpose and if the income from these assets is used for their statutory non-profit purpose. The same principles apply to alternative investments, hedge funds, or private equity.

➤ **Are foundations legally allowed to allocate grant funds towards furthering their public benefit purpose/programmes which (can) also generate income? (recoverable grants; low interest loans; equities)**

Foundations are not forbidden from allocating grant funds towards furthering their public benefit purpose/programmes which also generate income.

➤ **What are the requirements for an amendment of statutes/amendment of foundations purpose?**

According to Art. 30, amendments of statutes of PUFs have to be communicated to the Ministry of Justice. If the amendments make changes relating to Arts. 28.3 and 28.5 to 28.8 (e.g. the purpose, regulation on modification of the statutes, or board appointment) they have to be approved by the King.

Amendments of the statutes of private foundations relating to Arts.28.3, and 28.5 to 28.8 (e.g. purpose, board appointment) must be agreed on by formal decision.

According to Art. 30.3, the court may also change the statutes for both types of foundations under special circumstances. Any amendment must be published in the Belgian Gazette (Art. 31.4).

➤ **What are requirements with regard to reporting, accountability, auditing?**

Small private foundations, small public utility foundations and large public utility foundations have to file their accounts and annual budgets with the clerk’s office of the commercial court.

Large private foundations have to file their accounts, detailed information on board members and the report of the statutory auditors with the National Bank of Belgium/*Banque Nationale de Belgique*.

Public utility foundations and private foundations must keep yearly accounts according to the Law of 17 July 1975, if they fulfil certain criteria enumerated in Art. 37.3, namely two of the following criteria: 5 workers, €250,000 of normal cash receipts, or €1,000,000 for the total of the balance sheet.

Statutory auditors must review the annual accounts of very large foundations, i.e. foundations that exceed the criteria enumerated by the law (Art. 37.5).

Reporting requirements: Do annual reports and/or accounts of foundations need to be made publicly available?

Yes, see below.

What type(s) of report must be submitted (annual report including details of finances and activities, public benefit report, tax report/tax return, other reports e.g. on 1% schemes)?

The reports that must be submitted annually are:

- The annual accounts and the budget. These documents should be filed at the clerk's office of the court of first instance for public benefit foundations and small private foundations and at the National Bank of Belgium in the case of large private foundations.
- The income tax return (in most of the cases the income tax of legal entities) should be filed at the local tax inspection office. The date of this submission is mentioned in the annexes of the Belgian official Gazette (*Le Moniteur Belge*).

Who checks (supervisory/tax authorities)?

The National Bank or the clerk's office of the court do not perform a systematic control, regarding the content of the annual accounts.

As far as tax aspects are concerned, the inspector may perform tax audits in order to determine whether all elements that are subject to the tax on legal entities were properly declared and whether the formalities concerning payments to third parties were completed. He will also check whether the exemption from corporate tax can effectively be claimed by the foundation.

Where is the required information publicised?

Concerning the accounting documents, the "*Moniteur Belge*" indicates only the name and address of the foundation and the date of their publication. The annual accounts of big private foundations can be consulted on the website of the National Bank of Belgium (*centrale des bilans*). For public benefit foundations and small private foundations the annual accounts can be consulted at the clerk's office of the court of first instance. Tax documents of foundations (income tax return) cannot be consulted by third parties.

What are the legal requirements concerning external audit? Is external audit required by law for all foundations?

Very large foundations (see question on governance requirements above) should appoint a statutory auditor who is a member of the "*Institut des réviseurs d'entreprises*". The other types of foundations are not obliged to do so. The statutory auditor will audit the accounts of the foundation and issue a report, which should be attached to the accounts to be deposited.

By whom should audits be undertaken? Do requirements/guidelines exist regarding international and national auditing agencies and standards?

The statutory auditors of Belgian foundations should apply the standards foreseen by the Belgian legislation.

➤ **Supervision (which authority – what measures / sanctions?)**

There is no supervision on a periodic (annual) basis. Supervising authorities, like the Ministry of Justice and the court of first instance do however intervene in certain circumstances,

The Ministry of Justice intervenes as the supervising authority upon the creation of a public benefit foundation or in case a public benefit foundation's statutes are amended. It also intervenes in cases where a private foundation is converted into a public benefit foundation.

The court of first instance can intervene (for private and public benefit foundations) if the assets have not been used for the purpose of the foundation, in cases where the directors have been negligent, or in cases where no annual accounts have been filed during three consecutive years.

The court of justice is also the only authority that takes the decision on liquidating a foundation, appointing a liquidator and closing the liquidation,

Donations of over €100,000 that do not consist of hand-to-hand donations (*dons Manuels/ handgiften*) to private or to public benefit foundations must be approved by Royal Decree (via a request to be sent to the Ministry of Justice).

Does the supervisory authority comprise of a public administrative body, a public independent body, a combination of a governmental body and a court, or a public body and an independent body?

For public benefit foundations, the supervisory authority consists of:

- A governmental body (Ministry of Justice) for the verification of the statutes and the modifications thereto
- A court (court of first instance)

What is the extent of the supervision? Does the body review reports and make inquiries? Are public benefit organisations subject to inspection?

The extent of the supervision is quite limited. There are no *ex officio* inspections, reviews of reports, or inquiries. The Court can only take action in specific circumstances, upon a request introduced by the public prosecutor or by a director of the foundation, by its board of directors, or by any interested party.

Is approval from the authority required for certain decisions of the Board of Directors?

Yes, for public benefit foundations certain modifications of the statutes should be authorised by the Ministry of Justice. This mainly concerning the modification of the objective and the modification of the activities of the organisation.

Is it mandatory to have a state supervisory official on the board?

Unlike for some other countries, the Belgian law does not foresee the presence of a state supervisory official on the board.

What enforcement measures are in place (including compliance measures and sanctions for non-compliance) concerning registrations, governance, reporting, and public benefit status?

Sanctions for non compliance:

Failure to comply with the obligation to register or to deposit certain documents at the clerk's office of the court will result in the decisions contained in these documents being unenforceable and claims introduced by the foundation before a court being inadmissible.

Accounting obligations:

Foundations which have not published their annual accounts for three years (dormant foundations) can be liquidated by the Court upon the request of the public prosecutor or any third party. Any claim which would be introduced by a foundation which had not deposited its annual accounts would be inadmissible.

Tax aspects:

Foundations which do not file their income tax returns will receive penalties: A tax of 309% will be imposed on foundations which do not justify in a specific format (statement 325) the payment of professional income to employees or self employed persons. The eligibility for receiving income tax deductible gifts will not be renewed in cases of infringement of the tax laws, if it appears that the foundation is no longer exempted from the corporate tax or if the foundation has not published their annual accounts.

Enforcement measures:

Upon the request of the public prosecutor, the court of first instance can dismiss directors who have been blatantly negligent and appoint new directors. It can also modify the statutes if the application of the current statutes leads to a paralysed situation or to a situation which was not foreseen by the founder. The court can also dissolve the foundation in the abovementioned circumstances (see below).

➤ **When and how does a foundation dissolve?**

According to Art. 39, only the competent court can dissolve a foundation upon the request of the founder, the board, or of the public prosecutor's department in certain cases, i.e. if the purpose has been achieved or is impossible to achieve; if the foundation uses its estate for other purposes other than the statutory purpose; if the foundation violates the law, or the bylaws, or neglects to submit its accounts for three years.

➤ **Under what conditions does the civil law in your country recognise a foreign foundation?**

Foreign foundations can operate in Belgium through a centre of activity, insofar as they have been validly constituted abroad in accordance with the law of the state to which they belong. In order to be recognised in Belgium, they have to comply with Article 31, § 1 and §§ 3 to 6 of the Law of 17 June 1921 (creation of a file at the clerk's office at the court of Commerce and publications at the Belgian official Gazette, accounting requirements, etc).

➤ **Does the civil law in your country allow a foundation to conduct (some or all) activities (grant-making, operating, asset administration, fundraising) abroad? Is there any limitation?**

Activities performed abroad are not forbidden, but approval for receiving tax-deductible gifts could until now not be given to organisations active in sectors like scientific research and protection of monuments. For certain categories of organisations, approval can only be given if the organisation receives subsidies from the Belgian State or from one of its subdivisions, which implies that they conduct their activities mainly in Belgium.

II. Tax treatment of the foundation

➤ **What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?)**

Foundations are generally exempted from corporate tax, like the other types of non-profit organisations, and are subject to the tax on legal entities. Exemption from corporate tax is only applicable if the entity has a non-profit status (which implies a non-distribution constraint), and does not carry out profit-making operations. If this last condition is not met, the exemption is still granted if the entity performs activities that include only incidentally industrial or commercial operations or which do not involve the use of industrial or commercial methods (Art. 182 of the Income Tax Code - ITC).

Exemption from corporate tax is also applicable to non-profit organisations (NPOs) operating in the so-called privileged sectors as foreseen by the law (Art. 181 Income Tax Code), i.e. distributing social allowances, helping families or elderly people, securing professional interests or working in the field of exhibitions, or providing education.

There is no obligation to pursue a public benefit purpose to benefit from the exemption.

The exemption is not subject to any prior formal agreement by the tax authorities. The tax inspector, however, may challenge the organisation's income tax status later on at any time.

Foreign entities which have a permanent presence in Belgium also benefit from the exemption provided by Art. 182 of the ITC, but cannot be exempted on the sole basis of Art. 181 (organisations operating in the field of the privileged sectors mentioned above). This restriction might be in conflict with the Treaty of Rome.

➤ **What are reporting/proof requirements to claim tax exemptions?**

➤ **Is specific reporting required for the use of state funds?**

There are no specific rules on reporting for the use of state funds, but certain obligations might be foreseen by the national, regional or local subsidising authority.

➤ **Is there an obligation to report on donors and beneficiaries?**

In the framework of the law on tax deductibility of gifts, the charity can only keep its status if it provides to the tax authorities a statement with the amounts and the name of the donors who benefitted from the tax deduction.

➤ **Are there specific accounting rules for foundations?**

The accounting rules are foreseen by the law of 17 June 1921 on associations and foundations, with different regimes for small and for large associations or foundations.

➤ **Is there a statutory definition in the civil law (foundation law, trust law) of your country what a public benefit purpose (charitable purpose) is? If yes, please give us the definition.**

There is no legal definition of the public benefit purpose, The part of the law which concerns public benefit foundations contains an exhaustive list of 7 objectives that can be pursued by a public benefit foundation. The entity can only be agreed as such if its statutory purpose falls within one of these categories.

➤ **Is there a statutory definition in the tax law of your country of what a public benefit purpose is? If yes, please give us the definition.**

The tax law does not use public benefit as a criterion, does it give a definition of public benefit purpose. Corporate tax law uses more general criteria such as non-profit purpose and non-profit-making operations. The inheritance tax legislation refers to the legal form (associations, foundations) and generally uses this as the sole criterion.

➤ **Support of “the public at large”**

Do the activities of a tax-exempt foundation generally have to benefit “the public at large”?

For corporate tax exemption, the number of beneficiaries concerned (“public at large”) is not a criterion as such.

For the eligibility of the foundation to receive income tax deductible gifts, there is a geographical criterion. According to Art. 104 of the Income Tax Code, the activity scope of organisations in some of the sectors enumerated by the law should be national or at least cover one of the three regions or one of the three communities of Belgium.

If yes, can a tax-exempt foundation support a small number of disadvantaged/ underprivileged individuals?

The criterion “public at large” is not relevant for determining whether tax exemption and income tax deduction should be granted or not. In the below-mentioned examples the income tax exemption for gifts might in some cases not be granted in some cases, since for some types of charities enumerated by the law there are conditions regarding the geographical scope of activity of the foundation which might not be met (second row of the table). For the first row, this criterion would be met if we take the example of Brussels, which is a city, but also a “region” in the sense of Belgian law. Universities (rows 5 and 6) do not meet the criterion of the geographical scope, but are explicitly mentioned by the law as eligible for tax benefits.

Examples: Do the following purposes promote the public at large?

	Yes	Probably yes	Unclear	Probably no	No
For benefit of the inhabitants of a city with 1,000,000 inhabitants		X - income tax deductible			
For benefit of the inhabitants of a village with 10,000 inhabitants			X- income tax deductible		
For benefit of the employees of a company					X -income tax deductible
For benefit of the members of a family					X - income tax deductible
For benefit of the students of a university	X -income tax deductible				
Award for the best student of a university	X - income tax deductible				

➤ **Non-Distribution Constraint**

Does a **tax-exempt** foundation generally have to follow a “non-distribution constraint” which forbids any financial support of the foundation board, staff, etc?

Yes, Articles 181 and 182 of the ITC (on corporate tax exemption) refer to non-profit associations and other legal entities that do not pursue a profit making purpose. These terms are not defined in the tax law and should be interpreted in the light of the civil law (Law of 27 June 1921 on non-profit associations and foundations). According to this law, the entity should not provide to its directors, staff or founders with any material gain. Any distribution of surpluses or distribution of assets is forbidden.

What happens with the foundation’s assets in case of dissolution?

The assets should be transmitted to another entity which has a similar purpose to that of the liquidated organisation. The statutes should indicate which organisation would be entitled to receive the net assets. For public benefit foundations, the attribution of the assets coming from the liquidation will be submitted to the authority of a judge.

“Altruistic” Element

Is remuneration of board members allowed in **civil law** and in **tax law**? If remuneration is allowed, are there any limits in **civil law** and/or in **tax law**?

Remuneration of directors is not explicitly forbidden in civil nor in tax law. Neither of these establish any ceiling. However, according to the doctrine, the remuneration of directors should never be set as a function of the foundation’s income, but only as a function of their work.

Does **tax law** allow a donor/funder to receive some type of benefit in return for a donation? (e.g. postcards, free tickets for a concert)

If the founders/donors/directors receive some type of benefit from the foundation, this is taxable as a benefit in kind. If benefits are granted on a larger scale, it could contribute to jeopardising the (corporate) tax-exempt status of the foundation.

Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**? If yes, how are “administration costs” defined?

The provisions on the eligibility of an organisation to receive tax-deductible gifts require that the organisation does not spend more than 20% of its resources on administrative costs.

Hybrid Structures (elements of private benefit in public benefit foundations)

Does the **civil law** of your country accept the following provisions/activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.	X - only for private foundations, never for PUFs*				
The founder retains a beneficial reversionary interest in the capital of a property or other asset for his own continuing use.			X		
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder			X		

(or another member of her/his family) as tenant.					
A foundation distributes a (small) part of its income to the founder or his family.					X

*See comments on private foundations, which are entitled to pursue either a private objective or a public benefit objective (or both) in the questions below.

Does the **tax law** of your country accept the following provisions/activities of a tax-exempt foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.	X - for private foundations				
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for its own continuing use.				X*	
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.				X*	
A foundation distributes a (small) part of its income to the founder or his family.					X

*There is no practice and no jurisprudence on these possibilities in Belgium, since the legal form “private foundation” has only existed since 2002 (see hereunder).

Are there any other examples from your country (in **civil law** and/or **tax law**) regarding such “hybrid structures” (e.g. law provisions, court decisions, etc.)?

As explained in the first question, it should be kept in mind that there are two types of foundations in Belgium: The public benefit foundation and the private foundation, created by the Law of 2 May 2002. For a public benefit foundation, legal personality is only granted when the foundation has been recognised by Royal Decree.

Private foundations, which are not subject to such recognition, are allowed to pursue private (non-profit) objectives as well as public benefit objectives. According to a recent survey, more than 20% of the newly created private foundations appear to have a public benefit purpose.

The private foundation can be used as a “hybrid structure” in the sense that it can pursue private and public benefit objectives at the same time. It can also be an appropriate structure for the use illustrated in the first row of the above table. It can, for instance, be used for the maintenance of a family estate or for ensuring care for a handicapped child after the death of the founder (see preparatory works of the law). It can also be used for keeping intact an enterprise after the death of the founder. Regarding this last possibility, Belgian lawmakers were inspired by the Dutch “*Stichting administratiekantoor*”. A separation is made between the remuneration of the capital (the heirs are still entitled to receive dividends through certificates which are distributed to them by the foundation in exchange for their shares) and the management which belongs to the private foundation.

Private foundations acting as “*Stichting administratiekantoor*” are explicitly exempted from corporate tax if they comply with the conditions stated in Belgian law.

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

Yes, as long as these expenses are made to pursue the objectives and activities of the foundation which are mentioned in the statutes.

Are they allowed to be set up for a limited period of time only?

Yes

Does the **civil law** and/or the **tax law** of your country require a foundation to spend its income (or a certain amount of the income) within a certain period of time, e.g. within the next financial year?

No

Does the **civil law** and/or the **tax law** of your country require a foundation to spend a percentage of its overall assets in the form of a “payout rule”?

No

Example: Does the **civil law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.	X				

Example: Does the **tax law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.	X				

Are there any examples or cases from your country (in **civil law** and/or **tax law**) regarding the question of “timely disbursement” (e.g. law provisions, court decisions, etc.)?

n/a

➤ **Does activity abroad put the tax-exempt status at risk?**

For Belgian foundations, activities abroad are not an obstacle to exemption from corporate tax or to the application of the privileged inheritance or gift tax regime. However, as far as the eligibility to receive tax deductible gifts is concerned, it should be noted that for certain categories of organisation mentioned by the law, activities should be exclusively carried out on Belgian territory. Activities on a larger scope than Belgium could put the eligibility of these organisations to receive certain tax exemptions at risk.

➤ **Income tax treatment**

Foundations as well as other NPOs which are exempted from corporate tax are subject to the tax on legal entities. This tax is not applied on global income but only on income derived from specific sources. Income derived from real estate, movable income, and capital gains on specific items are subject to the tax on legal entities. Movable income is taxed through a final withholding tax,

Income from real estate is taxed through a final withholding tax, calculated on the cadastral income (i.e. the annual rental value of the immovable property) or at a flat rate of 20% depending on the place where the real estate is located (in Belgium or abroad).

Miscellaneous income – such as income from subletting or transferring and renting of immovable property whether furnished or not, income from the renting of advertising space, or income from the renting of hunting, fishing or bird-catching rights – is taxed through a withholding tax of 15%.

Grants and donations

Grants and donations are not subject to tax on legal entities.

Investment income (asset administration)

Income from investments, e.g. dividends, interest, royalties, is normally taxed through a withholding tax at the rate of 15% or 25%.

Economic activities related/unrelated

Economic activities are not subject to the tax on legal entities nor to corporate tax if these activities remain ancillary. If this is not the case, not only the income from these activities but the global income will also be subject to corporate tax. There is no possibility for a partial exemption.

Major shareholding - considered as an economic activity and taxed accordingly?

There is no legal provision that states that a major shareholding would be considered (and taxed) as a specific economic activity. However in such a case, the tax authorities might challenge the situation of the “parent” non-profit organisation if the boards of directors of the two entities are composed of the same persons.

In all the other cases, income from dividends from this major shareholding would be subject, like any other dividend income, to the tax on legal entities, as explained above.

Income deriving from grant expenditure towards public benefit purpose/programme activities (such as loans, guarantees, equities)?

The recovery of grants is not subject to the tax on legal entities.

Interest income or dividends are subject to the tax on legal entities (taxation through a withholding tax).

➤ **Capital gains tax, where separate from income tax**

Capital gains can arise on the transfer of assets for free or for monetary compensation.

If the assets are donated by a non-profit organisation (subject to the tax on legal entities), the capital gains realised on these assets are not subject to the tax on legal entities. Only transfers for compensation (e.g. sale or exchange) are subject to the tax on legal entities as follows:

If a non-profit organisation (i.e. foundation) transfers assets for compensation, the capital gain is taxable insofar as it concerns:

- Land or buildings located in Belgium which have been purchased or acquired through a lifetime gift if the capital gain is realised in a certain period after the acquisition
- Substantial shareholdings in commercial companies which are subject to the Belgian corporate tax (i.e. if the NPO has owned a shareholding of at least 25% during the 5 years preceding the transfer of the shares), if the shares are sold to a company which is not subject to the corporate tax in Belgium, i.e. a resident company

➤ **Withholding tax on foreign investment income?**

Foundations, as well as other NPOs, are normally subject to the tax on legal entities. This regime implies taxation through a withholding tax on movable income (dividend, interest, etc.) For foreign investment income consisting of dividends and interest income, the non-profit organisation should pay the withholding tax if the income was directly received abroad (which implies that no tax was withheld by a Belgian intermediary).

➤ **Gift- and inheritance tax**

The rates of inheritance tax on a legacy to a PUF are reduced to 6.6%, 7% or 8.8% respectively if the legacy is made by a resident of Brussels Region, Wallonia or Flanders.

The rates of inheritance tax on a legacy to a private foundation are reduced to 7% or to 8.8% respectively if the legacy is made by a resident of Wallonia or of Flanders. If the legacy is made to a private foundation by a resident of Brussels Region the rate is 25% or 12.5% if the entity is eligible to receive tax-deductible gifts according Art. 104 of the ITC.

The rate of gift tax is reduced to 6.6% if the donation is made by a resident of Brussels region to a public benefit foundation. For donations made by residents of Flanders or residents of Wallonia to private or to public benefit foundations, the reduced rate is 7%.

If foundations receive movable assets through an informal gift (gift from hand to hand) they are not liable to registration duties on that gift. However, if the donor dies within three years of making the gift, inheritance tax will be calculated either at the reduced inheritance tax rates mentioned above or at the full rate, if the receiving entity does not qualify for a reduced rate for one reason or another.

Belgian legislation stipulates that comparable foundations which are located in another EU Member State can benefit from the same reduced rates. This amendment was the result of an infringement procedure by the European Commission against Belgium. In Wallonia, however, the extension of the privileged rates to EU-based foundations is subject to very strict conditions. This issue is currently being challenged by the European Commission ("Walloon Case").

➤ **Value added tax (VAT)**

If a foundation delivers goods or provides services for monetary compensation in the sense of the VAT code, it is subject to VAT. The law foresees exemptions for services of social utility (including health care, education, and culture). These services are enumerated in Art. 44 of the VAT code. It should be mentioned that these exceptions should be interpreted restrictively. The VAT exemption is not optional: It is applicable or not, depending on the exact circumstances or facts relevant to the organisation that renders the services or supplies goods linked to these services.

Foundations which are to be considered exempted taxpayers do not need to charge VAT on their services, but may not deduct input VAT.

➤ **Capital taxes on the value of assets, where applicable?**

The substitute inheritance tax (*taxe compensatoire aux droits de succession/tax tot vergoeding der successierechten*) is an annual worth tax levied on non-profit associations created after 10 July 1921, international non-profit associations and private foundations.

Public utility foundations are not subject to this tax.

The tax is calculated on total worldwide assets existing on 1 January, except for real estate located abroad. The rate of this tax is 0.17% of the assets.

The tax is not due if the value of the assets does not exceed €25,000.

➤ **Taxes on the transfer of assets?**

Transfers of real estate for monetary compensation made to a non-profit organisation or from a non-profit organisation are subject to registration duties at the normal rate of 12.5% for real estate located in Brussels Region or in Wallonia and 10% for real estate located in Flanders.

If a foundation transfers real estate for free to another non-profit organisation, there is no gift tax on the transfer, but only a flat tax of €100.

➤ **Other taxes, where applicable (Real property tax)**

Non-profit organisations are subject to a real estate withholding tax on their immovable assets located in Belgium. This tax is assessed on the cadastral income (i.e. the annual rental value of the immovable property). Some non-profit organisations can be exempted from real estate tax (Art. 253.1 of the Income Tax Code). In order to benefit from this exemption, the charity should use the real estate, without profit purpose, for one of the purposes enumerated by the law, e.g. church-related aims or aims related to non-religious moral standards, education, health care (hospitals or clinics), holiday homes for children, or homes for the elderly.

➤ **Can a foreign foundation get the same tax benefits as a national foundation according to the wording of the tax law in your country? If yes, under what conditions?**

A foreign foundation operating in Belgium is in principle treated the same way as a Belgian foundation. The corporate tax exemption can be obtained based on one of the two following grounds: (i) The organisation can be exempted if it does not carry out operations of a for-profit nature. The exemption based on this criterion can be claimed by both resident and non-resident entities. (ii) An organisation can also claim the exemption

on the sole basis that it belongs to one of the privileged sectors enumerated by Article 181 of the Income Tax Code (for instance, education). However, the criterion of privileged sectors is only applicable to resident organisations. A foreign organisation operating in Belgium that only meets the second criterion would be subject to corporate tax. The Belgian legislation should be amended on this point, as far as organisations of European Union or European Economic Area (EEA) countries are concerned, since it violates the Treaty of Rome.

Eligibility for income tax deduction of gifts concerns only organisations established in Belgium. An exception has recently been introduced by the law in December 2009 for organisations established in one of the EEA countries (see section III on the tax treatment of donors: Donations to nonresident public benefit foundations).

➤ **What is the tax treatment (inheritance and gift tax) of legacies to non-resident public benefit foundations?**

Outside of the EEA or EU: Legacies to non-resident public benefit foundations will not benefit from the privileged regime (reduced tax rate).

Within the EU/EEA: According to the new legislation, tax relief (reduced rate) has now been extended to comparable organisations located in EU or EEA countries. However, the legislation of the Walloon Region subordinates the application of the preferential rate to specific conditions. These conditions appear to be in conflict with the Treaty of Rome (see also section II on tax treatment of the foundation, question on gift and inheritance tax).

➤ **Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations are protected by the fundamental freedoms of the EC Treaty? Especially: Are the consequences of the Stauffer decision of the European Court of Justice and/or the current infringement procedures of the European Commission discussed by legal scholars or by practitioners? (e.g. publications in law journals) / Have there been any resulting changes to your country's legislation, or are changes being discussed?**

Belgium was the first country in Europe whose legislation on tax relief for donations or legacies to foreign organisations was challenged by the European Commission (October 2002). New developments on cross-border activities of foundations are being closely followed by the practitioners (conferences, publications, creation of a database for donors and charities on legal and tax aspects, contacts with the European Commission, etc). These discussions and contacts increased after the so called Heine Persche case (ECJ C 318/07 in 2009), which finally incited Belgium to extend the equal treatment (tax deduction) to all the categories of eligible charities listed by the law (see below). In the meantime, interesting initiatives have been launched, such as Transnational Giving Europe (<http://www.transnationalgiving.eu/tge/>), in cooperation with an increasing number of other European countries.

III. Tax treatment of donors

➤ **System of tax credit or tax deduction?**

Gifts to qualifying organisations, including foundations, (i.e. charities that are operating in specific areas and which have been recognised by royal decree) are deductible from the taxable base within certain limits, as specified below.

➤ Tax treatment of individual donors

In principle, only gifts of cash to qualifying NPOs can benefit from tax deduction. As of 1 January 2011, in order for an individual to claim tax deductions their donations must amount to €40 or more over the course of the financial year. The only exception to this principle concerns gifts of works of art: If such a gift is made to a museum dependent on the State or its subdivisions and if certain conditions are fulfilled, the value of the donated asset is deductible. Foundations do not benefit from this exception.

The aggregate value of the gifts cannot exceed 10% of the taxable income, with an absolute maximum of €331,200 for the tax year 2009

➤ Tax treatment of corporate donors

In principle, only gifts of cash can benefit from tax deduction. As of 1 January 2011, in order for a corporate donor to claim tax deductions their donations must amount to €40 or more over the course of the financial year. The only exception to this principle concerns gifts of works of art: if such a gift is made to a museum dependent on the State or its subdivisions and if certain conditions are fulfilled, the value of the donated asset is deductible. Foundations do not benefit from this exception.

The aggregate value of the gifts cannot exceed 5% of the taxable income, with an absolute maximum of €346,100 for the tax year 2010.

➤ Tax treatment of donations to non-resident public-benefit foundations

On 31 December 2009 the “*Moniteur Belge*” (official gazette) published the law of December 22, 2009 (*Loi portant des dispositions fiscales et diverses*). Part of this law concerns the income tax deductibility for donations or gifts to the so called “recognised institutions”. The law now states that donations to qualifying domestic institutions or to similar institutions from another member state of the European Economic Area, which are recognised on a similar manner (“*ou aux institutions similaires d'un autre Etat membre de l'Espace économique européen qui sont agréées de manière analogue*”) will be tax deductible. Non-resident receiving organisations within the EEA should be considered as comparable to a Belgian institution and should be licensed ‘in a similar manner’ in their country of residence, in order to generate tax relief for the donor.

➤ Other frameworks such as percentage law systems

Not applicable in Belgium.

➤ What are reporting/proof requirements to claim tax benefits?

According to recent instructions of the Belgian tax authorities, the taxpayer who claims the deduction for a cross-border gift should keep at the disposal of the tax authorities the evidence showing that the foreign institution can be considered as similar to a Belgian institution dealt with by the law and the documents showing that it has been licensed ‘in a similar manner’ in its country of residence.

IV. Tax treatment of the beneficiary (receiving a grant or other benefit from a foundation)

Individuals

Income tax:

Social benefits provided to individuals by charities within the framework of their charitable purposes are normally not subject to individual income tax since these benefits are not linked to a professional activity of the beneficiary.

The provision of grants, subsidies, prizes or other benefits by national or international institutions, including non-profit organisations (i.e. foundations or associations), to individuals can sometimes be connected to a professional or occasional activity of the beneficiary, for instance prizes awarded to musicians or to authors, and subsidies granted to scientists.

In such cases the grants, subsidies or prizes are subject to individual tax if they exceed €3,200 per year. Generally, they will be taxed as miscellaneous income (at a reduced rate).

However, these grants, subsidies or prizes can be totally exempted if they are paid by institutions or foundations which have been recognised by Royal Decree for this purpose.

Gift tax:

This issue is not relevant, since grants, subsidies or prizes are generally not a “donation” in the strict sense of the word. Moreover, it should be kept in mind that there is no gift tax on informal gifts of movable assets.

Legal entities

Income tax:

If the legal entity which receives a grant or a benefit from a foundation is subject to corporate tax, the grant or benefit will be considered as income and will be taxed. If the entity receiving the grant is a non-profit organisation which is exempt from corporate tax and subject to the tax on legal entities, there will be no income tax on this grant.

Gift tax:

As far as movable assets are concerned, it should be kept in mind that there is no gift tax on informal gifts (gifts from hand to hand). If the benefit is provided through a donation made by a non-profit organisation having one of the legal forms enumerated by the law to another organisation having one of these forms (e.g. from a foundation to another foundation or to an ASBL), the gift tax will be limited to a fixed amount of €100.

V. Trends and developments

➤ Recent trends or developments affecting the legal and fiscal environment for public benefit foundations

When the law of May 2002 on non-profit associations, international non-profit associations and foundations came into force, it appeared that the situation of private foundations was not regulated as far as inheritance or gift taxes were concerned.

In two of the three Belgian regions initial contributions, donations and legacies were subject to progressive rates applicable between unrelated parties. These regional laws have recently been amended. A private foundation can now also benefit from the privileged inheritance or gift tax regime in each of the Belgian regions.

With respect to the exemption from corporate tax, it should be noted that foreign non-profit entities which have a permanent presence in Belgium cannot be exempted on the sole basis of Art. 181 of the ITC (the so-called privileged sectors). This restriction might be in conflict with the Treaty of Rome. Since the infringement procedure against Belgium is not yet closed, the European Commission could include this point in its referral to the European Court of Justice. In case of a ruling favorable to the above-mentioned foreign non-profit organisations, Belgium will have to amend its income tax legislation on this issue.

➤ **Impact of anti-terrorist debate**

Is there a specific national/regional anti-terrorism act (legislation) in your country. (which one and date of entry into force or adoption)?

There is a specific anti-terrorism act, namely the law of 11 January 1993 preventing the use of the financial system for money laundering and terrorist financing ("*loi du 11 janvier 1993 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme*").

If so, has this law introduced new legal and regulatory requirements for foundations (please describe)?

There are no direct requirements for foundations, but it should be stressed that notaries, lawyers, advisers, accountants, external auditors, and bankers should notify the CETIF (*cellule de traitement des informations financières*) about any transaction where they have reasons to suspect money laundering by their client. The term "client" includes commercial companies, but also other legal entities or trusts.

Has the foundation supervisory authority introduced new regulatory/oversight requirements to comply with counter terrorism measures/law?

There are no new requirements in the framework of counterterrorism measures that have been specifically introduced by the supervisory/regulatory authorities for foundations.

Has the foundation supervisory / regulatory authority(ies) introduced guidance tools to assist foundations to comply with counterterrorism measures/law?

No

If so, did the foundation supervisory authority engage in a consultation with the foundation sector on counter terrorism measures/ does it plan such a consultation?

No

➤ **Public fundraising**

Are there any specific laws that regulate fundraising and do they affect foundations?

No

Useful contacts

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