

EFC COUNTRY PROFILE JANUARY 2011: NETHERLANDS

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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)?**

In the Dutch Civil Code/*Burgerlijk Wetboek* Article 285 Book 2, a foundation (*stichting*) is defined as “a legal person created by a legal act which has no members and whose purpose is to realise an objective stated in its statutes using capital allocated to such purpose”.

There are no different types of foundations in the Netherlands. However, a Dutch foundation can be used for different purposes.

- **What purposes can foundations pursue?**

The foundation does not necessarily have to serve a purpose of public interest. Thus, it is possible to pursue a purpose of private benefit. However, the purpose cannot be to distribute the foundation’s profits to the founder or to members of its organs.

- **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 a notarial deed (also under a will) containing the statutes. They then receive full legal capacity. The initial board has to be named in the statutes. No governmental body is involved. No minimum capital is needed for establishment or operation. Regarding the purpose, there are no restrictions – foundations can be established for public and private purposes. The only restriction is that the purpose cannot be to distribute the foundation’s profits to the founder or to members of its organs.

Furthermore, the assets of a foundation do not play an important role when defining or establishing a foundation.

According to Art. 2:289 of the Civil Code, all foundations must be registered in the Register of Commerce/*handelsregister*. The Chamber of Commerce and Industry in the area where the foundation is headquartered keeps the foundation register. The register contains further information about the board that represents the foundation as well as the names and addresses of the founders. The deed, including the statutes is kept at the register.

- **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?)**

No

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

According to 2:289 of the Dutch Civil Code, all foundations must be registered in the Register of Commerce/*handelsregister*.

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

The register contains information about the activities and the size (number of employees) of the foundation. The deed, including the statutes, is kept at the register. The name and the address of the foundation, the names and addresses of the members of the board with powers of representation of the foundation or the representatives of the foundation, and the names and addresses of the founders are kept at the register.

If foundations are registered, is the register publicly available?

Yes

- **Is a minimum capital required?**

No

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

According to Arts. 2:291 and 2:292 of the Civil Code, the foundation is governed and represented legally by a governing board that is responsible for the administration of the foundation. There is no specific number of board members required.

In the Civil Code only the board is mentioned as the constituent body, charged with the management of the foundation. It is possible for a foundation to have other constituent bodies, with certain authority vested in them by the statutes. Many foundations have a "council of advisors" or a "supervisory board" which, for instance, have the authority to:

- Approve the general accounts (balance sheet and the profit and loss account)
- Approve certain decisions before they can legally be made by the officers of the board
- Approve an intention to amend the statutes of the foundation
- Appoint and dismiss board members

Is it mandatory to have a supervisory board?

No

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 Civil Code only lays down a few rules concerning the members of the board (directors). Subject to the restrictions of the statutes, they must manage the foundation. They cannot enter into agreements to purchase, dispose of or encumber registered property, unless the

statutes of the foundation specifically state that they have the authority to do so. (The same applies to agreements by which the foundation commits itself as guarantor, or joint and several debtor, guarantees performance by a third party, or undertakes to provide security for a debt of a third party.)

The board represents the foundation. If the statutes of the foundation provide for the possibility to change the statutes, the board can amend them.

The statutes of the foundation describe the manner of appointment and dismissal of the board. As long as these statutes are not contrary to the law or morals, any system is possible. The members of the board may themselves choose their successors or decide to dismiss an officer; the authority to appoint or dismiss board members may be vested in another constituent body of the foundation or even in a third party (another organisation). The board can consist of one or more members (directors).

The founder can also be a member of the board.

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

The Civil Code only lays down a few rules concerning the members of the board (directors). Subject to the restrictions of the statutes, they must manage the foundation. Part of that task is to financially manage the (funds of the) foundation. Secondly, they have to represent the foundation towards third parties. Thirdly, they have to prepare and support the decision making process within other bodies of the foundation if those are present.

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 founders have no rights by law, but rights or powers can be attributed to them in the statutes. Founders can also be a member of the board.

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

The beneficiaries have no rights by law, but rights or powers can be attributed to them in the statutes of the foundation.

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?

There is no legal definition of the term 'conflict of interest'. Furthermore, concerning foundations there are no legal rules in place to ensure against it. This in contrast to the private or public limited company (BV or NV) where civil law prohibits the conflict of interest of a director. In Dutch literature it is argued that this prohibition also applies to foundations and associations. As mentioned before, the purpose of the foundation cannot be to distribute the foundation's profits to the founder or to members of its organs.

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

The statutory provisions of the foundation assign the power of decision making.

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

According to the Dutch Civil Code, the board members in principle represent the foundation towards third parties. The statutory provisions of the foundation could assign the authority to represent the foundation to one or several board members and also to persons other than the board members.

Do the director and officers have powers of representation?

Not by law. According to the Dutch Civil Code, the board members in principle represent the foundation towards third parties. The statutory provisions of the foundation could assign the authority to represent the foundation to persons other than the board members.

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

While the foundation is liable for any legal actions it undertakes, its officers are only liable in some cases. In addition, they may be liable based on tort or criminal law.

Internal liability

This liability with respect to the foundation is based on the general provisions of Book 2 of the Civil Code which are applicable to the foundation. This general provision (section 9) provides that each member of the board has an obligation towards the foundation to properly perform the duties assigned to him. With respect to matters within the competence of one or more board members, each is jointly and severally liable with respect to any shortcoming, unless he proves that the shortcoming is not attributable to him and that he has not breached any duty to take measures to prevent the consequences of the shortcoming.

Liability for registration

Each board member shall be jointly and severally liable towards the foundation for any legal act by which he binds the foundation, until the filing of the deposit of the initial registration. It is therefore important to register the foundation as soon as possible. This is an external liability, towards third parties.

Liability for annual accounts

If the annual accounts misrepresent the condition of the foundation, board members shall be jointly and severally liable to third parties for any loss sustained by them as a result of this. This liability only applies in the event of an involuntary liquidation of a foundation that is subject to corporate income tax.

The Second and Third Abuse Act

This legislation was enacted in 1987 to prevent abuse of legal entities and to protect creditors. Board members shall be jointly and severally liable:

- For involuntary liquidation (bankruptcy) of the foundation for the amount of the liabilities to the extent that these cannot be satisfied out of the liquidation of other assets. Liability is only possible if the foundation is subject to corporate income tax. Furthermore, liability is only possible if the board has manifestly performed its duties improperly and it is plausible that this is an important cause of the involuntary liquidation. However, if the board has not complied with the obligations described above under "reporting, accountability, auditing", it has performed its duties manifestly improperly and it is assumed that this is an important cause of the involuntary liquidation. To escape liability, the board member has to prove that the improper performance has not been attributable to him and that he has not been negligent in taking measures to prevent the consequences of this.

- for the payment of social security premiums, income taxes, VAT obligations and mandatory contributions to a pension fund if the foundation is in default of payment of these. Liability is only possible if the foundation is subject to corporate income tax. Furthermore, liability is only possible if the board has manifestly performed its duties improperly. However, if the board has not given proper notice of the inability to pay taxes or premiums, the burden of proof is reversed. To escape liability, a board member has to prove that the non-notification is not attributable to him and that there has not been a manifestly improper performance of these duties.

For the purpose of this legislation, any person who has determined or jointly determined foundation policy as if he were a board member shall be treated as a board member.

A board member may be removed by the Court upon the request of the Public Prosecutor's Office or on the application of any interested party if he acts (or fails to act) in breach of the provisions of the law or the statutes, or is guilty of mismanagement.

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

Each board member has the obligation to properly perform the duties assigned to him. There are no differences between voluntary and paid board 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?

With respect to matters within the competence of one or more board members, each is jointly and severally liable with respect to any shortcoming, unless he proves that the shortcoming is not attributable to him and that he has not breached any duty to take measures to prevent the consequences of the shortcoming.

What is the liability of the directors and officers?

Only board members are (jointly and severally) liable under certain conditions. Directors and officers can also be members of the board, or can be considered as persons who have determined or jointly determined foundation policy as if they were board members.

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

The foundation's statutes specify the duties of the board members.

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 ¹			
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).					X ²

¹ It is likely that the shortcoming is attributable to the board members. If the board members cannot prove that the shortcomings are not attributable to them, then the board members are civilly liable.

² No consequences are stated in civil law whether a foundation is tax- exempt or not.

The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.				X ³	
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	

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

Commercial activities are allowed provided they are within the objectives of the foundation and are in general taxed. As mentioned before, a foundation is not allowed to distribute its profits to the founder or to members of its organs.

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

Legally there are no rules or limitations with respect to the asset management of foundations. As stated in Section II ("Tax treatment of the foundation"), a foundation is basically subject to Dutch corporate income tax (CIT) if it carries out business activities in competition with commercial enterprises. The question is what business activities are "business activities" (taxed) as opposed to "investments" (tax-exempt).

Please note that if a foundation invests or operates business activities in a very risky manner, the board can be held responsible for possible bankruptcy.

➤ **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)**

Yes. A public benefit purpose can be pursued and at the same time income can be generated. However, commercial activities may be subject to CIT.

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

According to the Civil Code (Art. 2:293), the statutes can only be changed if the statutes provide for amendment. If this is not the case, a request for amendment has to be made to the District Court/*Arrondissementsrechtbank* (Art. 2:294). The court will only agree to the amendment if this is necessary to achieve the purpose of the foundation. The court is also entitled to change the statutes.

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

The board has the duty to maintain financial records. Within 6 months of the end of each preceding financial year, the board must prepare a balance sheet and a statement of revenues and expenditures of the foundation. These records have to be kept for 7 years.

³ If the foundation is subject to corporate income tax, a board member can be held liable. To escape liability, the board member has to prove that the improper performance has not been attributable to him and that he has not been negligent in taking measures to prevent the consequences of this. (See also the paragraph 'The Second and Third Abuse Act' for the liability of board members.)

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

Part 9 of Book 2 of the Civil Code is applicable to foundations. In principle every commercial foundation has to publish its annual accounts within 8 days after they are approved. There is, however, an exemption based on the size of the business of the foundation. A commercial foundation whose net turnover totals less than €8.8 million and whose assets do not exceed the value of €4.4 million over two consecutive years could under certain conditions be exempted from the obligatory publication of accounts.

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)?

When applicable, only the annual statement and report have to be submitted.

Who checks (supervisory/tax authorities)?

The annual report is not checked by default.

Where is the required information publicised?

At the chamber of commerce (*Kamer van Koophandel*)

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

An external audit is only required if the commercial foundation is a 'medium or large entity'. An entity is considered 'small' when it meets two of the three following requirements in two consecutive years:

- The value of the assets according to its balance sheet does not exceed €4.4 million
- The net sales of the fiscal year do not exceed €8.8 million
- the average number of employees for the year is less than 50

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

Audits should be undertaken by a certified accountant.

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

Foundations fall under the supervision of the Public Prosecutor's Office and the District Court/*arrondissementsrechtbank*. Interested parties can ask for a decision to change the statutes, dismiss directors or dissolve the foundation. The District Court is the competent authority to take such action in the interest of the foundation. Dissolution is the last resort.

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?

The supervisory authority is the District Court.

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

The supervision will only take place on request of interested parties. Only on request the District Court will undertake action in the interest of the foundation.

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

Approval is required if the board wants to change the statutes of the foundation in a way that is not allowed by the statutes.

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

No

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

If a foundation is not registered at the chamber of commerce, all board members are jointly and severally liable. The board members are also jointly and severally liable if the foundation is required to file yearly accounts and neglects this. Furthermore, a fine can be issued.

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

General provisions exist for the dissolution of all legal entities (Art. 2:19 of the Civil Code). The court, at the request of the Public Prosecutor's Office, may dissolve the foundation in the event of inactivity, according to Art. 2:21 of the Civil Code. Every foundation must include in its statutes provisions regarding the use of the assets in the event of dissolution.

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

In principle every foreign foundation is recognised in the Netherlands by civil law.

➤ **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?**

Civil law allows a foundation to conduct activities abroad.

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?)**

In general:

Foundations are only subject to Dutch corporate income tax (CIT) if and to the extent they carry out economic activities (Art. 2(1)(e) Dutch Corporate Income Tax Act (DICTA)). In addition, they are deemed to carry out economic activities and are therefore subject to tax, if they compete with entities that are subject to CIT. A foundation that does not carry on economic activities or does not compete with commercial enterprises is not subject to CIT.

If a foundation is subject to tax, the foundation may however still be exempt from CIT under Art. 5 or Art. 6 DICTA.

Please refer to the section 'Income tax treatment' for a further explanation.

Foundations with public benefit purposes are wholly exempt from gift and inheritance tax.

As of 1 January 2008 a foundation has to be officially qualified as a charity by the Dutch tax authorities in order to qualify for tax benefits. Among the benefits are the following:

- Donations by Dutch residents to the qualifying foundation are tax-exempt. This also applies to inheritances
- Donations by the foundation are exempt from gift tax, if more than 90% of the donation is in the public interest

Criteria in order to qualify as a charitable organisation:

- Based on the statutes and based on the actual activities, the foundation should not have any intention to make a profit
- In accordance with its statutes and also in actual behaviour, the foundation has to demonstrate its charitable character
- It should be clear that a natural person/legal entity cannot have control over the assets of the institution as if it were his/its own capital
- The institution is not allowed to have more assets than reasonably necessary for the continuity of the institution. Endowments should be dealt with in accordance with the wishes of the donor
- The members of the ultimate policymaking body are only entitled to receive an allowance for expenses and a reasonable fee for attendance. However, a reasonable compensation paid to a member who carries out daily activities is allowed
- To give an insight into the foundation's activities, fundraising, and administration of funds and expenditures, it is necessary to have a current policy plan
- Costs of fundraising and administration should be in reasonable proportion to the charitable expenditures
- All proceeds from liquidation of the charitable institution should accrue to a similar institution
- The books and records of the charitable institution must be transparent with regard to the points mentioned above
- The qualification as a charitable institution is made public as of 1 January 2008 by the Ministry of Finance on its website
- As from 2010, an entity has to 'exclusively or almost exclusively' (=> 90%) pursue a public benefit purpose to qualify for the ANBI status. Before 2010 the entity should pursue public benefit purpose for more than 50%
- As from 2010, the entity, a board member of the entity, a person who actually manages the entity, or a person who is important for the image of the entity, may in the past four years not be irrevocably sentenced for of inciting hate, violence, or use of violence

As from 2010, the tax rates of the gift and inheritance tax have been changed. The rates depend on the relationship between the deceased and the heirs or legatees, and on the amount of the acquisition. The rate applicable to donations between unrelated parties/persons is 30% for amounts up to € 118,000 and 40% for any amount above. An exemption of € 2,000 applies for donations between unrelated parties/persons.

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

The standard tax rules with regard to reporting apply. When a tax exemption is claimed, the foundation should be able to prove it qualifies for the exemption.

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

A governing body can impose obligations on a beneficiary who receives a grant with regards to its administration. Usually an activity and budget plan is required. When during the year a considerable discrepancy occurs between the cash flow and the accounted budget, the governing body has to be notified.

No specific reporting with regard to reporting for the use of state funds on the field of taxation is required.

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

No

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

Fundraising entities with a widely accepted certificate (CBF-Keur) are required to make accounts followed by Dutch accounting rules (RJ 650).

In addition, foundations are required to keep record of their financial position in such a way that at any moment there is a clear insight of their financial rights and obligations.

➤ **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 statutory definition of the term public benefit purpose in civil law.

➤ **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.**

There is no statutory definition of the term public benefit purpose in tax law. The public benefit of a specific foundation is often determined in Dutch case law.

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

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

No

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

n/a

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					
For benefit of the inhabitants					

of a village with 10,000 inhabitants					
For benefit of the employees of a company					
For benefit of the members of a family					
For benefit of the students of a university					
Award for the best student of a university					

➤ **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?

According to the Dutch Civil Code, foundations in the Netherlands are prohibited from distributing their profits to their founders or to members of their organs.

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

This depends on its statutory provisions. If nothing is provided in its statutes, the assets will go to the state which will use it as far as possible for the purpose of the foundation.

➤ **“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 is only allowed when this is in accordance with the statutory provisions of the foundation. In the tax law, remuneration of board members is allowed, but they probably have to pay personal income tax. If a foundation wants to be qualified as a charitable institution, remuneration of board members is only allowed for reimbursement of expenses, carrying out work, or attending meetings.

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)

It is allowed by income tax law, but there can be liability for VAT purposes or gift tax.

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 amount must be in accordance with the statutory provisions of the foundation. If a foundation wants to be qualified as a charitable institution, the administration costs have to be ‘reasonable’.

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

There are no specific provisions for public benefit foundations in civil law. The answers below apply to every foundation. The only restriction is that the purpose of the foundation cannot be to distribute the foundation’s profits to the founder or to members of its organs and that the foundation has to act in accordance with its statutes.

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 ⁴			
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 (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			

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 ⁵		
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 ⁶		
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 ⁷			

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.)?

No

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

There are no regulations or limitations with respect to the asset management of foundations.

⁴ Maintaining the founder is not allowed, but maintaining his spouse and descendents is accepted by civil law.

⁵ If the main purpose of the foundation is for the interest of a private individual, the foundation will be transparent for tax purposes. The income, gifts and inheritances are subject to tax by the individual instead of the foundation.

⁶ See footnote 5.

⁷ This distribution will probably be subject to gift tax.

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

According to Article 2:17 of the Dutch Civil Code, a foundation is set up for an indefinite period of time. If the foundation does not have enough equity to exist, it will be dissolved.

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			

To qualify as a charitable institution, the foundation is not allowed to have more assets than reasonably necessary for the continuity of the institution.

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.)?

Yes, there is a case in tax law. On 29 November 1972 (BNB 1973/36), the Supreme Court of the Netherlands decided that a charitable institution may accumulate its income. In response of this decision, the Ministry of Finance decided that the foundation is not allowed to have more assets than reasonably necessary for the continuity of the institution in order to qualify as a charitable institution.

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

In general, Dutch foundations are allowed to pursue activities abroad, under the condition that the worldwide activities meet the requirements for the tax exemption. It is not necessary that these activities are for the public benefit of the Netherlands.

➤ **Income tax treatment**

A foundation is subject to the Dutch CIT if and to the extent that it carries out business activities. If the activities of the foundation consist solely of investing in property or capital (investment income), this does in principle not qualify as a business for the exemption of CIT. If these activities are charitable, such as for example, science and educational activities, the foundation is not subject to the CIT.

If there is a permanent organisation of capital and labour with the purpose of making profits through participation in the market, a business would exist. If there is a frequent surplus (of profits), a profit-making purpose will be deemed to be present. If there is no business based on these criteria, a foundation will nevertheless be deemed to be subject to CIT if the foundation is in competition with commercial enterprises subject to CIT.

A foundation that does not conduct a business or competitive commercial activities is exempt from CIT.

According to Art. 5.1a, CIT foundations that own wooded estates can be exempt from this tax upon approval of the Ministry of Agriculture and Fisheries and the Ministry of Finance.

According to Art. 5.1c, CIT organisations that are established to carry out almost exclusively (at least 90%) the following activities of general public interest are exempt from income tax: Caring for the sick, providing accommodation for the elderly or invalid, assisting the disabled, and providing small credits to the poor. The exemption depends on the actual activities and financing of the organisation. Foreign entities can also qualify for tax exemption if their worldwide activities meet these requirements.

Other entities are enumerated in Art. 5.1e-h CIT such as health funds, social security entities, and libraries. Furthermore, the Ministry of Finance can grant tax exemption to other entities which pursue public interest aims if their profit does not exceed a certain amount according to Art. 6 CIT. According to the Ministry of Finance, the tax exemption only applies when the profit is used for the benefit of another exempted entity according to Art. 6 CIT or when the profit is used for a public interest purpose.

Grants and donations

A foundation is subject to the Dutch CIT if and to the extent that it carries out business activities. If the activities of the foundation consist solely of investing in property or capital (investment income), this does not qualify as a business.

Investment income (asset administration)

Only when the investment qualifies as a business activity.

Economic activities (related/unrelated)

If the activities qualify as a business activity they are subject to Dutch CIT.

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

If the foundation is not directly involved with the management of the company, it is not considered as an economic activity. Please note that the Dutch tax authorities are of the opinion that a major shareholding in a commercial entity restricts the foundation's eligibility to obtain the status of an ANBI (Institution for General Benefit).

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

Only if it qualifies as a business activity.

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

The Netherlands does not have a capital gains tax. In general, if a foundation is subject to Dutch CIT, the foundation has to pay CIT on a possible capital gain from an asset. In that case capital losses are in principle deductible.

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

A possible withholding tax depends on the foreign investment and country concerned.

➤ **Gift- and inheritance tax**

Donations made by residents of the Netherlands are in general subject to Dutch gift tax. Inheritances received from somebody who was a resident of the Netherlands at the time of decease are in general subject to Dutch inheritance tax. The beneficiary's nationality or residence is irrelevant. The rate applicable to donations or inheritances between unrelated parties/persons is 30% for amounts up to € 118,000 and 40% for any amount above (an exemption of € 2,000 applies for donations between unrelated parties/persons). If a Dutch resident makes a donation to a foundation, the foundation will in principle be liable to pay the gift tax. An exception is made for the '*Algemeen Nut Beogende Instelling*' (Institution for General Benefit).

The '*Algemeen Nut Beogende Instelling*' (ANBI) is a vehicle that is recognised and registered by the Dutch tax authorities. When a body qualifies as an ANBI, in principle all donations to (and originating from) it are exempted from gift tax. In order to receive tax privileged donations, all ANBIs must register with the Dutch authorities. A list is published on the website of the Dutch tax authorities that shows the registered ANBIs.

The same applies to inheritances. If a qualified ANBI receives an inheritance from a resident of the Netherlands, this will be wholly exempt from inheritance tax.

Please see information above on the requirements to receive tax exemptions.

➤ **Value added tax (VAT)**

All foundations that supply goods or services as a business are subject to VAT. Services by non-commercial entities are exempted according to Art. 11 VAT Act.

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

No

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

The transfer of real estate is subject to transfer tax which has to be paid by the obtainer of the real estate.

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

Owners and users of real estate have to pay real property tax. The amount of tax is determined by the fair market value for tax purposes (*WOZ-waarde*) of the real estate.

➤ **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 is subject to Dutch CIT only with respect to certain items of income derived from Dutch sources. A Dutch foundation is subject to Dutch CIT if and to the extent that it carries out business activities. A foreign foundation can therefore be subject to Dutch CIT with respect to certain items of income, without carrying out business activities. In 2006 the Dutch Secretary of Finance confirmed that non-resident foundations which have only Dutch real estate are not subject to Dutch CIT.

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

A domestic donor (individual or corporate) can receive a tax benefit when donating to foreign foundations, as long as the Ministry of Finance has qualified it as a charitable institution. As of 1 January 2008 a qualified charitable organisation resident in the EU or a qualified country can receive the same tax exemption from gift tax as a similar Dutch-based institution. Additional conditions may be laid down for foreign foundations to qualify as a charitable institution.

➤ **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?**

As of 1 January 2008 a qualified charitable organisation resident in the EU or a qualified country can receive the same tax exemption from gift tax as a similar Dutch-based institution. Additional conditions may be laid down for foreign foundations to qualify as a charitable institution.

Please note that in September 2010 the European Commission has decided to send requests to the Netherlands to change discriminatory tax rules. Two of these requests concern Dutch taxation of foreign foundations.

The Commission has formally requested the Netherlands to change its tax rules which discriminate against foreign charities that have real estate in the Netherlands. Under the Dutch tax law in question, domestic charities which do not carry out business activities, are exempt from taxation on income from real estate in the Netherlands. However, non-resident foreign charities are subject to tax on any income from property they may have in the Netherlands. The Commission considers these rules contrary to EU law on the freedom of movement of capital.

The Commission has also formally requested the Netherlands to change its tax rules under which resident charities which do not carry out business activities are exempt from Dutch corporate income tax, whereas similar non-resident charities are not. Dutch charities which do not carry out business activities but which receive income from substantial interests in Dutch companies or from debt claims on companies in which they hold shares, are exempt from Dutch corporate income tax. However, foreign charities have to pay tax on such income received from Dutch companies. The European Commission considers these rules contrary to EU law on the free movement of capital.

Please also note that in March 2010 the European Commission requested the Netherlands to change its tax rules for foreign foundations which want to obtain from the benefits of an ANBI. According to Dutch tax law, a foreign foundation can only benefit from a tax deduction or exemption if the foundation applied for the ANBI status with the Dutch tax authorities. The Commission is of the opinion that these rules are unnecessarily restrictive, as the tax deduction or exemption cannot be obtained if the foreign foundation did not apply for the ANBI status with the Dutch tax authorities. The Commission considers these rules contrary to EU law on the free movement of capital. After all, the Dutch tax authorities could always demand the foundation to show that the foundation satisfies the criteria to obtain the tax deduction or exemption.

III. Tax treatment of donors

➤ System of tax credit or tax deduction?

Within certain limitations a donor can deduct from his taxable income gifts to charities on his income tax return. The donor needs written proof that he has donated to a charity. No credit system exists in the Netherlands.

Gifts can be made in different forms. Deductible donations can take the form of annuities, cash and donations in kind. Gifts of real estate need notarial form as well as annuities.

As mentioned before, as of 1 January 2008 a foundation has to be officially qualified as a charitable institution by the Dutch tax authorities. Before 1 January 2008 it was not mandatory to have such an official qualification.

➤ Tax treatment of individual donors

The deduction of donations by individuals is regulated in Chapter 6 of the Individual Income Tax Act (IIT) 2001. According to Article 6.39 IIT, individuals can deduct donations to a qualifying Institution for General Benefit (*Algemeen Nut Beogende Instelling* or ANBI) up to 10% of their gross income. No deduction is possible for donations below 1% of the gross income or 60 euro (2010).

In addition, annual payments for a minimum period of five years to ANBI's and qualifying associations are wholly deductible. The annual payments should be formalised by a notarial (gift) deed.

➤ Tax treatment of corporate donors

Corporations are allowed to deduct donations to a qualifying Institution for General Benefit (*Algemeen Nut Beogende Instelling* or ANBI). The donations should be at least €227 (2010), up to a maximum of 10% of the annual income of the corporation. Commercial gifts that are related to the interests of the business are fully deductible.

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

A domestic donor (individual or corporate donors) can receive a tax benefit when donating to foreign foundations, as long as the Ministry of Finance has qualified it as a charitable institution. As of 1 January 2008 a charitable organisation resident in the EU or another qualified country has the same tax privileges as a similar Dutch-based institution. Additional conditions may be laid down for foreign foundations as to qualify as a charitable institution.

➤ **Other frameworks such as percentage law systems**

No

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

Annual payments of individual donors should be formalised by a notarial (gift) deed. When claiming tax benefits for other gifts, written documents should be available.

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

A gift from a Dutch foundation which has been qualified as a charitable organisation is exempt from gift tax when the charitable organisation qualifies as an ANBI and the gift is for more than 90% in the public interest. The '*Algemeen Nut Beogende Instelling*' (ANBI) is a vehicle that is recognised and registered by the Dutch tax authorities. A list is published online that shows the registered ANBI's. If there is no exemption, the rate applicable to donations between unrelated parties/persons is 30% for amounts up to €118,000 and 40% for any amount above. An exemption of €2,000 applies for donations between unrelated parties/persons.

V. Trends and developments

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

➤ **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)?

Yes there is. The "*Wet terroristische misdrijven*" (Law for Terrorist Offences), came into force on 10 August 2004.

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

No

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

No

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

n/a

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?

Useful contacts

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