

EFC COUNTRY PROFILE JANUARY 2011: PORTUGAL

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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)?**

There is no legal definition. However, according to the rules set out in the Civil Code, it is adequate to describe a foundation as a non-profit-making legal entity which has been endowed with an irrevocable transfer of assets to pursue the founder's will for a long-term social purpose. Regarding the different legal types of foundations:

- There are no foundations without legal personality
- Temporary foundations, although rare, are allowed (Art. 192.1a of the Civil Code)
- There is a basic distinction between public and private law foundations:
- Public law foundations are created, regulated and financed by public governing bodies and act as public administration institutions (not subject to Civil Code rules).
- Private law foundations can be created by public or private initiative. Private law foundations can be recognised as being of public benefit if their purpose is of general interest and they cooperate with the public administration (Art. 1.1, Decree-Law 460/77, 7 November – amended by Law 40/2007, 24 August, and Decree-Law 391/2007, 13 December). The group of public benefit foundations comprises three types: Legal entities of administrative public utility, legal entities of simple public utility, and private social welfare institutions. The latter are governed by a specific legal regime (Decree-Law 519-G2/79, 29 December, and Decree-Law 119/83, 25 February, with later amendments);
- An international agreement between Portugal and the Holy See governs Catholic church foundations
- Arts. 33 to 51 of Law 16/2001, 22 June, on the freedom of religion govern religious-purpose foundations

The identification of additional types of foundations according to their purpose or other criteria is without further legal consequences (for instance, regarding corporate foundations or enterprise foundations).

➤ **What purposes can foundations pursue?**

Private benefit foundations are not foreseen. The Civil Code requires a foundation to pursue a social interest purpose (Art. 188.1). This concept differs from that of a public benefit purpose, the recognition of which requires a specific procedure

➤ **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?**

Private law foundations are set up by the founder through a notarial deed of gift or by will (Art. 185.1 C.C.). They will acquire legal personality upon recognition from the competent administrative authority (Art. 158.2 C.C.). The foundation should then be registered in the national register of legal entities or, where applicable, in the register of private social welfare institutions.

➤ **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?)**

Yes

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

Foundations are registered in the national register of legal entities or, where applicable, in the register of private social welfare institutions.

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

The founding documents and if applicable, information on change of name or purpose, transfer of registered office, or dissolution.

If foundations are registered, is the register publicly available?

Access to the information is restricted.

Public utility foundations must file their annual report and accounts with the government (Art. 12.1a, Decree-Law 460/77, 7 November). All financial reports and records must be kept and made available for review by the tax authorities. If a private foundation regularly receives funds from the State budget, it is annually subject to an audit by the Court of Audit (Law 98/97, 26 August, Art. 2.2g).

➤ **Is a minimum capital required?**

No. That said, the Civil Code requires the administrative authority to refuse a request for recognition if the assets are deemed insufficient for the pursuance of the foundation's purpose (Art. 188.2). In practice, a minimum capital has been established: €250,000 .

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

According to the Civil Code, private autonomy prevails as far as private law foundations are concerned. To some extent, an exception is made for private social welfare foundations (Decree-Law 119/83, 25 February). This Decree deals with the governing board and supervisory committee responsibilities, the eligibility, remuneration and liability of their members, conflicts of interests and self-dealing, quorum and voting, and management (Arts. 12 to 25).

Is it mandatory to have a supervisory board?

A supervisory committee is stipulated (Art. 162 C.C. and Decree-Law 119/83, Art. 12.1).

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?

An uneven number of governing board members is required (Art. 162 C.C. and Decree-Law 119/83, 25 February, Art. 12.1).

No rules concerning governing board composition (who can become a board member and how, expulsion, resignation, term of office) are set out in the Civil Code.

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

Rights and duties of board members are left to the statutes of the foundation (Art. 164.1 C.C.). However, one may read in Decree-Law no. 119/83, of 25 February, in Art. 13.1 on the responsibilities of the governing board and in Art. 14 on the responsibilities of the supervisory board, that "The governing board is responsible for managing the institution and representing it, and is charged, namely, with: a) Guaranteeing that the rights of the beneficiaries are given effect; b) Annually drawing up and submitting to the supervisory board the management report and accounts, and also the budget and action plan for the following year; c) Ensuring the organisation and operation of the services, and bookkeeping, according to the law; d) Organising the permanent staff and hiring and managing the institution's employees; e) Representing the institution in and out of court; f) Encouraging compliance with the law, the statutes and the resolutions of the institution's bodies" (Art. 13.1); and that "The supervisory board is responsible for monitoring compliance with the law and the statutes, and is charged, namely, with: a) Supervising the institution's bookkeeping and documents, whenever it deems it necessary; b) Attending or being represented by one of its members at meetings of the executive board, whenever it deems it necessary; c) Giving its opinion on the report and accounts and the budget and all issues that the executive board submits to it for assessment" (Art. 14).

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?

Concerning the rights of the founder, the most inclusive provision seems to be found in Decree-Law 119/83, 25 February, dealing with private social welfare institutions. Art. 6 states that the will of the founder shall always be respected. It is unclear, nonetheless, what the scope of this commitment is with regard to foundation governance. According to the Civil Code, once a foundation is created, the will of the founder, both actual and presumed, serves as a criterion when drafting or amending the statutes, or changing the purpose of the foundation (Arts. 187.3, 189 and 190).

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

More detailed provisions on this subject are set out in Art. 5 of Decree-Law no. 119/83, 25 February: "1. The rights and interests of the beneficiaries take precedence over those of the institutions themselves, the members and the founders; 2. The beneficiaries' dignity and private life must be respected and they may not be discriminated against on the basis of ideological, political, religious or racial criteria; 3. Limits to the scope of action in order to meet specific needs of particular groups or categories of people shall not be considered to be discrimination which constitutes non-compliance with the provisions of the previous paragraph".

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?

The following provisions of Decree-Law no. 119/83, 25 February, may be mentioned: "Voting on (...) issues related to the personal affairs of its members is by secret ballot (...)" (Art. 16.2); "Members of the management bodies may not vote on issues which relate to them directly, or on those in which their spouses, ascendants or descendants or equivalent have an interest" (Art. 21.3); "Members of the management bodies may not enter into contracts with the institution, either directly or indirectly, unless such contracts represent an obvious benefit to the institution" (Art. 21.4).

Can staff (director and/or officers) participate in decision making? How and to what extent? Do the director and officers have powers of representation?

According to Art. 13.3 of Decree-Law 119/83, 25 February, "If the statutes allow it, the governing board may delegate some of its powers to qualified persons in the service of the institution, or to representatives, under the terms set out in the statutes (...), and may also revoke such mandates".

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

Art. 163.1 of the Civil Code states that "representation of a legal person, in and out of court, is the responsibility of whoever is designated by the statute or, in the absence of statutory provisions, the administration or whoever is designated by it".

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

Private law foundations are liable to injured third parties for the damage caused by actions or omissions of its organs, although it may take recourse from the members of the organs (Art. 165 C.C.). These members may be held civilly and criminally liable. Statutes can set out their civil liability to the foundation (Art. 164.1 C.C.). Decree-Law 119/83, 25 February, governing private social welfare institutions, exempts members from liability when, according to the meeting records, they have clearly stated a dissenting opinion (Art. 20).

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

Board members are submitted to the general standard of the *bonus paterfamilias* (reasonable person standard), applicable to both torts and contracts (Arts. 487.2 and 799.2 of the Civil Code). Our law does not differentiate between unpaid 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?

It is only foreseen that board members escape liability if they express a dissenting opinion (Arts. 164.2 of the Civil Code and 20 of Decree-Law 119/83, 25 February).

What is the liability the directors and officers?

There is no specific provision on the subject. General rules of civil and criminal liability apply.

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

Statutes can set out board members’ civil liability to the foundation (Article 164.1 of the Civil Code).

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 - civil liability				X - criminal liability
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).	X - civil liability		X - criminal liability: Malice is required		
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.					X - criminal and civil liability
The foundation sells immovable property to the spouse of a board member. The board member was unaware that the price was too low.			X - civil Liability: Should he/she be aware?		X - criminal liability
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.			X - civil liability: Should he/she be aware?		X - criminal liability

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

Foundations are allowed to have economic activities provided they are useful to the pursuance of their purpose (Art. 160.1 C.C.).

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

There are no rules/limitations regarding foundations' asset management.

➤ **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)**

There are no rules/limitations regarding this matter.

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

Statutes can be amended, at any time, by the competent authority, upon the request of the foundation's board, as long as the purpose of the institution is not substantially changed and the will of the founder is respected (Art. 189 C.C.). Art 190 of the Civil Code states that after consulting the board of the foundation and the living founder, the competent authority for recognition can change the purpose of the institution when the initial aim has been fulfilled or has become impossible to achieve (1a), when it no longer has social interest (1b), or when assets have become insufficient to fulfil the purpose (1c). Regarding private social welfare institutions, Arts. 81 and 82 of Decree-Law 119/83, 25 February, have similar provisions.

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

Reporting requirements: Do annual reports and/or accounts of foundations need to be made publicly available? 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)? Who checks (supervisory/tax authorities)? Where is the required information publicised?

According to Art. 12.1a of Decree-Law 460/77, 7 November, "it is the duty of the legal entities of public utility (...) to send to the Secretary-General of the Presidency of the Council of Ministers, by electronic mail the annual report and accounts of the previous year, within a period of six months after these have been approved". This information can be made publicly available, based on Article 8.1 of the same Decree-Law: "A database of entities declared to be of public utility within the scope of this law is ... maintained by the Secretary-General of the Presidency of the Council of Ministers who shall make it available, for the purposes of public consultation, on its website".

What are the legal requirements concerning external audit? Is external audit required by law for all foundations? By whom should audits be undertaken? Do requirements/guidelines exist regarding international and national auditing agencies and standards?

No external audit is required.

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

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? What is the extent of the supervision? Does the body review reports and make inquiries? Are public benefit organisations subject to inspection? 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 fails to meet the criteria of public utility, the competent authority will remove its public utility status (Decree-Law 460/77, 7 November, Art. 13.1b, 2 to 4). Government supervision and related sanctions are wider for private social welfare institutions. Accounts have to be approved by the competent public authorities, who are able to enquire into the affairs of the foundation. They may also act in court requesting the dismissal of any member of the board. The court shall then appoint an independent receiver and manager to act in place of the governing board. The same procedure is available when the interests of the institution, the state or the beneficiaries are urgently at stake. When there is evidence that the foundation is acting against the law or is creating a severe risk to either the physical or mental health of its beneficiaries, the competent authority has the right to close the institution. In case the foundation's activities have been suspended or ceased, the competent authority may allocate its goods to another institution of similar purposes, provided the decision is based on the interests of the beneficiaries (Decree-Law 119/83, 25 February, Arts. 32 to 39).

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

According to Art. 32 of Decree-Law 119/83, 25 February, "The following actions require the authorization of the competent services: a) Acquisition of immovable property for consideration; b) Sale of immovable property in any form; c) Contracting of loans" (1) and "Authorization is not required in each of the following situations: a) When the sum of the actions is within the limits established by an order from the Minister with responsibility; (...) c) When the resolution is made by the governing board of a foundation and when the supervisory board has unanimously ruled positively on it" (2).

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

No

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

According to Arts. 192.1 and 193 of the Civil Code, the competent authority, informed by the board, must declare the dissolution of the foundation when the term for which the foundation was set up is over (Art. 192.1a), when a situation defined as a cause for dissolution by the statutes has occurred (Art. 192.1b), or when a court has declared the foundation insolvent (Art. 192.1c). The same authority may dissolve the foundation when the purpose has been reached or has become impossible to fulfil (Art. 192.2a), when the actual aim does not match the purpose as defined in the statutes (Art. 192.2b), when the aim is pursued through the use of illicit or immoral means (Art. 192.2c), or when the existence of the foundation has become detrimental to public order (Art. 192.2d). Liquidated assets can be transferred to another foundation with similar purposes (Art. 166.1 C.C.). Similar rules are found in Decree-Law 119/83, 25 February, applicable to private social welfare institutions (Art. 84).

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

Foreign foundations are recognised as of right in Portugal. Our country is bound by the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (Strasbourg, 24 April 1986). According to Art. 1 of the Convention, it shall apply "(...) to associations, foundations and other private institutions (hereinafter referred to as "NGOs") which satisfy the following conditions: Have a non-profit-making aim of international utility; have been established by an instrument governed by the

internal law of a Party; carry on their activities with effect in at least two States; and have their statutory office in the territory of a Party and the central management and control in the territory of that Party or of another Party". Art. 2 states that "The legal personality and capacity, as acquired by an NGO in the Party in which it has its statutory office, shall be recognised as of right in the other Parties. When they are required by essential public interest, restrictions, limitations or special procedures governing the exercise of the rights arising out of the legal capacity and provided for by the legislation of the Party where recognition takes place shall be applicable to NGOs established in another Party". Art. 4 should also be mentioned: "In each Party the application of this Convention may only be excluded if the NGO invoking this Convention, by its objective, its purpose or the activity which it actually exercises: a) Contravenes national security, public safety, or is detrimental to the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others; or b) Jeopardises relations with another State or the maintenance of international peace and security".

- **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?**

There are no limitations.

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

According to Art. 10 CIRC (Corporate Income Tax Code), legal entities of administrative public utility, social welfare institutions and legal entities of simple public utility whose main purposes are in the area of science, culture, charity, assistance, benevolence, social solidarity or environmental protection, are exempt from corporate income tax. The exemption of the latter must be recognised, at the request of the foundation, by the Ministry of Finance, which, through a dispatch published in the Official Gazette, will define its scope. The law demands compliance with certain requirements in order for the exemption status to be kept. The foundation must spend, in the following four financial years, 50% of its net income in the fulfilment of its purpose. Otherwise this tax benefit will be withdrawn.

If they do not qualify for tax exemption, private law foundations fall under the general corporate income tax regime applicable to entities that do not have as their main object commercial, industrial or agricultural activities. They are, then, taxed at the rate of 20% (Arts. 2.1a, 3.1b, 53, 54, 87.5 and 108 CIRC).

Foreign foundations are subject to the general non-resident income tax of 25% (Art. 87.4 CIRC).

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

No

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

No

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

No

➤ **Is there a statutory definition in civil law (foundation law, trust law) of your country what a public benefit purpose (charitable purpose) is?**

According to Art. 1.1 of Decree-Law 460/77, 7 November, “legal entities of public utility are associations or foundations that pursue aims of a general interest or pursue the interest of the national community or of any region or district, cooperating with the central or local administration”. Art. 2.1 (as amended by Decree-Law 391/2007, 13 December) stipulates compliance with certain requirements: “Under the terms of this Decree-Law, entities... may only be declared of public utility when... the following requirements are satisfied: a) They carry out their action in favour of the community, with non-profit-making aims, in areas of social importance such as the promotion of citizenship and human rights, education, culture, science, sport, social interaction of young persons, protection of children, young persons, the elderly, disadvantaged individuals, and citizens with special needs, consumer protection, protection of the environment and the natural heritage, the fight against discrimination on the grounds of gender, race, ethnic background, religion or any other form of discrimination prohibited by law, eradication of poverty, promotion of health and physical well-being, protection of health, prevention and control of disease, entrepreneurialism, innovation and economic development, preservation of the cultural heritage; b) they are regularly constituted and governed by statutes drawn up in accordance with the law; c) they do not carry out, as their principle activity, economic activities in competition with other entities that may not benefit from the status of public utility; d) they are not included within special legal regimes which recognise the nature or, alternatively, the enjoyment of prerogatives of legal entities of public utility; e) they possess the appropriate human and material means for compliance with their statutory aims; f) they do not perform their activity exclusively for the benefit of private interests, whether of their own members or of the founders”.

On private social welfare institutions, another type of public utility entity, Art. 1.1 of Decree-Law 119/83, 25 February, provides a definition: “Private social welfare institutions are those which are constituted for non-profit-making purposes, on the initiative of individuals, with the purpose of giving organised expression to the moral duty of solidarity and justice between individuals and... are neither administered by the State nor by a local authority, in order to pursue, among other things, the following aims, by means of the concession of property and the provision of services: a) Support for children and young persons; b) family support; c) support for social and community integration; d) protection of citizens in old age and with disabilities and in all situations of a lack of or reduction in the means of subsistence or capacity to work; e) promotion and protection of health, namely by means of the provision of preventive, curative or rehabilitative medical care; f) education and professional training of citizens; g) resolution of housing problems”. Art. 1.2 adds: “besides those listed in the previous paragraph, institutions may pursue on a secondary basis other non-profit-making aims which are compatible with the former”.

- **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.**

No

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

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

Yes

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

Yes, according to Art. 2.1a of Decree-Law 460/77, 7 November, and Art. 10.1b and c) of the Corporate Income Tax Code.

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

- **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?

Art. 10.3c of the Corporate Income Tax Code states: “The exemption (...) is based on observance of the following requirements: A lack of any direct or indirect interest of the members of the statutory bodies, by themselves or through an intermediary, in the results of...the economic activities pursued” by the concerned institutions. Regarding private social welfare institutions, which are tax-exempt, Art.18.1 of Decree-Law 119/83, 25 February, states: “The exercise of any position within the managing bodies of the institutions is gratuitous, although the payment of expenses resulting from such a position may be justified”.

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

According to Art. 166.2 of the Civil Code “The destination of the property (...) is that which is fixed for it by the statutes (...), notwithstanding the provisions of special laws; in the absence of such fixing or of a special law, the court, at the request of the Public Prosecutor’s Office, the liquidators, or any other (...) interested party, shall determine that it be attributed to another legal person or to the State, ensuring, as far as is possible, the realisation of the aims of the [dissolved entity]”. Decree-Law 119/83 on private social welfare institutions states: “When any of the causes of [dissolution] provided for in the general law are confirmed, the ministry relevant to the activities of the concerned entity may determine that the property of the foundation in which this occurs is included within another private social welfare institution or, where this is not possible, within a service or official establishment the aims of which are similar to those of the foundation which is [dissolved]” (Art. 85.1).

➤ **“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**?

Only the Decree-Law 119/83, 25 February, on private social welfare institutions, deals with the question: “When the volume of financial transactions or the complexity of the administration of the institutions requires the extended presence of one or more members of the managing bodies, these may be remunerated, provided that the statutes so permit.” (Art. 18.2).

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)

No

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?

No

➤ **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?

The possibility of a hybrid structure seems to be provided for in Art. 2.1 of Decree-Law 460/77, 7 November (as amended by Decree-Law 391/2007, 13 December): awarding of public utility status requires that the interested institutions “do not perform their activity exclusively for the benefit of private interests, whether of their own members or of the founders”.

	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			
The founder retains a beneficial		X			

reversionary interest in the capital of a property or other asset for his own continuing use.					
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			
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			

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 relevant examples.

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

No restriction applies.

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

Yes, pursuant to Art. 192.1a, of the Civil Code.

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? 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.)?

Following Art. 10.3b of the Corporate Income Tax, the foundation must allocate to the purposes which have justified its tax exemption, “(...) at least 50% of the overall net

income...subject to taxation..., by the end of the 4th year of activity after that in which it was obtained, except in the case of just impediment to compliance with the period of allocation...". Failure to comply with this requirement is penalised by paragraph 5 of the same article: "(...) in the 4th year of activity after that in which the overall net income is obtained, the part of that income which should have been allocated to the respective aims is subject to taxation".

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

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

It results from the notion of a legal entity of public utility that the tax-exempt status is dependent on the requirement that the entity pursues aims of general interest for domestic benefit within a national or local scope (Decree-Law 460/77, 7 November Art. 1.1).

➤ **Income tax treatment**

Grants and donations

Investment income (asset administration)

Economic activities related/unrelated

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

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

Pursuant to Art. 10.3 CIRC, with the amendments of Law 60-A/2005, 30 December, tax exemption does not apply to income from bearer securities and unrelated economic activities.

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

Capital gains are subject to the applicable regime on income tax.

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

Yes, pursuant to Arts. 94.3b), 94.5 and 87.4 CIRC.

➤ **Gift- and inheritance tax**

After the 2000 reform, the Stamp Duty Code has governed the gratuitous transfer of property. According to the applicable law, public utility foundations are exempt from stamp duty (Art. 6c and d).

➤ **Value added tax (VAT)**

The sale of goods and services related to social security and assistance by private social welfare institutions is exempt from VAT (VAT Code, Art. 9.6).

The sale of goods and services in the fields of childhood and youth education and protection, disabled protection, and elderly protection by public organisations and private social welfare institutions is also exempt from VAT (Art. 9.7).

There are several other VAT exemptions applicable to non-profit organisations (Art. 10) for the sale of goods and services in areas such as sport, culture or education (Arts. 9.8, 9.12, 9.13 and 9.14).

There is also a VAT exemption for the sale of goods and the performance of services by the above-mentioned organisations with the aim of raising funds for their sole benefit (Art. 9.20).

Depending on the amount, a private social welfare institution may recover VAT paid on goods and services to build up or maintain real estate that is totally or mainly used in pursuit of its purpose. The same applies to VAT paid on goods and services related to assets likely to depreciate when solely and exclusively used to achieve the foundation's purpose; also to VAT paid on the acquisition and repair of vehicles that are solely and exclusively used to achieve its purpose (Decree-Law 20/90, 13 January).

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

Income tax exemption on the value of assets is provided (Art 10.1 to 3 CIRC).

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

Private law foundations of public utility are exempt from property sale and purchase tax related to the acquisition of real estate when directly and immediately intended for the fulfilment of their purposes (Code on Property Sale and Purchase Tax (CIMT) – Art. 6.d and e). The beneficiaries have to request the competent tax authority to recognise the exemption (Art. 10). If property is subsequently transferred, or other purpose is given to it, without the consent of the Ministry of Finance, the foundation has to pay the tax from which it was previously exempt (Art. 11.1).

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

Private law foundations of public utility are exempt from real estate tax concerning property when directly used for the pursuance of their purpose (Tax Benefits Statute – Art. 44.1e and f). The exemption has to be recognised by the competent tax authority (Art. 44.8).

Private law foundations of public utility are also exempt from vehicle tax.

➤ **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?**

The foreign foundation has to apply for public utility status.

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

Exemption is awarded to legal entities of public utility. Considering that the status requires the pursuance of aims of general interest for domestic benefit, exemption seems restricted to resident public benefit foundations.

➤ **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?**

No

III. Tax treatment of donors

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

Individual donors: system of tax credit.

Corporate donors: system of tax deduction.

➤ **Tax treatment of individual donors**

Donations in cash only.

The Tax Benefits Statute, which was approved by Decree-Law 215/89, 1 July, with later amendments, grants tax incentives to individual donors in accordance with the regime applicable to corporate donors. Individual donors can subtract 25% of the amount donated from their total income tax in the respective year in cases where there is no limit on deduction for corporate donors. Also, individual donors can subtract 25% of the amount donated, as long as the amount does not exceed 15% of their total income tax in the respective year, in cases where there is a limit on deduction for corporate donors (Art. 63.1).

➤ **Tax treatment of corporate donors. What are reporting/proof requirements to claim tax benefits?**

Any kind of donation qualifies for tax relief.

Corporate donors are not subject to limits on tax deduction when donations benefit foundations to whose initial assets the state, autonomous regions or local councils have contributed. Similarly, subject to recognition by a joint decision of the Ministry of Finance and the ministry relevant to the activities of the concerned entity, no limits apply when donations represent the endowment of private origin foundations that pursue predominantly social or cultural aims (Tax Benefits Statute, Art. 62.1 c and d and 9. See, also, regarding science patronage, Law 26/2004, 8 July, Art. 8.1). Art. 62.3 sets out certain limits: Donations made to support private welfare institutions and legal entities of administrative and simple public utility whose main purposes are in the area of charity, assistance, benevolence and social solidarity are regarded as operational costs or losses up to a maximum of 8/1000 of the revenues from sales or services. The same limit is valid regarding family patronage and in the field of information technology (Arts. 62.5 and 65). It is also applied to science patronage (Law 26/2004, Art. 8.2). Donations to support foundations working in the field of culture, environment, sport or education are regarded as operational costs or losses up to a limit of 6/1000 of the revenues from sales or services (Art. 62.6). In this case, some tax privileges depend on the previous recognition of the status of the beneficiary by the ministry relevant to the activities of the concerned entity (Art. 62.10). Aggregate tax deductions are subject to a global ceiling of 8/1000 of the revenues from sales and services (Art. 62.12). In any case, beneficiaries must provide the tax authority with thorough information regarding all donors (Art. 66. See also, regarding science patronage, Law 26/2004, as amended by Law 67-A/2007, 31 December, Article 11-A).

Calculation of the tax incentive: Donations are regarded as a cost for the donor. The calculation of this cost varies depending on the status and purpose of the organisation to which the donation is granted. It ranges from 120% of the monetary value of the donation (when made to a foundation working in the field of culture, environment, sport or education, according to Art. 62.2 and 7) to 150% (family patronage – Art. 62.5).

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

Though not clearly stated, public benefit status seems to be available only to domestic foundations or, at least, to domestic operating foundations. Even so, some references made by the Tax Benefits Statute to NGOs and other entities in general as beneficiaries (Art. 62.3 d, e and f) may serve as a legal basis to grant tax incentives to corporate and individual donors when donating to non-resident public benefit foundations.

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

Art. 32.4 and 6 of Law 16/2001, 22 June, on freedom of religion provides for a percentage system: 0.5% of tax due can be devoted to a public utility institution of benevolence, assistance or humanitarian purposes or a private social welfare institution.

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

Individuals: Tax exempt

Legal entities: Tax exempt

V. Trends and developments

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

With the aim of reforming the law on foundations in Portugal, three recent proposals, differing in their fundamental principles, should be mentioned. The first proposal (2002) suggests a distinction between private law foundations under Civil Code rules and private law foundations of public origin. The main amendments to the Civil Code concern: Expanding the cases in which transformation of the foundation is allowed (no longer as an alternative to dissolution), the admissibility of a merger between foundations, the possibility of dissolving a foundation if it did not carry out any relevant activity during the preceding three years, and the irreversible nature of gifts of property. Recognition remains under the same principles. The proposal suggests, however, that recognition, as well as later supervision of foundations, should be entrusted to an independent administrative authority. A separate central register for foundations might be added to the existing national corporate register. Regulations regarding transparency are also addressed.

The second proposal (2004) subjects public origin foundations to private law if the concerned institution is an independently managed and financed non-profit legal person. Recognition is now based on different principles. Adhering to some current trends, reflected in the *EFC Model Law for Public Benefit Foundations in Europe*, the draft contains a list of public benefit purposes, restricting the discretionary power of the competent authority, and a presumption regarding the sufficiency of the endowment. Competence for the recognition and supervision of foundations remains with the administrative authority but the draft ensures its independence. The proposal includes a provision on economic activities. Governance issues are also addressed.

Two essential aspects characterise the last proposal submitted at the end of 2009: Private law public foundations will be subject to compliance with the constitutional and legal principles of administrative law; a National Council of Foundations will be set up, as an independent administrative body set up within the scope of the Presidency of the Council of Ministers, which will be responsible for recognising and supervising 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)?

Law 52/2003, 22 August, in compliance with Council Framework Decision no. 2002/475/JHA, of 13 June, on combating terrorism. Meanwhile, Law no. 25/2008, of 5 June, established preventative and repressive measures to combat the laundering of benefits of illicit origin and the financing of terrorism, transposing into national law Directive no. 2005/60/EC, of the European Parliament and the Council, of 26 October, and Directive no. 2006/70/EC, of the Commission, of 1 August.

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?

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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