

EFC COUNTRY PROFILE JANUARY 2011: UNITED KINGDOM (FOCUS ON ENGLAND AND WALES)

Drafted by Eleanor Boddington, Paul Bater, and Sabien Khan The Wellcome Trust

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)?**

When considering charity law in the UK, it should be noted that different charity laws exist in England and Wales, Scotland and Northern Ireland. The Charities Act 2006 (the “Act”) updated charity law in England and Wales and the Charities and Trustee Investment (Scotland) Act 2005 introduced new charity law for Scotland. Charities in England and Wales are regulated by the Charity Commission (the “Commission”)¹, while charities in Scotland are regulated by the Office of the Scottish Charity Regulator (OSCR)². Charity law has also been enacted for Northern Ireland in the Charities Act (NI) 2008, which provides for regulation by a new Charity Commission for Northern Ireland (CCNI)³. However, the CCNI has not yet been able to register any charities in Northern Ireland due to a technical problem with the wording of the Charities Act (NI) 2008, which has been referred to the Department for Social Development for consideration.

Taxation law as it applies to charities in the UK is essentially the same in all three legal jurisdictions. The definition of charity for UK tax purposes follows the definition for charity law purposes in England and Wales. This EFC Country Profile will focus on the charity legislation in England and Wales.

In practice, the term “foundation” in England and Wales is generally used to refer to a specific type of charity, i.e. an endowed, grant-making charity. However the term “foundation” in this profile is used with its “European” meaning and is intended to be synonymous with the term “charity”. The vast majority of foundations in England and Wales raise funds from the public, although there are also a number of large endowed grant-making foundations.

Whether or not an organisation is regarded as a charity depends on the purposes for which it was established and whether it exists for the public benefit, rather than the legal form of the organisation.

Section 1 of the Act states: “For the purposes of the law of England and Wales, “charity” means an institution, which is established for charitable purposes only, and falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities”.

There is no specific legal form for foundations in England and Wales required by law. Organisational set-up ranges from incorporated or unincorporated associations, trusts, and companies limited by guarantee to bodies created by Royal Charter or Act of Parliament or

¹ www.charity-commission.gov.uk/

² <http://www.oscr.org.uk/>

³ <http://www.charitycommissionni.org.uk/index.aspx>

Friendly Societies and Industrial and Provident societies. Unincorporated organisations, such as trusts, have no legal personality and in many cases the trustees enter into agreements and undertake liability in a personal capacity. The trustees of an unincorporated organisation may decide to set up a charitable company limited by guarantee to act as the sole trustee for the charity in order to limit the personal liability of the trustees and/or obtain insurances to protect their position (provided this is permissible under the constitution of the charity). Charitable companies limited by guarantee acquire legal personality upon registration at Companies House. The directors of a charitable company are also the charity trustees.

Charitable companies are subject to dual regulation in that they have to submit annual returns to both the Commission and the regulator of companies; the Registrar of Companies, administered by Companies House. However, the Act has created a new, optional legal vehicle for charities requiring a corporate structure but without the burden of dual regulation – the Charitable Incorporated Organisation (CIO). A CIO has the advantages of a corporate structure, such as limited liability for trustees, but without having to provide annual returns to both the Commission and Companies House. A CIO will only be required to submit annual returns to the Commission. Existing charities will be able to convert to the CIO structure or they may retain their existing legal form. Creating the CIO as a new legal vehicle will require additional, secondary legislation. The implementation of the CIO provisions is expected to start in spring 2011.

➤ **What purposes can foundations pursue?**

Section 2 of the Act defines a charitable purpose as a purpose which falls within the description of charitable purposes listed in Section 2(2) of the Act and which is for the public benefit.

The descriptions of charitable purposes are:

- The prevention or relief of poverty
- The advancement of education
- The advancement of religion
- The advancement of health or the saving of lives
- The advancement of citizenship or community development
- The advancement of the arts, culture, heritage or science
- The advancement of amateur sport
- The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity
- The advancement of environmental protection or improvement
- The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage
- The advancement of animal welfare
- The promotion of the efficiency of the armed forces of the Crown; or the efficiency of the police, fire and rescue services or ambulance services
- Any other purposes recognised under existing charitable law or any other purpose that may be reasonably regarded as analogous to existing charity law or the purposes listed above

Prior to the Act, there was a presumption that organisations established for certain charitable purposes would exist for the public benefit, whereas Section 3 of the Act removes that presumption and requires that all charities demonstrate that they exist for the public benefit.

The Commission has the objective to promote understanding and awareness of this public benefit requirement. The Commission continues to consult the charity sector and wider public on public benefit. The Commission published its general principles of public benefit in January 2008⁴ and

⁴ http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx

published the results of its formal public benefit assessments in July 2010⁵. These assessments serve as good practice examples of ways in which real charities have demonstrated how they have met the public benefit principles.

It should be noted that although organisations that are established to pursue political purposes cannot be charities, campaigning and political activity may be carried out by charities as a means of furthering their charitable purposes⁶.

➤ **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?**

Section 9 of the Act requires the Commission to maintain a register of all charities required to be registered by the Act. The register must contain the name of every charity and such other information as the Commission thinks fit. The register is open to public inspection.

The majority of charities in England and Wales must be registered with the Commission. There are currently around 180,000 registered charities in England and Wales. There are also a significant number of charities which are not registered charities. All charities, whether registered or unregistered, are subject to the general principles of charity law.

The following charities do not have to register with the Commission:

- “Exempt Charities”⁷: These are charities which already have a principal regulator that has agreed to take responsibility for ensuring they meet charity law (for example, universities which are regulated by the Higher Education Funding Council for England and Wales). The Commission will be able to investigate these charities if their principal regulator asks it to. It should be noted that the number of exempt charities that existed prior to the 2006 Act has been reduced by the Act because if no suitable principal regulator exists then a previously exempt charity will stop being exempt and will have to register with the Commission.
- “Excepted Charities”: These are charities which are permanently or temporarily excepted⁸ by the Commission or by regulations made by the Secretary of State but only where the annual gross income of such charities does not exceed 100,000 GBP (approx. €12,000). As with exempt charities, this might be reviewed when the Act is reviewed.
- Charities with an annual gross income below 5,000 GBP (approx. €6,000) although charities with an income below this threshold can register with the Commission on a voluntary basis. Such charities can register with HM Revenue and Customs in order to obtain the tax benefits available to all charities in England and Wales.
- UK Charities with a head office outside of England and Wales must register with the appropriate regulator in Scotland or Northern Ireland.

The Commission decides whether an applicant body falls within the definition of charity as defined by the Act and can be registered⁹ as a charity and may require, or advise on, changes that may need to be made to the organisation’s governing document.

The four main types of governing document are a constitution or rules, a small charity constitution, a trust deed and/or articles of association. Which type of governing document to use will depend on the legal form that the organisation chooses to adopt and the Commission can

⁵ http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/infosheet.aspx

⁶ <http://www.charitycommission.gov.uk/publications/cc9.asp>

⁷ Exempt charities were not previously allowed to register with the Commission because it was assumed that they were adequately overseen by other public bodies, such as the Financial Services Authority.

⁸ Excepted charities include, for example, some religious and armed forces charities.

⁹ See Commission guidance on registering as a charity at <http://www.charitycommission.gov.uk/publications/cc21.asp>

provide advice in this regard, although where possible independent legal advice should be sought.

Bodies obtaining registered charity status receive a charity number and are placed on the Register of Charities. The Register is accessible to the public at the Commission's offices and on the Commission's website. It contains details of the charity (charitable objectives, trustees, corresponding address, etc) as well as the annual reports and accounts that the charity is obliged to return to the Commission.

➤ **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, but the Commission's approval is required. The Commission is a Non-Ministerial Government Department, i.e. the Commission is completely independent from Ministerial influence and also independent from the sector it regulates. The Commission is accountable to Parliament and the public.

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

All foundations with an annual income exceeding 5,000 GBP (approx. €6,000) must register with the Charity Commission unless they are required to register with a different regulator (e.g. the Department of Culture, Media & Sport regulates certain national museums and galleries). Where the income of a charity is less than 5,000 GBP they can register with HM Revenue and Customs to obtain the tax benefits provided to charities in England and Wales.

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

The register includes the governing instrument, details of the charitable purposes undertaken, the geographical area of activity, the names of the board members and whether or not they are board members of other charities, and copies of annual accounts.

If foundations are registered, is the register publicly available?

Yes, it is available on the Charity Commission website: www.charitycommission.gov.uk.

➤ **Is a minimum capital required?**

No minimum amount of capital is needed to establish a foundation.

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

Extensive fiduciary and statutory duties of charity trustees are imposed by a combination of the law governing trusts, charities and (for incorporated charities) companies, together with guidance set out in Commission publications¹⁰.

Fiduciary duties include the requirement that charity trustees must exercise their powers in good faith and in such a way as to further their charity's charitable objectives thereby furthering the interests of the charity's beneficiaries. Also, while charity trustees have wide powers to delegate their powers and functions, they cannot delegate their duties and so remain personally responsible for the administration of their charity. Each charity trustee is under an obligation to ensure that proper safeguards are in place to protect their charity's property and funds. In particular, the charity should ensure that they have formal systems of financial control and should ensure that employees of the charity are properly supervised.

Charity law does not generally allow trustees to be paid for being trustees unless there is express provision for trustees to be remunerated in the foundation's governing document. However, the

¹⁰ See in particular, The Essential Trustee: What You Need to Know
<http://www.charitycommission.gov.uk/publications/cc3.asp>

Act allows trustees to pay an individual trustee for providing an additional service to the charity, if they think it is in the best interest of the charity, without having to come to the Commission for authorisation to do so. An example of this could be a charity trustee who is a plumber providing plumbing services to the charity as long as the trustees agree that it is in the charity's best interest, for example, because the trustee is charging a better price or in some way delivering a better service than the trustees could get elsewhere. However, the Act requires that (i) the number of trustees receiving payment in this way must be in a minority; (ii) the amount paid must be reasonable and set out in a written agreement between the trustee and the charity; and (iii) the trusts or governing document must not contain any specific provision forbidding this type of payment.

A Code of Governance for the Voluntary and Community Sector has been published by the National Council for Voluntary Organisations (NCVO)¹¹ which is based on six key principles that have been designed to apply to any charity. However, in practice, larger incorporated charities often adopt their own, made-to-measure governance codes more aligned with corporate governance codes for companies.

Where the Commission has cause for concern about the management of a charity by charity trustees, the Charities Act 1993 as amended by the Act gives the Commission wide powers to intervene for the protection of the charity (see below under "Supervision").

Is it mandatory to have a supervisory board?

No. UK charities typically have only a single tier governing body. The governing body is referred to in different ways depending on how the charity is established and/or how the charity refers to the governing body internally. The members of the governing body may be known as trustees, directors, board members, governors or committee members (for ease of reference they are collectively known in this document as "trustees" unless otherwise indicated).

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?

For an unincorporated charity the minimum/maximum number of board members that are necessary will be specified in the foundations' governing document. For incorporated charities the minimum number of board members required by the Company Act 2006 is one for private companies and two for public companies. It is, however, accepted good practice for a charity to have a minimum of three trustees regardless of the vehicle used to administer the charity.

Usually, the charity's governing document will also set out how trustees are to be appointed - this varies according to the particular charity. All trustees, however appointed, must act in the charity's interests, and must not represent the interests of any outside organisation or their own personal interests.

If the governing document does not specify the length of service of a trustee, the appointment continues until the trustee dies, resigns or is removed from office.

A trustee whose term of office has expired can be appointed for a further term of office, unless the governing document prohibits it. This should be checked before any reappointment. It is good practice for the governing document to deal with such matters. It is considered good practice for the term of office of a trustee to be rotated with an emphasis on succession planning so that the skills of the supervisory board are diverse and refreshed.

¹¹ <http://www.ncvo-vol.org.uk/codeofgovernance>

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

The primary pieces of legislation that are relevant for board members of charitable entities in England and Wales are the Act, the Companies Act 2006 and the Trustees Act 2000 and any other relevant legislation to the undertaking of the charity. The Commission also issues operational guidance which sets out good practice and general guidance for trustees (see “the Essential Trustee”¹² which the Commission recommends all charity trustees read prior to taking office and during the course of their office).

Trustees’ duties include:

Duty of compliance: The responsibility for ensuring that the charity acts in accordance with the rules and regulations set out in the charity’s governing document (in particular that it abides by the charitable purpose for which it was established and for the public benefit) rests with the trustee(s) of the charity. The trustee(s) of the charity must ensure that the charity remains solvent and complies with the requirements of the Commission and national legislation.

Duty of Prudence: A trustee must act in a prudent manner and has to exercise the same degree of care in dealing with the administration of the charity as a “prudent businessman” would exercise in managing his own affairs or those of someone else for whom he or she was responsible. In particular, a charity trustee must avoid undertaking activities that might place the charity’s endowment, funds, assets or reputation at undue risk. Charity trustees must also take special care when investing the funds of the charity or borrowing funds for the charity to use.

Duty of Care: Under the Trustee Act 2000, a charity trustee has a statutory ‘duty of care’. This requires a charity trustee to exercise reasonable care and skill to ensure that the charity is well run and efficient. Where required, trustees should consider getting professional advice on matters where there may be material risk to the charity.

Narrowly speaking, the statutory duty of care only applies to trustees of unincorporated charities who are exercising specified powers conferred on them by the Trustee Act 2000. But, where an incorporated charity is itself a trustee of an unincorporated charity, then the Trustee Act 2000 will apply to its actions as a trustee.

In relation to an incorporated charity, the requirements of the Companies Act 2006 in regard to directors’ duties will also apply. There is a significant overlap in relation to the duties of a director of a company and the general duties of a charity trustee. The duties of a director include:

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid a conflict of interest with the company
- Duty not to accept benefits from third parties
- Duty to declare any direct or indirect interest in a proposed or existing transaction or arrangement with the company
- Duty to keep company information confidential

¹² <http://www.charity-commission.gov.uk/Publications/cc3.aspx#d>

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?

A charity may be established by a founder for a specific purpose, provided such purpose complies with the Act. It is possible for founders to include provisions to protect their interests in the governing instrument of a charity but they cannot override decisions of the board. A founder might, on establishment of a charity, determine that the charity's assets are to be used for specific charitable purposes only. Such assets cannot be used for different charitable purposes and if they are so required, such use can only occur with the permission of the Commission (unless there are provisions in the governing instrument for such amendments – see further below).

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

All charities must make their accounting records and annual reports available to the public on request.

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?

Trustees have a duty to avoid conflicts of interests. They must avoid situations where their personal interests (or the interests of persons connected with them) or their duties conflict with their duty to the charity.

The legal definition of a conflict of interest has been determined by case law and accepted best practice. A conflict of interest may occur in a variety of circumstances, the obvious example being where a trustee benefits personally from the charity. This might include financial or non-financial benefit and a conflict might also arise if such benefit is obtained by a person connected with the trustee. The exception to this is when such benefit is derived lawfully, for example, if the governing document contains express provisions such as remuneration of a trustee or is allowed in accordance with legislation.

Another way in which a conflict of interest might occur is where the trustee's personal or other interests conflict with his or her loyalty to the charity.

In order to effectively manage conflicts of interest it is recommended good practice for the charity to have in place a conflict of interest policy and a register which notes any conflicts that might arise. When a trustee is in a position of conflict, the trustee should declare that conflict and/or withdraw from being part of the decision making process which relates to the conflicting situation in which he or she is placed.

The Companies Act 2006 brought in new statutory duties for trustees of charitable companies which includes a duty to avoid conflicts of interest (see above under the section "What are the duties and what are the rights of board members, as specified by national legislation?")

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

As noted above the trustees are responsible for running the charity. The trustees may have the power to delegate to staff and/or other agents provided there is adequate provision for doing so in the governing document and/or under any applicable legislation.

In the case of larger charities it is very likely that they will need to delegate decisions for the day-to-day management of the charity to employees and/or other agents. Under such circumstances it is good practice to set out the level and scope of the delegated authority. There should also be in place proper reporting procedures and clear lines of accountability. Information and guidance for trustees who employ staff is provided by a number of organisations, including the National

Council for Voluntary Organisations (NCVO) and the National Association for Voluntary and Community Action (NAVCA). See also guidance produced by the Commission.

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

The board of the charity has collective responsibility in law for the administration of the charity. The governing document of the charity may permit the board to delegate responsibility for individual tasks to employees or third parties, but the board will retain legal responsibility for the supervision of the delegate's activities.

Do the director and officers have powers of representation?

In an unincorporated charity the trustees represent the charity in its dealings with third parties. An incorporated charity has legal personality and can therefore represent itself. The governing document of the charity defines the powers of the board and the extent to which these powers can be delegated.

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

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

If the board members can demonstrate that they have acted prudently, lawfully and in accordance with the governing document, then any liabilities that they incur as board members can normally be met out of the foundation's resources. However, if board members incur liabilities or debts that amount in total to more than the value of the foundation's assets they may not be able to cover themselves in full out of the foundation's assets, even if the liabilities have been properly incurred.

If the board members act imprudently, or are otherwise in breach of the law or the governing document, the position is different. Here, they may be personally responsible for liabilities incurred by the foundation, or for making good any loss to the foundation. Since the board acts collectively in running a foundation, the board members will usually be collectively responsible for meeting any such liability. There is no distinction between voluntary and paid board members. Board members with professional expertise may be held to a higher standard of care than other board members in matters involving their area of expertise.

Different liability rules apply to the directors of incorporated charities, as company law applies in addition to charity law to confer limited liability on company directors. The general principles of prudence are, however, the same.

If individual board members benefit personally from transactions that represent a breach of trust or conflict of interest, they will normally be required to repay that benefit to the foundation.

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?

Provided that trustees can demonstrate that they have acted in accordance with their duties set out above under "What are the duties and what are the rights of board members, as specified by national legislation?" They will generally be protected from any liability.

What is the liability of the directors and officers?

Charity trustees can be held civilly or criminally liable for breaches of trust or negligence. Recruiting new trustees can be made harder if potential trustees are worried they may be

personally liable for mistakes they make which put the charity's assets at risk. Before the Act, only the courts could relieve trustees of this sort of liability. The Act allows charity trustees to apply to the Commission, as well as the courts, for relief from personal liability for a breach of trust where the trustee has acted honestly and reasonably. This only applies where mistakes have been honestly made. The Commission and the courts still take deliberate breaches of trust by trustees very seriously. If a trustee acts imprudently or otherwise in breach of the law or governing document all of the trustees collectively will be personally responsible for any liability.

Where it is in the interests of the foundation, trustees can be insured by their foundation against personal liability. Trustee indemnity insurance covers trustees from having to personally pay out when claims are made against them, such as health and safety breaches which cause an employee injury, as long as the mistake was honestly made and not the result of wilful misconduct. Prior to the Act, trustees were not held liable in this way for honest mistakes, but anxiety about the possibility of liability may have made people reluctant to become trustees. There was a question as to whether a charity's funds could be used to pay for insurance which would benefit trustees. The Act clarifies this and allows trustees to take out trustee indemnity insurance using the charity's funds without the Commission's permission, as long as there is no provision in the charity's governing document which specifically forbids this. If there is a specific prohibition in the charity's governing document, then trustees need Commission permission to amend this before they can buy trustee indemnity insurance.

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

No, but the governing document may allow the foundation to purchase insurance to indemnify board members against personal liabilities where they have acted reasonably and not for their private benefit.

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

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

In all the above cases civil liability would be likely to arise. Criminal liability would generally be relevant only in cases where the board member has knowingly received an unauthorised private benefit at the expense of the foundation.

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

Charities are allowed to engage in economic activity (trading) where it is pursued in furtherance of the charitable purposes of the organisation (so-called “primary purpose trading”). If charities wish to conduct more than a nominal amount of non-primary purpose trading activity, they must use a non-charitable trading subsidiary company to conduct such activities. The subsidiary can eliminate its taxable profits if it donates them to the parent foundation.

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

Charity trustees have a general duty to invest charity funds. Foundations have the right to hold and to receive tax-free most types of investment.

Shareholding and whole ownership of commercial companies is allowed. However, due consideration by charity trustees regarding suitability and diversification of investments apply as much to this form of investment as to any other, as does the duty to take "proper advice" on making investments. Modern governing documents of charities typically cater for a diversified and flexible asset allocation for the charity and the ability to spend capital as well as income.

The Commission strongly recommends that charity trustees decide on an investment policy for their charity and record it clearly in writing. The policy should be kept under regular review. Under the Trustee Act 2000 this is a legal requirement if the trustees delegate their investment function to an investment manager.

Generally, unless a charity’s governing document otherwise provides, where permanent endowment is held as an investment by an unincorporated charity, the income from the investment must be spent but the capital may not. Section 75 of the Charities Act 1993 allows trustees of charities with slender resources to remove the restriction on expenditure of capital where the income is so small that little can be achieved by spending income alone. Section 43 of the Act modifies and extends section 75 of the 1993 Act. Whereas section 75 required that trustees had to be satisfied that the charity’s income from property is too small for “any useful purpose”, section 43 of the Act substitutes a different test of whether the purposes for which the fund is established “could be carried out more effectively” by spending some or all of the capital. Section 43 of the Act also liberalises the extent to which larger unincorporated charities may spend capital given for a particular purpose, but this is subject to additional safeguards set out in Section 43, such as requiring the charity to send the Commission copies of any resolutions it passes to spend capital.

➤ **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. Charities may through the provision of loans, loan guarantees or the subscription or purchase of shares or through the letting of land and buildings and in doing so they may generate a financial return. Applying charitable funds in this way is referred to as “programme related investment” (“PRI”) or “social investment”, but it must be stressed that the charity’s main objective in making them should be to help its beneficiaries. PRIs are not “investments” in the conventional sense because they are not made with the sole aim of financial return. Indeed, Her Majesty’s Revenue and Customs (HMRC) does not regard PRI as investment at all for tax purposes. A charity cannot make use of PRI if its governing document prohibits this. Also, a charity must have a clearly articulated PRI policy which should explain why it engages in PRI activity.

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

It depends on the nature of the change, the structure of the charity (company or unincorporated charity), the size, whether the powers provided by statute can be used and the terms of the governing document.

All charitable companies can amend their articles of association. However, there are certain 'regulated alterations' which require Commission approval.

Unincorporated charities with incomes of 10,000 GBP (approx. €12,000) or less can change their governing document, even if there is no power to do so in their governing document, although the Commission does have a right to object to such changes. Generally speaking, the Commission's involvement is only needed where the changes involve the charity's purposes or powers which result in a benefit for trustees or connected persons.

Trustees of unincorporated charities with incomes of more than 10,000 GBP can change the powers they have to administer the charity and related procedures if their governing document provides specific powers to do so. In the event that they wish to change the charity's purposes they can only do so if the governing document provides them with this power. In the event that no such power exists the trustees must apply to the Commission for a Scheme.

Trustees of regulated charities must keep the Commission up to date with regards to any changes to their governing documents so that their entry on the register is up to date.

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

All charities need to keep accounting records and prepare annual accounts which must be made available to the public on request.

All registered charities must prepare an annual return or an annual update (depending on their income) and accounts (which should be publically available) and depending on the level of their income return this information to the Commission. This must include an updated list of charity trustees, annual accounts and an annual report.

If the Charity has an annual income of 1 million GBP (approx. €1.2 million) or more then a Summary Information Return ("SIR"), which forms Part C of the Annual Return, must also be completed. The SIR summarises the key information in the report and accounts, with a particular emphasis on the charity's strategies, objectives and achievements, overall financial health and governance. These documents must also be made available to any member of the public at cost.

Sections 28, 29 and 32 of the Act set out the rules which govern when a professional audit of a charity is required. It gives both charities which are companies and those which are not, similar thresholds.

A non-company charity's accounts will have to be professionally audited if it has:

- Gross annual income over 500,000 GBP (approx €600,000), or
- An aggregate value of assets over 3.26 million GBP (approximately €3.85 million) and gross annual income over 250,000 GBP (approx. €300,000)

Below this threshold, for non-company charities, an independent examiner can be used instead of an auditor. An independent examination is less rigorous than an audit and must be carried out by 'an independent person who is reasonably believed by the trustees to have the requisite ability and practical experience to carry out a competent examination of the financial statements'. An independent examination is not required if the charity's income is below 25,000 GBP (approx. €30,000).

For charities which are companies, accounts will have to be professionally audited if the charity has:

- Gross annual income over 500,000 GBP (approx. €600,000), or
- A balance sheet total (aggregate assets) over 3.26 million GBP and gross annual income over 250,000 GBP (approx. €300,000)

A charitable company which does not meet the above thresholds may have an independent examination instead of an audit.

Auditors who scrutinise charity accounts are sometimes able to identify abuse or significant breaches of trust during the audit process. The Act extends auditors' and independent examiners' duties to report such matters to the Commission. Such matters extend to connected institutions of the charity (e.g. a trading subsidiary company). The provisions cover reporting any matter which is likely to be of material significance to the Commission under its investigatory and protective powers. The Act ensures that auditors of accounts for charitable companies (in addition to the existing protection for auditors of non-company charities) are protected from the risk of action for breach of confidence or defamation when they pass on relevant information to the Commission. The Act also extends whistleblowing duties, powers and protections to independent examiners as well as auditors.

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

Yes. The annual accounts of most UK foundations are published on the Charity Commission website. The amount of information that must be included in the accounts increases in the case of larger foundations. All charities must make their accounts and reports (unless they are exempt or excepted charities) available to the public on request.

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)?

All registered charities must prepare a Trustees' Annual Report (TAR) and accounts and make copies available to the public. Legislation has been put in place to reduce the administrative burden on small charities so that charities in the income range up to 10,000 GBP (approx. €12,000) do not have to submit as much information to the Commission. All charities are required to explain in their annual report how they deliver public benefit.

Charities with an annual income of more than 500,000 GBP (approx. €600,000), must submit an annual return to the Commission which lists information about the charity (this information forms part of the charity's entry on the Register, and includes key areas such as contact and trustee details as well as income and expenditure), financial information and reports of any serious incidents. A charity with an income of over 1 million GBP (approx. €1.2 million) must also submit a SIR.

Charities with an annual income between 25,000 GBP (approx. €30,000) and 500,000 GBP (approx. €600,000) need to submit an annual return containing charity information and reports of serious incidents.

Charities with an annual income between 10,000 GBP (approx. €12,000) and 25,000 GBP (approx. €30,000) need to submit an annual return containing charity information only.

Charities with an annual income below 10,000 GBP (approx. €12,000) need to submit an annual update on an Annual Update Form with charity information only.

Also see above for further detail.

Who checks (supervisory/tax authorities)?

The Commission reviews the annual report and accounts, and checks that the charity is complying with the requirements of the relevant accounting standards.

Where is the required information publicised?

On the Commission website: <http://www.charitycommission.gov.uk>

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

Please see above under the “Requirements for Auditing” section above.

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

An audit is undertaken by a person who is eligible under the 1993 Act, normally a registered auditor. The auditor has to express a professional opinion as to whether the accounts are “true and fair” and should conduct the audit in accordance with relevant auditing standards. These standards, with which professional accountants are expected to be familiar, comprise a number of Statements of Standard Accounting Practice (SSAP), Financial Reporting Standards (FRS) and ‘Urgent Issues Taskforce Abstracts’ (UITF abstracts) and SORPs.

Charities with an income below a particular threshold (outlined above) are permitted to employ an independent examiner to conduct a simpler form of scrutiny than an audit which will still provide trustees, funders, beneficiaries, stakeholders and the public with an assurance that the accounts of the charity have been reviewed by an independent person. Where gross income is more than 250,000 GBP (approx. €300,000) charity law requires the examiner to be a member of a body listed in the 1993 Act.

Whether acting as a volunteer or being paid a fee for their work, the role of the independent examiner is important and they must follow certain steps in carrying out the examination and make a report to the trustees setting out particular matters once they have finished their examination. The Commission has published guidance which takes the examiner through the procedures that he must follow, explains his reporting duties and provides him with practical advice at every stage.

Whilst in most cases the independent examiner will be reviewing receipts and payments accounts and so will not need to be a qualified accountant to carry out a proper independent examination, the examiner still needs to have a certain level of ability and knowledge to undertake a competent examination and to set out the report in the way that is required by charity law.

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

The supervising authority for charities in England and Wales is the Charity Commission for England and Wales. The Commission is the independent regulator for charitable activity and ensures legal compliance of charity trustees, enhances accountability, encourages effectiveness and impact and promotes public interest in charity.

The Commission, a corporate body, replaced the individual five Charity Commissioners for England and Wales in February 2007. The Commission has five statutory objectives, which are: (i) To increase public confidence in the sector; (ii) to promote the awareness and understanding of the public benefit requirement; (iii) to promote charity trustees’ compliance with the law; (iv) to promote the effective use of charitable resources and (v) to enhance the accountability of charities to donors, beneficiaries and the general public.

Where the Commission has cause for concern about the management of a charity by charity trustees, the 1993 Charities Act as amended by the Act gives the Commission wide powers to investigate and, if necessary, intervene for the protection of the charity. These powers include the right to suspend trustees or other members of senior management of charities, appoint new trustees or remove a trustee, to freeze assets, or prevent a charity from engaging in certain transactions without the Commission’s approval, to direct the trustees, any officer or employee of the charity to take any action specified by the Commission which the Commission considers

expedient in the interest of the charity (see Section 20 of the Act). The Act also gives the Commission the power to enter and search premises with a warrant and take away specified material, including electronic material (Section 26 of the Act). In extreme cases, all the trustees can be replaced by a receiver and manager. The Commission itself cannot act in the administration of a charity – that is to say, it cannot “take over” the job of the trustees– but it can appoint an ‘interim manager’ to protect the assets of the charity where the trustees are unwilling to co-operate.

Section 8 of the Act enabled the creation of a Charity Tribunal to deal with appeals against and reviews of legal decisions by the Commission. It will also take referrals from the Commission or the Attorney General which involve the operation or application of charity law. Previously, in order to appeal against a legal decision by the Commission, the case had to be taken to the High Court, which was difficult and expensive and deterred charities from appealing in the past. The Tribunal was established by the Department for Constitutional Affairs (now, Ministry of Justice) in March 2008 and has jurisdiction over Commission decisions made on or after 18 March 2008.

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 Commission is a non-Ministerial Government Department; completely independent of the influence of Government. It has a number of quasi-judicial functions where it uses powers similar to those of the High Court. The High Court also has authority over charities.

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

The Commission has statutory objectives to ensure trustees comply with their legal obligations in managing charities and to increase public trust and confidence in charities. They also have a statutory function to identify and investigate abuse and mismanagement in charities.

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

Yes, for example, certain disposals of charity land need the consent of the Commission.

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?

The Commission has a Compliance Monitoring Unit whose primary purpose is to monitor charities where the Commission has concerns that there is serious non-compliance, or believes that there is a significant risk of serious non-compliance within the charity. The regulatory supervision and monitoring of charities includes appropriate and targeted scrutiny of accounts, ensuring that actions trustees have promised to carry out have been completed and carrying out compliance visits.

In 2008 the Commission started a programme of compliance visits to charities. The visits act as a deterrent to those who wish to abuse charities. The purpose of these visits is to verify that the charity is complying with the legal and regulatory framework and ensure that the trustees are discharging their duties and responsibilities as trustees.

If the Commission is concerned about the compliance of a specific charity it refers this concern to the Commission's Assessment Unit to decide the most appropriate and proportionate course of action.

Most problems in charities can be resolved by the charity trustees themselves, or simply by the Commission providing advice and guidance without the need for a formal investigation. However, where serious problems exist the Commission may need to investigate further. The Commission carries out two kinds of investigations: Non-statutory investigations called Regulatory Compliance Cases and Statutory Inquiries.

The Commission have built effective strategic and operational relationships with a range of other regulators, law enforcement and government departments in order to regulate this sector effectively.

Trustees and incorporated charities who knowingly or recklessly furnish any information which is false or misleading are liable to a fine if convicted of this offence.

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

The rules regarding the dissolution of a foundation depend on its legal form, on whether it is solvent or insolvent, on the provisions in its governing document and on whether it holds a permanent endowment.

A foundation can only be dissolved if:

- All of its property is expendable and has been disposed of, or
- The governing document contains a dissolution or winding-up provision, or
- In the case of a charity with permanent endowment, the trustees have used the powers in sections 75, 75A or 75B of the 1993 Act to remove the permanent endowment restriction on their charity's capital and have then decided to wind the charity up, or
- The trustees have decided to transfer their charity to another with similar objects. This can be quite simple for charities whose capital is entirely expendable; for charities with permanent endowment (restricted in what it can be used for), it is still possible to make a transfer either by using the power in section 74 of the 1993 Act (for charities whose yearly income is 10,000 GBP (approx. €12,000) or less) or (for larger charities) seeking a Scheme from the Commission to allow such a move.

Whenever a registered charity is wound up or ceases to operate because all its property has been spent or transferred to other charities, the trustees must send a copy of the final accounts (showing a nil balance and how the remaining assets were distributed) to the Commission, with a request to have the charity removed from the Register of Charities.

Different rules apply to the winding up of charitable companies. Further information is available from Companies House.

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

English civil law generally recognises the legal status of foreign entities without imposing any conditions. However, recognition of the charitable status of a foreign entity under English civil law is generally not possible except in the (remote) case that a foreign entity is subject to the jurisdiction of the English High Court. If an organisation's governing document does not make it clear that the law of England and Wales applies, the law that applies will be that of the country with which the organisation has the closest connection. The jurisdiction will generally depend on the following factors:

- If the organisation's centre of administration is in England and/or Wales
- Whether most of the trustees are resident in England and/or Wales
- Whether most of the organisation's assets are in England and/or Wales

The position is different for charitable companies: The sole criterion for deciding if they are regulated by the Charity Commission is whether or not they are incorporated in England and Wales.

➤ **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?**

Yes. There are no restrictions other than those imposed by the nature of the charitable purpose and the terms of the foundation's governing instrument. In certain cases it may be necessary to show that the activities carried out abroad are of public benefit. There are some purposes to be carried out in other countries which are not charitable because they are contrary to public policy (for example, purposes whose effect would be to damage the UK's relations with a friendly state, or to undermine its national security, would not be charitable). The courts have also said that to have the objective of changing the law or policy of a foreign government is not for the benefit of the public.

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?)**

For UK taxation purposes, the law is essentially the same in all three legal jurisdictions. In particular, the definition of charity for UK tax purposes is the same throughout the United Kingdom and follows the definition for charity law purposes in England and Wales. Moreover, the tax law governing charities generally applies to all charities, regardless of their legal form. Once a foundation established in England or Wales has been registered as a charity by the Commission (or the equivalent body for charities established in Scotland or Northern Ireland), such registration will generally lead to its acceptance as a charity for tax purposes by the tax authority, Her Majesty's Revenue and Customs (HMRC). Charities can apply to HMRC for recognition of their charitable status for tax purposes.

Foreign foundations, those established outside the UK, may not represent themselves as charities when they work within the UK. A foreign foundation must be managed or controlled from within the UK (i.e. be subject to the jurisdiction of the UK courts) in order to be capable of coming within the definition of a UK charity.

In order to comply with European Community law the Finance Act 2010 introduced a new definition of charities that are entitled to UK charity tax reliefs. To be recognised by HMRC as a charity for these tax purposes an organisation must demonstrate that it is established exclusively for purposes that are charitable in English law and meet three new tests relating to its jurisdiction, registration and management:

- The jurisdiction test requires the organisation to be subject to the control of a relevant court in the UK with respect to charities or a corresponding jurisdiction outside the UK in the EU or a relevant territory
- The registration test requires that the organisation is registered under the Charities Act 1993 (if it is required to do so) or to be registered in a corresponding register under the law of a relevant territory

- The management test requires the 'managers' of the organisation to be 'fit and proper' persons

The relevant territories specified to date are Iceland and Norway.

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

For a charity to satisfy the management condition its managers must be “fit and proper persons”. There is no definition in the legislation of a 'fit and proper person'. HMRC applies this test to those who have the general control and management of the administration of the charity. HMRC assumes that all people appointed by charities are fit and proper persons unless they hold information to show otherwise. Provided charities take appropriate steps when appointing personnel then HMRC will assume that they meet the management condition at all times unless, exceptionally, they are challenged by HMRC.

HMRC have set a procedure which can be followed in determining if a manager is a fit and proper person. There is no statutory requirement for charities to follow this suggested procedure but asking managers to read the basic guide and sign the model declaration included in the guide is one way the charity can demonstrate to HMRC that it has taken the necessary steps to reassure itself its managers are fit and proper.

Once HMRC Charities recognises the organisation as a charity for tax purposes, they will set up a record so that any repayment claims can be processed.

Before a charity can make a repayment claim it needs to nominate someone in the charity to be an authorised official and/or someone to be a nominee. HMRC have set guidance as to who this can be.

A charity can make a claim whenever it likes, but there are certain time limits. Once the time limit for making a repayment claim to HMRC has passed any tax paid cannot be claimed. However, charities are eligible to receive interest on backdated repayment claims that are received by HMRC within the time limits. For a charitable trust claims must be made no later than four years after the end of the tax year to which the claim relates.

HMRC Charities will repay claims only if they are signed by an authorised signatory of the charity, who has been authorised to do so, on a special nominee form. HMRC has set guidance as to who this can be.

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

No. However, there is a general requirement under charity law to demonstrate that the foundation is providing public benefit and funds are applied for charitable purposes.

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

A charity must report any one-off payment equal to or greater than 25,000 GBP (approx. €30,000), or two or more payments which add up to this amount in their annual return to the Commission

Changes in tax law following the Finance Act 2006 require a charity to keep records of significant donors and benefits received by those donors in order to avoid a tax liability. The Government intends to replace this legislation with effect from April 2011 by new rules that deny tax relief to donors who make gifts as part of wider arrangements to extract benefits from charities.

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

The law sets out a framework for reporting and accounting by charities, which is supplemented by the Charities Statement of Recommended Practice (SORP). The accounting recommendations of SORP supplement accounting standards. The Charities (Accounts and Reports) Regulations 2008 require the methods and principles of SORP to be followed when accounts are prepared under the 1993 Act. However, charities where a more specific SORP applies, for example Common Investment Funds, Registered Social Landlords or Higher and Further Education Establishments should follow the more specific SORP instead. The accounting recommendations of the SORP do not apply to charities preparing receipts and payments accounts.

Charitable companies prepare accounts under company law, and in addition must adhere to the recommendations of the SORP.

Excepted charities must keep accounting records, prepare annual accounts and make copies of those accounts available to the public on request.

Exempt charities must keep proper accounting records and prepare accounts. Where they are required to prepare accounts giving a true and fair view, they should follow the SORP in the preparation of their accounts, unless a more specialised SORP applies.

Exempt charities are not required by law to prepare an Annual Report but it is good practice to do so. They must also provide copies of their accounts to members of the public on request.

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

Yes. See part 1 of this profile.

➤ **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.**

See part 1 of this profile.

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

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

Yes, it is necessary to show that the foundation exists to further the public benefit. This requires that the purposes are capable of providing benefit that is charitable in law and that the benefit is available to a sufficiently large section of the public to have a public character.

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

Yes, in the sense that underprivileged people would generally be considered to have needs that fall within the scope of a charitable purpose.

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	X				

of a village with 10,000 inhabitants					
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?

The non-distribution constraint generally precludes the distribution by way of profit to any member or trustee of a charity. This would not preclude the payment of reasonable remuneration to staff or board members where permitted by the foundation’s governing instrument or otherwise authorised by a court, regulatory body or statute.

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

Surplus assets remaining after the discharge of liabilities can generally be transferred only to another charity with the same or similar purposes.

➤ **“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**?

The payment of reasonable remuneration to board members is allowed where permitted by the foundation’s governing instrument or otherwise authorised by a court or regulatory body. There are no monetary limits in civil law or tax law. The assessment of what is reasonable will take into account the nature of the duties of the board member and appropriate remuneration levels for comparable positions outside the charity sector.

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)

Under tax law, a charity can give donors modest (low value) tokens of appreciation - called 'benefits' - in order to acknowledge a gift but there are limits on their value.

Modest benefits received in consequence of making a donation of money will not stop the donation from qualifying as a donation under the 'Gift Aid' scheme (Gift Aid is a scheme which enables a charity to reclaim tax paid in respect of certain donations. See below for further details about 'Gift Aid'), provided their value does not exceed certain limits.

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?

There is no limit in civil law or tax law. However, the board is required to exercise prudential oversight of the foundation’s resources and excessive expenditure may amount to a breach of trust in civil law and/or the incurring of non-charitable expenditure in tax law.

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

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

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
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

While it is possible for the foundation to share an interest in an asset with the founder and/or persons connected with the founder, the board would be required to satisfy themselves that the transaction is properly entered into in furtherance of the foundation's purposes and on arm's length terms.

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.)?

Special tax law rules were introduced in 2006 to penalise charities that enter into prohibited transactions with substantial donors and persons connected to them. The Government intends to

replace this legislation with effect from April 2011 by new rules that deny tax relief to donors who make gifts as part of wider arrangements to extract benefits from charities.

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

Yes, subject to any restrictions in their governing instrument.

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

Yes

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

Both civil law and tax law require that the foundation spends its income within a reasonable period of time. What is a reasonable period will vary from case to case but, absent special circumstances (e.g. the accumulation of funds for a capital project), a foundation will generally be expected to apply its income within three years of receipt.

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”?

There is no pay-out rule in civil law or tax law.

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	

Much would depend on the facts of the case but a five year accumulation period would probably be considered excessive without a good reason to support it.

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.)?

Trustees of every charity must ensure that the charity's funds are used appropriately, prudently, lawfully and in accordance with the charity's purposes for the public benefit. The general principle of trust law is that funds received as income should be spent within a reasonable period of receipt.

The trustees must strike a balance by ensuring that the charity is holding the right amount of funds in reserve. Reserve levels which are particularly high may tie up money unnecessarily and will limit the amount spent on charitable activities, reducing the potential benefits a charity can provide. However, if reserves are too low, then the charity's solvency and its future activities can be put at risk.

The justifiable retention of reserves should not have any adverse tax implications.

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

A foundation may have activities abroad to the extent allowed by its objectives without prejudicing its charitable status.

➤ **Income tax treatment**

Foundations established in the UK exclusively for charitable purposes are generally exempt from tax on all capital gains and most forms of income, provided they are spent on charitable activities.

Exempt income includes:

- Gift Aid donations
- Rental income
- Interest and other investment income
- Capital gains
- Profits from the charity's "primary purpose trading". This means a trading activity that's carried out as part of the charitable purpose or aim, for example a theatre charity could sell tickets for a theatrical production they put on

Grants and donations

Grants and donations received by foundations do not normally constitute taxable income. Tax-privileged donations are treated as income of the foundation but are specifically exempt.

A charity can claim exemption from tax, and claim basic rate tax back from the UK tax authorities (HMRC) on income received from individuals through Gift Aid donations, as long as the income is used for charitable purposes only.

A charity can claim exemption from tax on donations received from companies, as long as the income is used for charitable purposes. Donations from companies don't have tax deducted from them so there is nothing to claim back from HMRC.

Investment income (asset administration)

Most forms of income from asset management, including income from renting real estate, are exempt, whether the assets are located in the UK or other countries. However, no relief is available for foreign taxes on foreign investment income or capital gains.

Economic activities (related/unrelated)

Whether or not the exemption from tax will apply to the economic activities of the charity depends on whether the activity is "related" or "unrelated" to the charitable objectives of the foundation, although these terms are not used in UK law. Rather, we use the terms "primary purpose trading",

which is when the economic activity is pursued in furtherance of the charitable objectives of the organisation as set out in its governing document, and “non-primary purpose trading” which is when the activity is intended to raise funds (as distinct from the charitable objectives) for the charity.

In certain defined cases the economic activities of a charity are exempt from corporation tax (or income tax in the case of unincorporated charities)

The sale of donated goods is not normally considered to be an economic activity. In addition, profits from fundraising events that are not held on a regular basis or in competition with commercial businesses are generally exempt.

All profits of a primary purpose trade, or trade where the work is carried on mainly by the beneficiaries of the foundation, are exempt from tax. Profits of a trade ancillary to the primary purpose trade are also exempt if the activity is ancillary and related in a broader sense to the primary public benefit purpose (e.g. profits of a theatre bar open only to the patrons of the theatre).

The small scale exemption is an exemption from corporation tax (or income tax in the case of charitable trusts) for the profits of small-scale non-primary purpose trading and the income from ‘miscellaneous’ activities carried on by charities. Miscellaneous income is other income that does not fall into one of the listed categories of exempt income. The small scale exemption applies only where all the relevant profits or income are applied for the charity’s purposes. It does not apply where the trading profits or other income are exempt from tax on some other basis.

In order to qualify for the small scale exemption within a given chargeable period, either:

- The annual turnover of the relevant non primary purpose trading of the charity, plus the “incoming resources from miscellaneous activities” potentially qualifying for exemption, must not exceed the ‘relevant threshold’ during the chargeable period, or
- If it does exceed the “relevant threshold”, the charity must have had a reasonable expectation at the start of the chargeable period that it would not do so.

If the total of all incoming resources in a particular chargeable period of the charity is under 20,000 GBP (approx. €23,500) then the relevant threshold is 5,000 GBP (approx. €6000), if all incoming resources are between 20,000 – 200,000 GBP (approx. €23,500 – €233,000) then the relevant threshold is 25% of the charity’s total incoming resources and if the total incoming resources are over 200,000 GBP then the relevant threshold is 50,000 GBP (approx. €58,000).

Major shareholding – considered as economic activity and taxed accordingly?

Major shareholding is allowed and is not considered to be an economic activity of the foundation. Income and capital gains derived by the foundation from a major shareholding are generally exempt.

The company in which the foundation holds the shareholding is treated as a separate entity for tax purposes and will normally be fully liable to corporation tax on its profits. However, any donations by a company that is wholly owned by one or more foundations are fully deductible from its profits without limit, so that a subsidiary of a foundation can eliminate its taxable profits if it donates them to the parent foundation (or indeed, any other foundation).

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

Such income is tax-exempt for charities.

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

Capital gains are calculated separately from income and are generally exempt, regardless of the nature of the asset, providing the proceeds of the disposal are used for charitable purposes only.

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

UK charities which have foreign investments are able to recover foreign withholding tax paid on these foreign investments only to the extent permitted by a double tax treaty concluded with the relevant foreign country. As the charity will normally be exempt from UK tax on the income, it cannot claim any relief for any foreign tax permitted by the treaty.

➤ **Gift- and inheritance tax**

The UK imposes a single tax, called inheritance tax, on lifetime gifts and gifts on death. The tax is levied on the donor, not the recipient of the gift.

Gifts made to qualifying charities established in the UK will be free of inheritance tax provided that the gift meets the following criteria:

- The asset given is used solely for charitable purposes
- The gift takes immediate effect in possession
- The transfer must not depend on a condition that is not satisfied within 12 months of the transfer
- The gift must not be defeasible (i.e. it cannot be annulled)
- The transfer is not for a limited period
- No interests must be retained in the property transferred
- The donor must give away his entire interest

There are also provisions in the inheritance tax code that allow owners of land and "pre-eminent" objects to trade in those objects in lieu of an inheritance tax liability to sell them to certain museums or national institutions and obtain a discount on their tax liability.

Gifts to foreign charities do not qualify for any relief from inheritance tax unless the foreign charity has been registered by HMRC as comparable to a UK charity (see the above conditions for registration).

➤ **Value added tax (VAT)**

Foundations are considered as final consumers. They are not allowed to claim a refund of VAT incurred on non-business or exempt business activities. Certain supplies by foundations are exempt from VAT in line with the exemptions permitted by the EC VAT Directive.

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

The UK does not levy any taxes on capital.

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

There are no taxes on the transfer of assets other than stamp duty taxes (see below).

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

Stamp Duty applies to a limited range of transfers of property evidenced by deed or other documents. Stamp Duty Reserve Tax (SDRT) applies to electronic transfers of shares. Generally, such transfers to charities are exempt from SDRT and from stamp duty .

Stamp Duty Land Tax, which was introduced in 2003, is applicable to most land and real property transactions in the UK that involve an estate, ownership interest, right or power over land located in the UK. However, there are exemptions for gifts and disposition by will. The Stamp Duty Land Tax exemption applies to land and interests in land purchased by charities provided that the recipient charity intends to use the land for charitable purposes or to hold the land as an investment and the transaction is not motivated by tax avoidance. Relief will be denied if the purchaser ceases to qualify as a charity or the charity ceases to use the land for charitable purposes within three years of the transfer.

Charities are also subject to business rates, a local tax on the occupation of non-domestic real estate. UK charities are entitled to 80% relief from local rates – the remaining 20% being at the discretion of the local authority.

➤ **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?**

No charity tax benefits are available to a foreign foundation unless it has been registered by HMRC as comparable to a UK charity (see the above conditions for registration).

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

Unless the foreign foundation has been registered by HMRC as comparable to a UK charity the donor would be liable to inheritance tax on a gift to a non-resident foundation, whether made on death or during his or her lifetime. In practice, it is often possible for the donor to obtain relief by making the gift to a UK intermediary charity, which then makes a matching grant to the foreign foundation.

➤ **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?**

The introduction in the Finance Act 2010 of provisions enabling foreign charities established in EU states to register with HMRC if they are comparable to a UK charity has largely closed the discussions of this issue. However, some of these provisions have not yet entered into force.

III. Tax treatment of donors

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

Tax deduction.

➤ **Tax treatment of individual donors**

Individuals may make tax-deductible gifts of money to under the Gift Aid or payroll giving schemes to UK charities and foreign charities established in EU states, Iceland or Norway that are comparable to UK charities.

Under the Gift Aid regime, individual donors who pay tax in the UK can make cash donations of any amount. The donor has to give a declaration to the charity that he or she has paid enough UK income or capital gains tax to cover the gift. The donor claims a deduction from taxable income or capital gains for the amount of the donation grossed up by the basic rate of tax (currently 20%). Gift Aid allows the charity then to reclaim from HMRC the income tax deemed to be deducted from the donation. Individuals liable to income tax at the higher rate of 40% and/or 50% can claim relief for the difference between the higher and basic rate in their self-assessment tax return. Higher-rate taxpayers can elect to carry back Gift Aid donations against their income of the previous tax year; excess donations cannot be carried forward.

An individual donor can also donate via payroll giving whereby the employer deducts the specific amount of the donation from the gross salary (after deduction of the employee's social security contributions) and sends it to an agency charity, which then distributes the donation to the charity nominated by the donor. The donor in this case receives an immediate direct tax relief as a result of the adjustment made by the employer.

Individuals can also claim a deduction for the market value of gifts of certain assets. The assets qualifying for this relief are limited to interests in UK real estate, listed shares, units in authorised unit trusts, shares in a UK open-ended investment company, and holdings in certain foreign collective investment schemes. In the case of gifts of real estate, the charity must certify the gift and within the next 6 years the donor and/or a connected person must not become entitled to an interest in or rights over the land given.

If individuals make gifts to UK or comparable EU charities of assets that have appreciated in value, the capital gain that is deemed to arise is exempt.

Limit of tax incentive

None, the whole donation is tax-deductible.

➤ **Tax treatment of corporate donors**

Companies can claim a deduction from their taxable profits for donations of money to UK charities. In contrast to the Gift Aid scheme used by individuals, companies deduct the actual amount paid to the charity from their taxable profits before calculating their corporation tax.

Companies can also claim a deduction for the value of their gifts of qualifying shares and securities and interests in UK real estate (see above).

If companies make gifts to UK charities of assets that have appreciated in value, the capital gain that is deemed to arise is exempt.

Limit of tax incentive

None, the whole donation is tax-deductible.

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

Donations to non-resident charities do not qualify for any tax relief unless they are comparable to UK charities.

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

The UK does not operate a percentage law system.

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

Generally, donors must be able to show that any benefits received do not exceed the permitted limits. Individual donors who have made Gift Aid declarations must be able to satisfy HMRC that they have paid enough tax in the tax year to cover the tax reclaimable on their Gift Aid donations.

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

Individuals

Donations received by persons other than charities may be subject to income tax or inheritance tax where applicable.

No liability to income tax generally arises unless the grant or benefit is recurring or otherwise has the character of income in the hands of the beneficiary. Income from a scholarship held by an individual in full-time education at a university, college, school or other educational establishment is generally exempt.

Legal entities

Donations received by non-charitable organisations may be subject to income tax or inheritance tax where applicable.

No liability to income or corporation tax generally arises unless the grant or benefit is recurring or otherwise has the character of income in the hands of the beneficiary.

V. Trends and developments

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

A Charities Bill with proposals for revising charity legislation was first published as a draft Bill in May 2004. The Bill received royal assent on 8 November 2006 and became the Charities Act 2006. The Act updates and expands the list of charitable purposes and removes the previous presumption that organisations with certain charitable purposes exist for the public benefit. The Act modernises and clarifies the objectives and powers of the Commission. Much of the Act is concerned with the function of the Commission itself, as well as the law relating to charities. Many of the changes in the law brought about by the Act will have little day-to-day impact on many charities, and the changes that will have an impact are largely seen by the sector as enabling and facilitating.

A parallel process has been taking place in Scotland, where the Charities and Trustee Investment (Scotland) Bill was passed by the Scottish Parliament on 9 June 2005 and received Royal Assent in July 2005. On 1 April 2006, the Office of the Scottish Charity Regulator (OSCR) assumed new powers and responsibilities to regulate Scottish charities.

Following the introduction in Northern Ireland of similar legislation to that applicable to charities established in England and Wales in 2008 a separate Charities Commission for Northern Ireland has been established to regulate charities operating in Northern Ireland.

Important changes to the conditions for charity tax exemptions have been introduced under the Finance Act 2010. These require charities to meet a stricter test in order to claim and retain their exemptions. There are important practical implications, especially in relation to governance, trustee and senior staff recruitment and internal financial management and control procedures.

➤ **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)?

The Terrorism Act 2000 (as amended) is the principal counterterrorism statute.

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

This law generally criminalises acts in furtherance or support of terrorism carried out by any individual or legal person (which includes foundations).

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

The Charity Commission is not responsible for counterterrorism legislation, but its supervisory role requires it to take steps to detect charities involved in terrorism, to intervene to protect the misuse of charity assets through freezing orders and the suspension or removal of board members, and to refer suspicions of criminal activity to the police.

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

The Charity Commission has issued a guidance note entitled the 'Charity Commission Counterterrorism Strategy'¹³. The Commission is also engaged in producing a series of compliance toolkits for charities entitled 'Protecting charities from harm'.

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?

Consultations on the UK Government's proposed strategy and the Charity Commission's response were held in 2007 and early 2008.

¹³ http://www.charitycommission.gov.uk/Our_regulatory_activity/Counter_terrorism_work/ctstrategy.aspx

➤ **Public fundraising**

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

Trustees must ensure their charity complies with the law relating to fundraising and follows best practice. This includes all aspects of fundraising including fundraising methods, the costs involved, the financial risk and how the money raised is spent. Trustees need to think about the impact their fundraising methods will have on public opinion and the reputation of their charity.

Some aspects of fundraising are subject to specific regulation and charity law. Fundraising may also be subject to other laws that fall outside of charity law such as those relating to gaming, taxation, insurance, child protection and data protection.

For charities with a gross income over 500,000 GBP (approx. €600,000) which are required to have an audit, the SORP requires that the trustees comment on any fundraising activity undertaken during the year. Smaller charities might find this a useful activity to do as well.

Section 5 of the 1993 Act says that registered charities with a gross income of 10,000 GBP (approx. €12,000) or more in the last financial year must state, on a range of official documents, that the charity is registered. These documents include notices, advertisements, material placed on websites, invoices, receipts and other documents issued by or on behalf of a charity that are intended to persuade the reader to give money or property to the charity. This includes the solicitation of membership subscriptions.

There are specific regulations for public collections (street collections, door-to-door collections, face-to-face collections), fundraising involving professional fundraisers, fundraising involving commercial participators, charity staff paid to fundraise in public places and lotteries:

- Public collections: When a charity carries out a public collection, they must seek a licence from the local authority or in some cases, the metropolitan police. Fundraisers must give a solicitation statement, detailing how they are remunerated, to the donor.
- Gaming activities: Activities such as lotteries, bingo and raffles are subject to regulation under the Gambling Act 2005. The Gambling Act is administered by the Gambling Commission.
- Event fundraising: This can be subject to a number of regulations, including local licensing laws, and those for alcohol licensing (if required), food safety and consumer protection. The Home Office's Good Practice Safety Guide provides information on safety at small events and sporting events on the highway, on roads and in public places. Copies can be requested from the Home Office.
- Broadcast and telephone fundraising: In addition to data protection laws and the charity law, broadcast and telephone fundraising must comply with Part II, section 59 in the 1992 Act ensuring that donors have a right to a refund if they donate over 100 GBP.
- Telephone fundraising: Charities should ensure they do not make unsolicited calls to numbers registered on the Telephone Preference System (TPS). Charities may continue to call donors on TPS who they have an ongoing relationship with and who have agreed to be contacted by the charity.
- Fundraising involving children: This is subject to child protection laws. Any person working with children should be vetted in accordance with the relevant child protection laws.
- Online fundraising appeals: These must comply with Privacy and Electronic Communications Regulations 2003 and the Consumer Protection (Distance Selling) Regulations 2000.
- Fundraising involving professional fundraisers, commercial participators and fundraisers who are paid by the charity: These must comply with Part II, section 60 in the 1992 Act

that requires fundraisers to make a solicitation statement that informs the donor of how they are remunerated. Commercial participators and professional fundraisers are also subject to regulations in the Charities Act that require charities to have a fundraising agreement with the professional fundraiser or commercial participator prior to fundraising.

- House-to-house collections: These are subject to the House to House Collections Act 1939 and local licensing laws if the charity does not hold an exemption order.
- Legacy fundraising: This is not subject to any particular laws but is subject to a general legal principle of “undue influence”.

Useful contacts

David Emerson
Association of Charitable Foundations
Central House
14 Upper Woburn Place
London WC1H 0AE
United Kingdom
Tel: +44.207.255.4499
Fax: +44.207.255.4496
www.acf.org.uk

Eleanor Boddington
The Wellcome Trust
215 Euston Road
London NW1 2BE
United Kingdom
Tel: +44.207.611.7287
Fax: +44.207.611.8800
e.boddington@wellcome.ac.uk
www.wellcome.ac.uk

Paul Bater
The Wellcome Trust
215 Euston Road
London NW1 2BE
United Kingdom
Tel: +44.207.611.7324
Fax: +44.207.611.8800

p.bater@wellcome.ac.uk
www.wellcome.ac.uk

Selected bibliography

Bater, P., in: *The Tax Treatment of Cross-Border Donations - Including the Tax Status of Charities and Foundations*, Bater, P. (editor), International Bureau of Fiscal Documentation, loose-leaf, Amsterdam, 1994-2001

Morgan, Gareth G., *The Charities Act 2006 – A guide for foundations and grantmaking trusts in England and Wales*, Association for Charitable Foundations (ACF), 2007

Charities Act 2006 – a guide to the main provisions which affect charities

<http://www.charitycommission.gov.uk/>

Giving in Europe <http://www.givingineurope.org/>

HM Revenue & Customs <http://www.hmrc.gov.uk/charities/index.htm>

Charity Commission <http://www.charitycommission.gov.uk/>

Selected law texts

Charities Act 1993 <http://www.legislation.gov.uk/ukpga/1993/10/contents>

Charities Act 2006 <http://www.legislation.gov.uk/ukpga/2006/50/contents>

Income and Corporation Taxes Act 1988

http://www.opsi.gov.uk/ACTS/acts1988/Ukpga_19880001_en_1.htm

Income Tax (Trading and Other Income) Act 2005 <http://www.opsi.gov.uk/acts/acts2005/20050005.htm>

Finance Act 2006 <http://www.legislation.gov.uk/ukpga/2006/25/contents>

Finance Act 2010 <http://www.legislation.gov.uk/ukpga/2010/13/contents>

Income Tax Act 2007 <http://www.legislation.gov.uk/ukpga/2007/3/contents>

Corporation Tax Act 2009 <http://www.legislation.gov.uk/ukpga/2009/4/contents>

Corporation Tax Act 2010 <http://www.legislation.gov.uk/ukpga/2010/4/contents>

The Charities (Accounts and Reports) Regulations 2008

<http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&PageNumber=3&NavFrom=3&activeTextDocId=3456634>

Terrorism Act 2000 (as amended) <http://www.legislation.gov.uk/ukpga/2000/11/contents>