



# EFC LEGAL AND FISCAL COUNTRY PROFILE

*The operating environment for  
foundations*

## **SPAIN – 2014**

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***The operating environment for foundations***

***Drafted by Lourdes Márquez de la Calleja and Beatriz Rabadán López, Fundación ONCE; Isidoro Martín Décano, National University of Distance Learning***

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## **I. Legal framework for foundations**

### **1. 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)?**

Foundation Act 50/2002 (onwards, LF) defines foundations in Article 2.1 as non-profit organisations, whose assets are, according to the wishes of the founders, allocated permanently to the fulfilment of general interest purposes. The common definition is “assets serving a general interest purpose”. Art. 34 of the Constitution of 1978 recognises the right to establish a foundation for general interest purposes.

Foundations that carry out their activities in more than one Autonomous Community, or in an Autonomous Community that lacks specific legislation, are governed by Foundation Act 50/2002. For foundations that operate only in one region, some Autonomous Communities have specific legislation for them.

Foundation Act 50/2002 covers foreign foundations that carry out activities in Spain on a regular basis if they can show that they are correctly constituted according to the law of their country of origin. In addition, these foundations are under the supervision of the state supervisory authorities (Protectorates) on the same terms as Spanish foundations.

### **2. What purposes can foundations pursue?**

The foundation must have assets that are allocated permanently to achieve general interest purposes defined by the founder. Foundations cannot pursue any private purpose like giving benefits to the founder or his/her family. At least 70% of the annual income must be used for the public benefit purposes of the foundation. According to Art. 2.2 LF, a foundation is governed by its founder's will and its statutes as well as the law.

### **3. 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?**

Both individuals and legal entities can set up a foundation according to Art. 8 LF. The deed can be *inter vivos* (notarial deed) or *causa mortis* (form of a will). This founding document is forwarded to the registration office for approval and registration at national and regional level. According to Art. 10 LF, the founding document has to contain the name and address of the founder, the founder's wish to set up a foundation, the aim of the foundation, a description of the assets of the foundation, the statutes, and the composition of the first board.

According to Art. 4.1 LF, foundations receive legal personality after the public deed of incorporation has been registered in the Register of Foundations. The registration authorities have to register the foundation if the legal requirements are met. A minimum capital of €30,000 is presumed sufficient to establish a foundation, see below.

Board members are encouraged to register the foundation and the deed of incorporation within six months according to Art. 13 LF. Otherwise, the foundation authorities can start a procedure to nominate new board members.

According to Foundation Act 50/2002, the National Register of Foundations will create a new section that will deal with coordinating the names included in the national and regional registers. For the first time it will include the regulation of public sector foundations.

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

Yes. Foundations are overseen by the Protectorate, which checks whether foundations are acting in accordance with their statutes and the law. According to Art. 4.1 LF, foundations receive legal personality after the public deed of incorporation has been registered in the Register of Foundations. The registration authorities have to register a foundation if it meets the legal requirements and the Protectorates have entered information in the Register confirming that the foundation conforms to the law.

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

Yes. There is a National Register of Foundations and regional registers for each autonomous region. Foundations must register in the autonomous region where their main activity is pursued, but if it is pursued in more than one region, they should register with the National Register.

(In December 2007, Royal Decree 1611/2007 regulating the Register of Foundations of national competence was adopted. It came into force in October 2008).

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

b) If foundations are registered, is the register publicly available?

Yes

**6. Is a minimum founding capital required? Is the foundation required to maintain these assets or any other specified asset level throughout its lifetime?**

Yes. A minimum capital of €30,000 is presumed sufficient to establish a foundation. Nevertheless, this amount can be increased if the state supervisory authorities for foundations (the Protectorates) deem it necessary in view of a foundation's statutory goals. If the founder wants to set up a foundation with less capital, he must then prove that this amount is sufficient to pursue its aims. 25% of the initial assets must be paid at the time of establishment. The remaining 75% must be paid within the following five years.

**7. What governance requirements are set out in the law?**

a) Is it mandatory to have a supervisory board?

Governance and representation of the foundation is entrusted to a board, which oversees asset management and ensures the fulfilment of the purpose of the foundation.

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

The governing board must consist of at least three members. Both individuals and legal entities have a right to be board members. Board members may get their expenses reimbursed. The law also permits remuneration of board members who provide services to the foundation other than those associated with being a board member, as long as 1) the founder has not expressly prohibited it, 2) these activities involve a significant contribution, and 3) previous authorisation has been received from the Protectorate.

Board members will be jointly accountable for any damages they cause through acts contrary to the law or to the bylaws, or through negligent behaviour.

In addition, board members can designate other persons to act on their behalf for certain purposes, as well as bodies other than the board to undertake specific activities.

Causes of termination of board membership:

- Death
- Disability, incapacitation or incompatibility, in accordance with the law
- Termination of the position because of which they were nominated members of the board
- Occupying a seat on the board without the foreseen diligence
- Court decision that the member committed acts contrary to the law or to the bylaws
- Not having asked for the entry of the foundation in the Register of Foundations within six months of the drafting of the founding document
- Ending of a board member's term if he was appointed for a certain period
- Resignation
- Reasons established in the foundation's statutes

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

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?

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

f) 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?

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

**8. 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 trustees is in charge of the governance and representation of the foundation. If the bylaws do not forbid it, the governing board can delegate these competences to one or more of its

members or create an alternative body. Nevertheless the following competence will always correspond to the board of trustees: the approval of the annual accounts, the modification of the bylaws, the merger and the liquidation of the foundation and those acts that need the authorisation of the Protectorate. All this actions will have to be registered.

a) Do the director and officers have powers of representation?

## **9. Liability of the foundation and its organs**

Although foundations have limited liability, a debate is still going on as to whether the property of a foundation can be seized. Board members can be held civilly and criminally liable. They will be jointly accountable for any damages they cause through acts contrary to the law or to the bylaws, or through negligent behaviour.

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

The same standard of diligence applicable as for company administrators (“representante leal”/ loyal representative).

Board members will be jointly accountable for any damages they cause for acting against the law and/or the bylaws or through negligent behaviour.

“Paid board members” are not allowed under Spanish law.

b) 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?

Board members will be exempt from liability if they voted against any agreement causing damage, or if they can prove they were not aware of the agreement, or being aware, tried to prevent the damage.

c) What is the liability of executive staff?

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

No

e) 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 - Depending on which is the trustee's responsibility regarding the requirement causing the loss of status.		
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		

**10. Are economic activities<sup>1</sup> allowed (related/unrelated)? If so, is there a ceiling/limit on economic activities (related/unrelated)?**

Art. 24 LF permits economic activities as long as they are related to the aim of the foundation or are complementary to it. Competition laws will have to be taken into account.

**11. Are foundations permitted to be major shareholders?**

**12. Are there any rules/limitations in civil and/or in tax law regarding foundations' asset management? What, if any, types of investment are prohibited?**

There were innovations in Foundation Act 50/2002 regarding the assets of the foundation composed of goods, rights and obligations liable to economic assessment that are part of the endowment, as well as regarding those received after the establishment, regardless of whether they are part of the endowment. This is one of the areas where the freedom principle operates more strongly in the new Act. Authorisation by the Protectorate for acts of disposal of property of the endowment or property

<sup>1</sup> For the purposes of this profile economic activity can be understood as "trade or business activity involving the sale of goods and services". "Related" economic activity is in itself related to and supports the pursuance of the public benefit purpose of the foundation. According to the above, normal asset administration by foundations (including investment in bonds, shares, real estate) would not be considered as economic activity.

directly linked to the aims of the foundation is still needed. But, the procedure established is just a communication *ex post* of acts of disposal that affect goods or rights.

Foundations can participate in the acquisition or sale of shares and assets in companies as long as they are not personally liable for the social debts. If a foundation owns a majority of shares in a company it will have to inform the relevant Protectorate. (Art. 24 LF)

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

Foundations in Spain can only allocate funds towards the aim of the foundation or complementary to it and any profits generated have to be reinvested in the pursuit of the purposes of the organisation.

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

According to Art. 29 LF, the board of the foundation can amend the statutes if this is in the interest of the foundation and in line with the will of the founder.

The statutes must be amended when circumstances change in such a way that the foundation cannot achieve its general interest purpose. The board of the foundation has to change the statutes, unless the founder has stipulated the dissolution of the foundation in this specific case. Should the board not act, the supervisory authority will proceed with the necessary amendments.

Any alteration will have to be communicated to the Protectorate and be registered in the Register of Foundations.

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

a) What type(s) of report must be produced?

- annual financial report
- annual activity report
- public benefit/activity report,
- tax report/tax return,
- other reports e.g. on 1% schemes)

b) Must all/any of the reports produced by the foundation be submitted to the supervisory authorities? If so, to which authorities (e.g. foundation authority, tax authority)?

According to Art. 27.5 of the Foundation Act, an annual report must be submitted to the Protectorate, which then sends it to the Public Register where it is available to the public.

Once the Protectorate has examined and verified their formal correctness, it will deposit them in the Register of Foundations.

Foundations must also present annual action plans to the appropriate administrative authority, which outline the activities that are foreseen to pursue the foundation's purpose (according to Art. 25.8 LF). Once the Protectorate has reviewed and approved the annual action plan, it will be deposited in the Register of Foundations.

c) Are the reports checked/reviewed? By whom (supervisory/tax authorities)?

See above.



d) Do any or all of the reports and/or accounts of foundations need to be made publicly available? If so, which reports and where (website, upon request)

See above.

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

Yes. An external audit is required if foundations meet two of the following conditions:

- The total amount of assets is over €2,400,000
- The total net amount of the annual turnover is over €2,400,000
- The average number of working staff is over 50

In order to simplify the management and accountability of smaller foundations, provided they meet certain requirements, the law authorises them to use an abbreviated formula for accounting and the annual report.

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

## **16. Supervision (which authority – what measures / sanctions?)**

a) 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 Protectorates are part of the General State Administration. The Protectorate will oversee the exercise of the rights of foundations and the legality of their constitutions and functioning.

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

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

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

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

## **17. When and how does a foundation dissolve?**

According to Art. 31 LF, foundations may be dissolved if the period for which they were set up has expired, the aim has been fulfilled or it has become impossible to fulfil the aim or another case foreseen in the statutes or the law has occurred. The board may decide upon dissolution. The Protectorates and in some cases the court will have to approve the dissolution. Any dissolution must be published in the foundation register. In case of dissolution, the remaining assets of the foundation must be transferred to foundations or private non-profit entities that pursue general interest purposes. Where the statutes of the foundation do not make any provision for the use of the assets in case of dissolution, the Protectorate will decide which foundation will receive the assets.

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

Recognition is given to all foundations legally constituted in another country and occasional activities are allowed with no requirements, but permission to regularly operate in Spain requires: (Art. 7 FL 50/2002).

- Establishing a formal branch in Spain
- Registration with the competent public body
- Purposes of general interest and fulfilment of legal requirements for foundations.

When foreign foundations' sole activity in Spain is fundraising, civil law does not allow formal registration.

**19. 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 activities abroad are allowed. There is no limitation.

**II. Tax treatment of the foundation**

**1. What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?). Is there a special approval process for receiving tax exemption? If so does the process have to be repeated every year?**

Registered Spanish foundations, as well as offices of foreign foundations, which are registered in Spain, receive a privileged tax regime upon request if they meet the requirements listed in the Tax Act.

According to Art. 3 of the Law on Patronage 49/2002, registered foundations working for the general interest, i.e. in the areas of education, culture, science, sports, health care, environment, social economy etc. can receive tax exemption on their income tax, if they use at least 70% of their net income to pursue their general interest purposes. The income must be used within a period of four years. They have to submit an annual financial report and annual accounts to the Protectorate. They have to fulfil their accounting obligations. Non-tax-exempt unrelated economic activities must not exceed 40% of the total revenues of the foundation. In case of liquidation, the assets must be used for similar purposes after dissolution. Moreover, the founders, partners, governing board members, statutory representatives, members of the governance bodies and the spouses or relatives up to the fourth degree, cannot be the principal beneficiaries of the activities carried out by the foundations, nor can they take advantage of the services that foundations carry out.

Foreign foundations can establish a branch in Spain but they need to register. The tax treatment in Spain only applies to the activities of this branch. However, many foreign foundations opt for the creation of a new foundation rather than setting up a branch.

**2. What are reporting/proof requirements to claim tax exemptions? What does the foundation have to submit to the authorities (statutes, financial reports, activity reports, other?)**

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

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

**5. Are there specific accounting rules for foundations?**

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

There is no statutory definition of public benefit purpose (purpose of general interest, as it is referred to in the Spanish legal framework) either in civil law or in tax law. Case law regarding this issue is not very informative.

The Foundation Act 50/2002 (LF) defines what a public benefit purpose is with an open list of general interest goals that a foundation must pursue:

Foundations will have to pursue general interest purposes such as, defence of human rights, support for victims of terrorism and violent acts, social assistance and social inclusion, civic, educational, cultural, scientific, sports, sanitary, labour, institutional strengthening, development cooperation, volunteering, promotion of social action, environmental protection, promotion of the social economy, attention to people at risk of exclusion for physical, social or cultural reasons, promotion of constitutional values and defense of democratic principles and tolerance, development of the information society, scientific investigation and technological development.(Art. 3.1. LF)

There is no statutory definition of public benefit purpose (purpose of general interest, as it is referred to in the Spanish legal framework) either in civil law or in tax law. Case law regarding this issue is not very informative.

Spanish regulation of foundations establishes an illustrative open list of possible public benefit purposes. According to legal scholars<sup>2</sup>, the “general interest purpose” of foundations is only limited by the law (Articles 34 and 22.2, Spanish Constitution) if they pursue purposes categorised as criminal by the penal code. Other authors<sup>3</sup> try to give a positive limit to the concept by saying that “general interest” refers to all purposes aimed at enforcing principles, institutions, and rights included in the Spanish Constitution.

Otherwise legal scholars agree that it is an open concept (*concepto jurídico indeterminado*) that addresses social needs in a particular moment<sup>4</sup>, so it would change through history depending on what the society understands is a “general interest” issue. Foundations of public benefit purpose then respond to unsatisfied social demands<sup>5</sup> and take on State responsibilities<sup>6</sup> (subsidiary principle).

**7. 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 above.

<sup>2</sup> J. Garcia Andrade “Comentarios a las leyes de Fundaciones y de Mecenazgo”, IUSTEL 2005 pgs. 24-25.

<sup>3</sup> R. De Lorenzo, “El nuevo Derecho de fundaciones”, cit., pgs. 138-139.

<sup>4</sup> Garcia De Enterría “Constitución y Fundación” *Revista de Administración Pública* no. 122, May - August 1990; Valero Agundez “La Fundación como forma de empresa” Valladolid 1969; Rebollo Alvarez-Amandi “La Nueva Ley de Fundaciones”1994.

<sup>5</sup> Rebollo Alvarez-Amandi “La Nueva Ley de Fundaciones”1994.

<sup>6</sup> M. A. Cabra De Luna, “ El Tercer Sector y las Fundaciones de España hacia el Nuevo Milenio”, *Escuela Libre Editorial* 1998

8. Please indicate whether the following purposes would or would not be accepted for tax privileges in your country:

Public benefit purpose	Accepted in tax law (for tax privileges)			
	Yes	Probably yes	Probably no	No
Arts, culture or historical preservation	X			
Environmental protection	X			
Civil or human rights	X			
Elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination	X			
Social welfare, including prevention or relief of poverty	X			
Humanitarian or disaster relief	X			
Development aid and development cooperation	X			
Assistance to refugees or immigrants	X			
Protection of, and support for, children, youth or elderly	X			
Assistance to, or protection of, people with disabilities	X			
Protection of animals	X			
Science, research and innovation	X			
Education and training	X			
European and international understanding	X			
Health, well-being and medical care	X			
Consumer protection	X			
Assistance to, or protection of vulnerable and disadvantaged persons	X			
Amateur sports	X			
Infrastructure support for public benefit purpose organisations	X			
<i>Other – please list other purposes accepted in tax law for tax privileges in your country</i>				

9. Support of “the public at large”

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

Yes. The foundation purpose must benefit generic groups of individuals. Groups of workers of one or several companies and their relatives are examples of such groups. (Art.3.2. LF)

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

Yes, in some cases, see below.

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

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

## 10. Non-Distribution Constraint

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

Yes. According to Art. 3 TL and Art. 27.1 LF, foundations have to dedicate at least 70% of their net income to the pursuit of their general interest purposes (this percentage includes administration costs) and allocate the rest to increase the endowment or the reserves.

b) What happens with the foundation's assets in case of dissolution?

According to Art. 33.2 and 3 of the Foundation Act, in case of dissolution all assets of the foundation being dissolved should be committed to another foundation or general interest purpose entity (for example: associations or even a public entity with general interest purposes). The receiving entity

should be designated either by the founder through the bylaws, or by a decision of the board of trustees. If neither option is taken, the Protectorate will make the decision.

## 11. “Altruistic” Element

a) 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 board members/trustees cannot be paid for being part of the Governing Board. They can be remunerated for any other professional services provided to the foundations (Art 15.4. LF), as long as:

- The founder has not expressly forbidden it
- These services involve a significant contribution to the foundation
- And it has been authorised by the Protectorate

b) 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)

The tax law for non-profit entities 49/2002 (TL) does not say anything regarding this issue.

c) 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?

Yes. Article 33 of Royal Decree 1337/2005 regulating foundations establishes that “administration cost” should not exceed the higher of the following two figures: either 5% of a foundation’s equity or 20% of its net income.

If yes, how are “administration costs” defined? Please indicate which of the following types of expenditures would/would not be considered as “administration costs”:

- Personnel costs (staff salaries/payroll costs)
- Board remuneration
- Costs of external audit
- Other legal/accounting costs
- General office overheads (rent/mortgage payments, utilities, office materials, computers, telecommunications, postage)
- Insurance
- Publicity and promotion of the foundation (e.g. website, printed promotional materials)
- Asset administration costs
- In the case of an operating foundation – costs related to programmes/institutions run by the foundation
- Costs related to fundraising

## 12. Hybrid Structures (elements of private benefit in public benefit foundations)

a) 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.					
A foundation distributes a (small) part of its income to the founder or his family.					X

b) 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

## 13. Distributions and Timely Disbursement

a) Are foundations allowed to spend down their capital?

b) Are they allowed to be set up for a limited period of time only? If so, is there a minimum length of time for which the foundation must exist?

Yes. According to Art. 31 of the Foundation Law, foundations may be dissolved if the period for which they were set up has expired.

c) 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? If so, is there a specific amount/percentage of the income that must be spent within this time? Which resources would be considered as income? E.g. would donations/contributions designated as being for building up the endowment be included in /excluded from the income to be spent? What expenditures would count towards the disbursement of income (e.g. would administration costs be included/excluded?)?

Yes, both bodies of law state that foundations must dedicate at least 70% of their net income to pursue their general interest purpose within a period of 4 years

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

No

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

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

#### 14. Does activity abroad put the tax-exempt status at risk?

Article 6.3 of the Foundation Act only requires that the governing body of foundations registered in Spain that carry out their principal activity abroad must have their statutory address inside Spanish territory.

**15. Are there any civil and/or tax law rules regulating cross-border grants by a foundation? If yes, please provide a description of the requirements the foundation must fulfil in such cases.**

#### 16. Income tax treatment

According to Art. 6 of Law 49/2002, tax exemption on corporate income tax is granted for:

- Income from activities to support the purpose of the foundation



- Increases in capital due to inheritances and gifts given to support the purpose of the foundation (including movable and immovable property)
- Income from movable and immovable property (dividends, rents, capital gains)
- Public grants and contributions from corporations to achieve the aim of the foundation (sponsorship agreements are treated like donations)
- Income from qualifying economic activities related to the public benefit purpose such as services in the areas of social welfare, science and research, culture, education, training, publishing and the environment

According to Art. 7, the following economic activities are exempted, as long as they are carried out in pursuit of the foundation's purpose:

- Promoting and managing social welfare activities, including activities auxiliary or complementary to these
- Hospitalisation and health care assistance, including activities auxiliary or complementary to them
- Scientific research and technological development
- Activities of goods of cultural interest according to the regulation of the Historical Patrimony of the State and of the Autonomous Communities, as well as of museums, libraries, and centres of documentation
- Organising musical, choreographic, theatrical, cinematographic or circus performances
- Foundation activities related to parks and other protected natural spaces.
- Education and vocational training.
- Organising exhibitions, conferences, colloquia, courses and seminars.
- Publication and sale of books, magazines, leaflets, audio-visual and multimedia material.
- Economic activities that are merely auxiliary or complementary to tax-exempt economic activities or to activities carried out to fulfil the statutory purpose of the entity. Economic activities will not be considered complementary if their net income exceeds 20% of the total income of the foundation.
- Minor economic activities which generate revenues that do not exceed €20,000.

According to Art. 10, other income derived from non-tax-exempt economic activities will be taxed at a special corporate tax rate of 10% (the general corporate tax rate is 25-30%).

How are the following types of income treated for income tax purposes?

Grants and donations

Investment income (asset administration)

- Interest from fixed rate bonds

Article 6.2 of Law 49/2002 also states that income from moveable and immovable assets owned by the NPE, such as dividends and capital shares, interests (fixed rate bonds), canons and rents.

- Equities

- Income from leasing of a property that belongs to the foundation

Article 6.2 of Law 49/2002, states that the income from real estate (such as leasing properties which belong to the NPOs) are **exempt** from Corporate Income Tax.

Economic activities related/unrelated)

- Income from running a hospital/museum/opera
- Income from producing/selling books (e.g. art books sold by a cultural foundation)
- Income from running a bookshop inside a museum/opera run by the foundation
- Income from running a café in the hospital/museum run by the foundation
- Income from selling T-shirts (activity not related to the pursuance of the public benefit purpose)
- Income from intellectual property (e.g. royalties and licence fees)

**17. Are capital gains subject to tax? If so, are they taxed as income or liable to a separate tax?**

A separate capital gains tax is not levied.

**18. Does any kind of value added tax (VAT) refund scheme for the irrecoverable VAT costs of public-benefit foundations exist in your country?**

This tax is regulated by VAT Act 37/1992.

All operations carried out by businesses are subject to this tax. Nevertheless, Art. 5.1 indicates that persons or entities that exclusively provide goods or services free of charge will not be treated like businesses. This means VAT is not levied on those activities of foundations that are free of charge. This is a general exception, but there are different kinds of exceptions in the regulation of the VAT:

- Exempt activities according to Art. 20.1, 20.1.6 and 20.1.12)
- Services provided by entities of social character (Art. 20.1.8 and 20.1.14)
- Activities related to education and training carried out by authorised entities

Foundations are considered to be final consumers unless they carry out economic activities. They cannot claim a VAT refund.

**19. Is capital tax levied on the value of assets, where applicable?**

**20. Are there taxes on the transfer of assets by foundations?**

Foundations that make use of the special fiscal regime established in Title II of the Foundations Tax Act 49/2002 (i.e. foundations that meet the requirements indicated under "Income tax treatment" above) get an automatic exemption from the tax on transfer of assets.

**21. Are there any other taxes to which public-benefit foundations are subject there (e.g. real property tax)?**

The real property tax is a direct, local tax levied on the property value of real estate.

Art. 15.1 of the Foundation Tax Act stipulates that properties owned by foundations will be exempt from this tax, except those that are related to their economic activities, which are not exempt from the corporate income tax.

Art. 15.2 of the Foundation Tax Act states that non-profit entities will be exempt from the tax on economic activities levied on the economic activities listed in Art. 7 of this law. Nevertheless, those entities will have to register for this tax and un-register if the activity is terminated.

Art. 15.3 also stipulates exemption from the capital gains tax on urban land (it is a tax on the increases in the price of urban land.).

In addition, Art. 45 of RDL 1/1993 (*Real Decreto Ley*) grants foundations an exemption from the tax on property transfers.

**22. 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 – if they have to fulfil exactly the same requirements as local based public benefit foundations, please refer to above but indicate which documents need to be provided and translated:**

- Statutes (translation required?)
- Last annual financial report (translation required?)
- Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes, which may not be required by the organisation's country of seat but are required according to the legislation of the country from which tax benefits are sought?
- Other?

According to the civil law:

- Establishing a formal branch in Spain,
- Registration with the competent public body
- Purposes of general interest and fulfilment of legal requirements for foundations.

According to the tax law, they have to satisfy the same requirements as Spanish foundations in order to benefit from the special tax regime. When foreign foundations' sole activity in Spain is fundraising, civil law does not allow formal registration, and therefore the special tax regime will not be applicable.

**23. Does your country apply withholding tax to the income from local investments held by domestic and/or foreign-based foundations? If so, can domestic or foreign-based foundations reclaim all or part of the withholding tax under domestic law?**

### **III. Tax treatment of donors of public benefit foundations**

#### **1. System of tax credit<sup>7</sup> or tax deduction<sup>8</sup>?**

Tax credit.

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<sup>7</sup> For the purposes of this profile tax credit can be defined as an amount that can be deducted from the actual tax to be paid (reduction in amount of tax paid)

<sup>8</sup> For the purposes of this profile tax deduction can be defined as a reduction in the gross amount on which tax is calculated (reduction in taxable income/tax base)

## **2. Tax treatment of individual donors**

a) What tax relief is provided for individual donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

b) Which assets qualify for tax deductibility?

An individual donor can deduct 25% of the value of his donation (cash or in-kind) up to a limit of 10% of his total taxable income in the form of a tax credit. Donations can include cash or any movable and immovable property.

Regarding Art. 21 of Law 49/2002, no resident persons that have to pay the income tax can also benefit from fiscal incentives.

## **3. Tax treatment of corporate donors**

a) What tax relief is provided for corporate donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

b) Which assets qualify for tax deductibility?

Corporations can deduct 35% of all donations up to a limit of 10% of their taxable income base or 0.1% of their turnover in the form of a tax credit. Donation is treated as an overhead cost (expense). If the gift is regarded as national cultural heritage property, the limit goes up to 30% or 0.3% of the company's turnover. Donations in excess of the limit can be deducted in the following 10 years.

## **4. Tax treatment of donations to non-resident public-benefit foundations – do donors get the same tax incentive?**

Not deductible.

## **5. Other frameworks such as percentage law systems**

In Spain every taxpayer when filling out his income tax declaration can choose between giving a percentage to the Church or to a non-profit entity.

## **6. What are the requirements that the donor must fulfil/ information they must provide in order to claim tax benefits?**

What information do donors have to provide to their tax authority in order receive tax incentives for their donation (e.g. submitting details on the organisation they support: statutes, annual financial

report, documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

**7. Are there any different or additional requirements to be fulfilled when a donor is giving to a foreign-based foundation?**

What information do donors to foreign-based organisations have to provide in order receive tax incentives for their donation (e.g. Statutes (translation required?)? Annual financial report (translation required?)? Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

Gifts to a foreign PBO cannot be deducted for income tax purposes in Spain, unless a delegation of such foreign PBO is registered in the Spanish Register of Foundations to carry out its activities in Spain and also, unless the PBO meets all the requisites required under Law 49/2002

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

Individuals and legal entities are not entitled to special benefits if they are the beneficiaries of a grant or a donation from a foundation. There is a tax exemption for grants from the state (i.e. public grants).

**1. Individuals**

**2. Legal entities**

**3. Are there any different or additional requirements that must be fulfilled by a beneficiary receiving funding from abroad?**

**1. Individuals**

Scholarships received from foundations for studies or research in Spain or abroad are tax-exempt.

**2. Legal entities**

**3. Are there any different or additional requirements that must be fulfilled by a beneficiary receiving funding from abroad?**

**V. Gift and inheritance tax**

This tax is regulated by the Gift and Inheritance Tax Law 29/1987. Art. 5 of this Law defines the passive subject of the tax as individuals, therefore it does not affect foundations – they only pay income tax.

**1. Does gift and inheritance tax/transfer tax exist in your country and if yes who has to pay the tax in the case of a donation/legacy to a public-benefit organisation (the donor or the recipient organisation)?**

**2. What are the tax rates? Is there a preferential system for PBO's? Which PBO's qualify? Is there a difference according to the region or the legal status of the PBO?**

**3. Is there a threshold (non-taxable amount) from gift and inheritance tax for donations/legacies to public-benefit organisations?**

**4. Is there a legal part of the estate that is reserved for certain protected heirs and which a donor cannot give to third parties?**

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

## **VI. Trends and developments**

**1. Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations and their donors are protected by the fundamental freedoms of the EC Treaty? Have there been any changes to your country's legislation, resulting from the Persche, Stauffer, Missionswerk or other relevant ECJ judgments, or are changes being discussed?**

No, no developments have been made. It is being discussed with regard to the European Foundation Statute but Tax Authorities do not agree with the fiscal articles.

**2. Has the fight against terrorism and financial crime led to the introduction in recent years of new laws / rules affecting the foundation sector (e.g. implementation of EU Anti Money Laundering Directive, or reactions to recommendations of the Financial Action Task Force)?**

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

Yes, the Act 10/2010, of 28th April, for the prevention of money laundering and terrorist financing.

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

This Act is the transposition of the Directive 2005/60/EC of the European Parliament and the Council to the Spanish legislation.

According to its art.2.1 x), foundations are specifically obligated by Act 10/2010. Their members of the governing board and managing directors are responsible for the accomplishment of the obligations foreseen in the Act (art 39).

For foundations, the specific areas of responsibility are all operations of receipt or delivery of money or goods for free (Art 39). Foundations must always identify not only individuals or legal entities to whom they deliver and those from whom receive money or goods for free but also the beneficial owner(s) of this money or these goods (Arts 3, 4 and 39).

The "beneficial owners" are defined by Act 10/2010 in art. 4 as:

- the natural person on whose behalf it is intended to establish a business relationship or intervene in any operations or
- the natural person who ultimately owns or controls, directly or indirectly, a percentage higher than 25% of the capital or voting rights of a legal person, or by other means exercises control, direct or indirect, of management of a legal person.

Foundations must keep the documents related to those deliveries and receipts for at least 10 years (Art 25), and will store copies of the documents supporting these operations, in optical, magnetic or electronic systems to ensure their integrity, the correct reading of the data, the impossibility of handling, and proper storage and location.

Foundations will ensure the proper management and availability of this documentation, both for internal control and to respond to any requirement from authorities.

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

the documents described above should be available for supervising authorities: anti money laundering and terrorism commission but also supervising authorities of foundations, but no specific mechanism has been implemented.

Act 10/2010 should be developed specially for NPO which could extend some requirements for these entities.

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

The Treasury approved recently a code of good practices (soft law) based on the recommendations of the Financial Action Task Force (FATF).

e) 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?

In July 2013, the Spanish Ministry of Economy issued a document of good practices aimed at reducing the risk of abuse of non-profit organisations for the realisation of activities related to money laundering and terrorism financing. These best practices are just recommendations and, therefore, not legally binding. Just to mention some of them:

- Regarding *the governing board and management team*, the Ministry of Economy recommends non-profit organisations to have procedures to ensure the ethical and professional suitability of its members, in order to prevent the infiltration of criminals.

- Regarding *the planning and technical follow up of the activities*, the Ministry recommends:

- Establishing clear criteria to select projects
- Approving an annual plan of activities
- Having clear criteria to select partners, taking a proactive approach to verify their honorability and that they are not related with or involved in money laundering and financing terrorist activities.
- Informing potential donors about the purpose(s) foreseen for their funds and ensuring that these funds are used to that aim.
- Informing donors about the activities done with the funds received.
- Elaborating and keeping monitoring reports on the progress and finalisation of the activities.

- Regarding *financial transparency*, the Ministry recommends:
  - o Approving clear criteria to accept donations
  - o Justifying with documents the allocation of the collected funds to the annual activities.
  - o Formalising procedures in order to use bank transfers for the receipt or delivery of donations and/or grants, trying to minimise the use of cash.

This document has taken into account some of the suggestions posed by the Spanish Association of Foundations (AEF)

### **3. Are there any other recent trends or developments affecting the legal and fiscal environment for public benefit foundations in your country?**

- The Minister of Finance has created a commission formed by different ministers with the aim of enhance tax incentives for donors. They have announced some other reforms of the civil law of foundations, but there is not any concrete proposal.
- A new law for banking foundations is being discussed. It will affect not only foundations of saving banks origin, but also foundations having significant participations in any commercial bank.
- The Minister of Health, Social Services and Equality announced in early March 2012 the creation of a Third Sector Act, aimed at ensure the stability and future to those entities, including foundations, and NGOs providing social services.
- A new regulatory framework for public funds for the third sector organisations is expected.
- It's currently under parliamentary discussion the "Transparency, access to public information and good governance Act". This Act has three goals: to increase and improve the transparency of public activity, to recognise and guarantee access to information and to establish good governance obligations to be met by public officials as well as the legal consequences of its failure. This law will affect, among others (political parties, the Congress, the Senate, the Royal House, etc...) , to private entities that receive during the period of one year public aids or subsidies amounting to more than 100,000 euros, or when at least the 40% of their annual income are public aids or subsidies, with a minimum of 3,000 euros.

### **4. Public fundraising**

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

We understand you are asking if there is some kind of regulation for those foundations that collect donations from the general public. In some countries there are specific requirements. In that case we understand that the answer is no. The issue of patronage has been addressed in the previous question.



### **Useful contacts**

Asociación Española de Fundaciones  
Rafael Calvo, 18 – 4º B  
28010 Madrid  
Spain  
Tel: +34.91.310.6309  
Fax: +34.91.578.3623  
[www.fundaciones.org](http://www.fundaciones.org)  
info@fundaciones.org

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### **Selected law texts online:**

Foundation Act 50/2002 (LF)  
Law on Patronage 49/2002  
<http://www.fundaciones.org/es/estatal>

### **About the EFC Legal and Fiscal Country profiles**

This profile is part of a series of profiles of the legal and fiscal environments for foundations in 42 different countries across the wider Europe, as well as some countries in other world regions. The aim of these profiles is to paint a picture of the current operating environment for foundations in these countries to better understand the legislative landscape foundations inhabit. The profiles are produced in collaboration with foundations, legal experts, and associations in each country. Each profile is written by the national-level expert. A comparative overview of the country profiles from wider Europe can be downloaded from the EFC website: “Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe.”

[www.efc.be](http://www.efc.be)

### **About the European Foundation Centre**

The European Foundation Centre, founded in 1989, is an international membership association representing public-benefit foundations and corporate funders active in philanthropy in Europe, and beyond. The EFC develops and pursues activities in line with its four key objectives: creating an enabling legal and fiscal environment; documenting the foundation landscape; building the capacity of foundation professionals; and promoting collaboration, both among foundations and between foundations and other actors. Emphasising transparency and best practice, all members sign up to and uphold the EFC Principles of Good Practice.