



EFC LEGAL AND FISCAL COUNTRY PROFILE

*The operating environment for
foundations*

LUXEMBOURG – 2014

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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)?

Foundations are governed by the Luxembourg Law on Non-Profit Associations and Foundations of 21 April 1928 (hereafter referred to as FA), amended in 1984, 1994, 2001, 2002 and 2008 (*Loi du 21 avril 1928 sur les associations et les fondations sans but lucratif, telle qu' elle a été modifiée*).

According to Art. 27.2 FA, foundations are establishments pursuing aims that are philanthropic, social, religious, scientific, artistic, pedagogic, related to sports, or in the field of tourism. The purpose shall be pursued using the assets dedicated to the foundation upon its creation or later on. According to the FA, there is only one type of foundation, pursuing non-profit or public benefit purposes.

Art. 27.1 of the FA provides that the foundation enjoys legal personality. However if the foundation fails to prepare the publications required by the FA statute, its personality will not be effective against third parties, the latter being nonetheless entitled to avail themselves of such a personality if it is in their interest.

2. What purposes can foundations pursue?

The aims of foundations have to be recognised as being of public utility. Foundations cannot be established as for-profit organisations. Foundations must pursue philanthropic, religious, scientific, artistic, pedagogic, social, sporting or tourist purposes (Art. 27.2 FA).

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?

Foundations can be established by a deed executed by a notary or via a will (Art. 28 FA).

The setting up of a foundation requires approval by a Grand Ducal Decree/*arrêté grand-ducal* (Art. 29 FA). If such approval is not given, recourse can be made to the administrative court (*tribunal administratif*) (Art. 30 FA)

According to Art. 30 FA, the statutes of the foundation must cover the following points:

- The purpose or purposes for which the foundation was created
- The name and the legal seat of the foundation, which must be located within the Grand Duchy of Luxembourg
- The name, profession, domicile, and nationality of the foundation's directors and regulations regarding their subsequent appointment
- The destination of assets upon dissolution of the foundation

Once the foundation obtains approval by a Grand Ducal Decree, both the statutes and any later amendments (which are again subject to prior approval by Grand Ducal Decree) must be published in the Official Gazette/*Mémorial, Recueil Spécial des Sociétés et Associations* following the same procedure as the one set forth for commercial companies (Art. 32.1). All foundations must register in the register of commerce/*registre de commerce et des sociétés*. For this registration, a copy of the Grand Ducal Decree must be submitted. Such registration does not create a presumption of commerciality for a foundation (Art. 32.3, 32.3 FA).

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 acquire legal personality only when their statutes are approved by Grand Ducal Decree (Art. 30.1 FA).

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

Yes, in the company register (*Registre de commerce et des sociétés*)

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

The articles of association and information on board members and accounts.

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?

Not by law, but in practice governmental approval of a foundation will only be obtained if it is found that the means which are at the foundation's disposal (and in particular its initial capital) are adequate for the activities to be pursued. Also, in practice, a foundation is unlikely to be approved if its initial capital is not at least €100,000.

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

Directors have to be appointed when setting up the foundation. According to Art. 30 FA, their profession, domicile, and nationality must be mentioned in the articles, along with the procedure for subsequent appointment of directors (Art. 33 FA).

All nominations, changes and dismissals of the board have to be published in the *Mémorial*.

According to Art. 38 FA, the directors have the powers conferred to them by the statutes. They represent the foundation towards third parties.

The founder (provided that the foundation is created while he is still alive) has the right to revoke his declaration setting up the foundation at any time before the approval by Grand Ducal Decree (Art. 28.3 FA).

The founder normally appoints the directors when setting up the foundation. The founder has the right to set up rules for amendments to the statutes (Art. 31 FA).

a) Is it mandatory to have a supervisory board?

No

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?

There needs to be a minimum of three board members. There is no maximum number of board members provided for in the law, but the articles of association may provide for such maximum.

Rules regarding the appointment, removal, resignation etc. of board members are to be laid down in the articles of the foundation.

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

The board members are in charge of the overall management of the foundation.

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?

The articles of a foundation may provide for certain rights in favour of the founder (such as, for example, the right to participate in the appointment of board members) but the law does not provide for any particular rights in favour of the founder. A fundamental change, such as, for example, the modification of the purpose of a foundation requires a change of the articles which cannot be operated by the founder *qualitate qua* and, at any rate, requires governmental approval.

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

The law does not provide for any specific rights of beneficiaries.

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?

There are presently no rules on conflicts of interest in the law.

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

There is no legal provision prohibiting employees/staff from being on the board of a foundation but in practice this is rare.

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

Every foundation has a board of directors as its governing body, but it is up to the statutes to say who can represent the foundation towards third parties. If there is no specific provision in the statutes, the board as a whole would need to represent the foundation towards third parties.

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

9. Liability of the foundation and its organs

A foundation's liability is limited to the assets that have been contributed to it (Art. 38.2 FA). As a consequence of its legal personality, the foundation incurs civil liability for any acts committed by its directors or other organs representing it (Art. 39 FA). However, this does not prevent the members

of these organs from being held personally liable according to common law. Except where they act wrongfully (according to tort law), the organs of a foundation (i.e. the directors), are not personally liable for the undertakings and commitments of the foundation.

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

A reasonable duty of care and diligence is expected. This is not stipulated in the law as such, but case law traditionally operates this kind of distinction.

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?

Yes, by acting in accordance with those standards, a board member would discharge his duty to act with reasonable care.

c) What is the liability of executive staff?

See above.

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

No (except possibly by imposing certain specific duties, such as seeking advice for certain transactions or actions).

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 - civil only ¹				
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).	X ²		X ³		
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.					X ⁴
The foundation sells immovable property to the spouse of a board member. The board		X ⁵			

¹ It is somewhat unclear who (except possibly the founder or a succeeding board) could take such action. However, the law does provide that the civil court may, on the request of an interested third party or of the attorney general, revoke board members who do not use the assets of a foundation in accordance with its purpose.

² In certain circumstances, however, a foundation may be dissolved/liquidated.

³ This is a matter to be assessed by the court.

⁴ Except that it is not up to a board member but up to the board as a whole to take such a decision (in principle).

⁵ This is a matter to be assessed by the court.

member was unaware that the price was too low.					
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.					X - if reasonable care used

10. Are economic activities⁶ allowed (related/unrelated)? If so, is there a ceiling/limit on economic activities (related/unrelated)?

Commercial and industrial activities are permitted but are taxed. However, the foundation may not have the primary goal of conducting commercial activities. There are a number of activities that may expose a foundation to income tax, such as trading, manufacturing, banking and insurance activities.

11. Are foundations permitted to be major shareholders?

There is no legal provision that would prevent a foundation from being a major shareholder

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?

According to Art. 35 FA, foundations may own real estate only to the extent necessary for the pursuance of their purpose(s).

Moreover, according to Art. 36 FA, donations or wills in favour of a foundation will be effective only if they conform to the provisions applicable to associations (ASBL) in such cases, namely Art. 16 FA that requires authorisation by Grand Ducal Decree for such donations/wills to take effect. However, such authorisation will not be requested for donations/wills of a value not exceeding €12,500. If such authorisation is not obtained, recourse can be made to the administrative court (*tribunal administratif*).

Furthermore, Art. 37 FA provides that the setting up of a foundation and donations/wills in favour of a foundation must not jeopardise the rights of the debtors and heirs entitled to the *réserve* of the founders, donor or testator. The latter are entitled to seek annulment of the donations/wills and even the dissolution of the foundation and liquidation of its assets.

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)

There is no provision in the FA prohibiting such activities and there is no reason that they should not be authorised.

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

If the founder has not specified the rules for amendment of the statutes, they may only be amended upon approval of the Minister of Justice and the majority of the current directors (Art. 31 FA). Any

⁶ 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.

amendment is subject to approval by Grand-Ducal Decree and must be published in the Official Gazette.

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)?

The directors of foundations have to submit accounts and the budget to the Ministry of Justice every year within two months of the closing of the accounts (Art. 34 FA). The annual accounts must be published within the same period in the *Mémorial*.

According to Art. 32bis FA, foundations' written acts (invoices, announcements, publications) must include the name of the foundation together with the word "foundation", the mention of the foundation's legal seat as well as the registration number in the *registre de commerce et des sociétés, Luxembourg*.

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

These are to be filed with the Ministry of Justice who would have the authority to check them.

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)

Yes - In the Register of Commerce.

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

Presently the law does not require an external audit to be performed on the annual accounts of foundations.

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

n/a

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

According to Art. 40 FA, the authority in charge of the supervision of foundations is the Ministry of Justice. The Ministry of Justice has to ensure that the assets of foundations are used for the purpose(s) for which they were created. The district court (civil) of the place where the foundation is

domiciled may, upon a request by either any interested third party or the public prosecutor, revoke the directors if they act imprudently or contrary to their obligations as set forth by the FA statutes, if they do not use the assets according to their destination as per the statutes or use the assets in a way contrary to public policy and order. New directors are then appointed pursuant to the statutes or, if the court so decides, by the Ministry of Justice.

Furthermore, Art. 41 FA provides that the district court may, on request of a director, any interested third party or the public prosecutor, dissolve a foundation if it has become unable to accomplish the purpose(s) for which it was created.

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?

As mentioned above, the authority in charge is the Ministry of Justice.

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

In practice there seems to be hardly any active supervision other than to check whether annual accounts are filed.

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

No (save that governmental approval is required for any change of the articles of association).

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

No

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

See above for the possibility that, upon a request of the Public Prosecutor, a foundation may have its directors revoked or be dissolved by the District Court.

17. When and how does a foundation dissolve?

A foundation may be dissolved by the civil court upon the request of a director, any interested third party or the public prosecutor, if it becomes unable to accomplish the purpose(s) for which it was created (Art. 41 FA). In such a case, the judge appoints one or more liquidators. After payment of the foundation's debts, the liquidated assets must be used according to the destination set forth in the statutes. If this proves impossible, the assets will then be transferred to the Ministry of Justice, which will see that they are used for a purpose as close as possible to the purpose for which the foundation was originally created.

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

A foundation incorporated abroad is automatically recognised in Luxembourg subject only to its activities not representing a threat to public order and security.

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

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?

According to the FA, state-approved foundations are by definition bodies of public interest pursuing public benefit purposes. As such, they are exempt from income tax (Art. 161.1 of the Income Tax Act), if they directly and exclusively pursue public benefit purposes (including charitable and religious purposes). However, they remain taxable to the extent that they carry out industrial or commercial activities.

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?)

No specific requirements in place.

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

It depends on the scheme under which such state funds are received.

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

Not as per the law on foundations.

5. Are there specific accounting rules for foundations?

No

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 definition properly speaking but rather an enumeration in the law on associations and foundations referring to "philanthropic, religious, scientific, artistic, pedagogic, social, sports or tourism" purposes as being eligible as public benefit purposes.

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.

No, tax law merely provides that foundations (as defined by the civil law on associations and foundations) which pursue "directly and exclusively cultural, charitable or public interest aims" are

exempt from income tax, except income generated by a commercial or industrial activity. Other tax law provisions are formulated in a similar way.

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>				

* **Note:** There is no list of purposes eligible for tax exemption as such – whether, in a given case, any such purpose will indeed be recognised as amounting to a public benefit purpose will depend on the manner in and the means by which it will be pursued so as to in practice benefit the public rather than some private interest.

9. Support of “the public at large”

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

Put like that, the question is difficult to answer under Luxembourg law. The foundation must serve the public interest and pursue one of the aims indicated above.

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

n/a

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

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

10. Non-Distribution Constraint

a) Does a **tax-exempt** foundation generally have to follow a “non-distribution constraint”⁷ which forbids any financial support of the foundation board, staff, etc.?

Board members can have their costs reimbursed. Staff may be normally remunerated. But at any rate, a foundation cannot be established for the benefit of its board members or its staff (just as it cannot be set up for the benefit of the founder and/or his family).

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

Such assets are to be used in accordance with what the statutes stipulate for this. (The statutes are subject to government approval). If for some reason this cannot be achieved, the assets are to be used for a purpose similar to the one for which the foundation has been incorporated.

⁷ For the purposes of this profile, a non-distribution constraint implies that any transactions/benefits to third parties going beyond reasonable compensation for services rendered are prohibited (such as unreasonable board remuneration or excessive payments to service deliverers) except where transactions/benefits provided are part of the direct promotion of the public benefit purpose.

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**?

See previous question.

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 question is whether the foundation pursues a public interest or not. Clearly what a donor/funder can receive must be an appropriately small token in relation to the size of the donation, otherwise the donor’s gift cannot be considered as such.

c) Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**?

No, but the public interest criteria will always apply.

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?

It is not simply a matter of the civil law ‘accepting’ or ‘not accepting’ these types of scenarios. In order to enjoy legal capacity, foundations need to be approved by the government and in this context the government no doubt enjoys a certain (possibly a considerable) amount of discretionary power to approve a foundation. It is up to the government to evaluate whether the envisaged scenarios can genuinely be viewed as serving a public interest. In this context, the government would clearly be anxious that no tax benefit can be obtained which exceeds the actual value of a donation. In practice, none of the scenarios envisaged below seems to exist in Luxembourg (except, possibly, in a way, for religious purpose foundations insofar as they may have among their aims the maintenance of the members of a convent).

	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 - see introductory remark		
The founder retains a beneficial reversionary interest in the capital of a property or other asset for his own continuing use.			X - see introductory remark		
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 - see introductory remark			
A foundation distributes a (small) part of its income to the founder or his family.			X - see introductory remark		

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

Before approving a foundation (see above), the government seeks the view of the director of the tax administration who is thus somewhat influential when it comes to whether a foundation should be approved or not. Tax law further provides that a foundation is exempt from income tax only if it pursues "directly and exclusively cultural, charitable or public interest aims". Apart from that, (i) in most instances only donations in cash provide a tax benefit to the donor and (ii) though no such scenario would seem to have arisen in the past, the tax administration might, in the scenarios envisaged below, limit the tax benefit for the founder to the actual value of the conditional donation.

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

13. Distributions and Timely Disbursement

a) Are foundations allowed to spend down their capital?

Yes, though that is not entirely in line with the definition of a foundation as set out in the law.

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, though there is no explicit provision in the law on this.

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?)?

No

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 “pay-out rule”?

No

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

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

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

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

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

Non-profit activities abroad are allowed without putting the Luxembourg tax exemption at risk. A foundation may pursue activities partly or wholly outside of Luxembourg.

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

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

Grants and donations

Once their creation has been approved by the Ministry of Justice through a Grand Ducal Decree, foundations are exempt from income tax (Art. 161.1 of the Income Tax Act), if they directly and exclusively pursue public benefit purposes.

Investment income (asset administration)

- Interest from fixed rate bonds
- Equities
- Income from leasing of a property that belongs to the foundation

Investment income is exempt from taxes provided it does not derive from a commercial or industrial activity and it is used for purposes related to the main objectives of the foundation.

Public benefit organisations are not allowed to own more real property than is needed for the realisation of its statutory purposes (articles 15 and 35 of the law of 21 April 1928). Property income exceeding the usual asset management needs will be considered as commercial taxable income.

The organisation may hold and manage interest bearing financial assets without being taxed on such income if the assets constitute allocated funds or assets ("Zweckvermögen") in the sense of article 6 of the decree of 16 December 1941 (Verordnung zur Durchführung der §§ 17 bis 19 des Steueranpassungsgesetzes – Gemeinnützigkeitsverordnung).

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)

Income from activities deemed to be commercial or industrial (including major shareholding) is subject to the regular corporate tax rate of around 30% (the exact tax rate depending on the municipality in which the foundation's offices are located and in which the activities are carried out).

According to article 161 (1) n° 1 L.I.R., organisations pursuing directly and exclusively purposes related to worship, charity or public benefit are exempt from corporate income tax. Industrial or commercial activities are not taxable as long as such activities remain only a means to fulfil the purposes defined in the statutes and if such activities exceed the scope of an asset management.

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

As for income deriving from grant expenditure towards public benefit purpose/programme activities (such as loans, guarantees, equities), it will be tax-exempt to the extent that such activities will not be deemed to be commercial.

Is major shareholding considered as an economic activity and taxed accordingly?

See above.

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

There is no separate capital gains tax in Luxembourg. Capital gains are included in ordinary income and taxed or exempted accordingly.

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

Foundations are liable to input tax. They are generally exempt from output tax unless they regularly carry out an economic activity and qualify as “taxable persons” for the purpose of VAT legislation.

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

Foundations are exempt from net wealth tax if and to the extent that they directly and exclusively pursue public benefit purposes, including charitable and religious purposes (paragraph 3 of the net wealth tax statute/*loi concernant l'impôt sur la fortune/Vermögensteuergesetz*).

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

n/a

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

Foundations are exempt from real estate property tax if they directly and exclusively pursue public benefit purposes and the real estate is to be used for charitable purposes (paragraph 4 (3) b of the real estate tax statute/*loi concernant l'impôt foncier/Grundsteuergesetz*).

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?

No, not according to the present wording of the tax law.

According to article 160 L.I.R. non-resident organisations are liable to corporate income tax in Luxembourg on behalf of their native income in the sense of article 156 L.I.R.

A personal tax-exempt status can be recognized to an organization only if the tax administration (administration des contributions directes) can control and supervise the respect of the legal conditions.

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?

Depends on the tax legislation of the jurisdiction from which the income originates.

III. Tax treatment of donors of public benefit foundations

1. System of tax credit⁸ or tax deduction⁹?

Tax deduction.

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?

Donations from individuals and legal entities are eligible for a tax benefit in the form of a deduction from the donor's income tax. Donations to public utility foundations are deductible up to an annual aggregate maximum limit of 20% of the taxable net income of the donor or €1,000,000, provided the donations have an aggregate value in excess of €120. Amounts donated in excess of these limits can be deducted during the two subsequent years under the same conditions and limits.

Such donations, as referred to in Articles 109 paragraph (1) 3 and 112 of the Income Tax Act as amended (and as further specified in a circular issued by the tax administration), cover the following kinds of gifts:

- Gifts made to philanthropic, religious, scientific, artistic, pedagogic, social, sporting or tourism entities recognised as being of public interest
- Gifts made to development NGOs recognised by the Ministry of Cooperation

⁸ 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)

⁹ 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)

- Gifts in cash or in kind made to public interest entities with cultural purposes via the National Cultural Fund as an intermediary (*“les dons en espèces ou en nature par l’intermédiaire du Fonds Culturel National”*)
- Gifts in cash or in kind made to audiovisual entities recognised as being of public interest via the National Audiovisual Production Fund as an intermediary (*“les dons en espèces ou en nature par l’intermédiaire du Fonds National de Soutien à la Production Audiovisuelle”*)

Whereas the deduction would normally apply to gifts in cash only, it is also available for gifts in kind made to the specified organisations via donations to the National Cultural Fund or to the National Audiovisual Production Fund (see above). The market value of the gift is in those cases established by a special commission.

All public benefit organisations to which gifts are tax-deductible are included in a list which is publicly available.

3. Tax treatment of corporate donors

Same tax treatment as for individuals – see above (Article 162 of the Income Tax Act, and Annex to the Grand Ducal Decree of 3 December 1969).

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?

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

On 20 July 2009 the Luxembourg Government issued a *circulaire*, which extends tax incentives for Luxembourg resident tax payers if they give to recognised public benefit organisations based in other EU countries, Iceland, Liechtenstein, Norway or Switzerland that have similar characteristics to their Luxembourg equivalents.

5. Other frameworks such as percentage law systems

None

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?)?

The EU beneficiary has to present the same type of documents than the national ones, the published statutes of the PBO and, in this specific case a certified translation, if the text is not in German or French. Eventually a mandate from the PBO to another person than **the** one designated as director by statutes. As the inheritance tax declaration needs a deed, the easiest way to get more information would be to contact the Chambre des notaires.

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

1. Individuals

See above, gift and inheritance tax

2. Legal entities

See above, gift and inheritance tax

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

V. Gift and inheritance tax

Gifts and inheritances received by the foundation are subject to a donation or inheritance tax, normally at a reduced rate of 4%. The tax does not apply to gifts or legacies by bequest that establish the foundation. Furthermore, gift tax is only due on registered gifts. Thus, informal gifts (so-called “*dons manuels*”) to charities are not subject to gift tax. Government authorisation, formerly required for donations above €12,500, is now only required for donations above €30,000 if they are not made through financial institutions from the European Union or from the European Economic Area.

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?

No tax benefit (according to the wording of the tax law).

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?

There is discussion, but it is informal. However, in situations similar to the one in which the Stauffer decision was rendered, Luxembourg courts should treat foreign foundations equally to Luxembourg foundations (the structure of Luxembourg tax law being similar to the structure of German tax law).

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)?

No, except the EU-inspired prohibition against financing of terrorist activities.

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

n/a

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

No

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

No

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?

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

The foundation law and foundation tax law was revised in December 2008. For further information, see EFC briefing on the matter:

<http://www.efc.be/EUAdvocacy/EU%20Communiquus%20%20Briefings/befc0951.pdf>

A bill of law no. 6054 was initiated in May 2009 for an overall reform of the legislation on associations and foundations. In respect of foundations, the law intended to introduce requirements such as a minimum endowment capital and independent external audit. It also intended to introduce much more detailed rules on governance, largely inspired by those presently prevailing for commercial companies. There has however been substantial opposition against many features of the law, mainly from the association sector. As of today it is difficult to forecast what will, at the end of the day, happen to this bill of law and when it is likely to be adopted in Parliament, if at all. In any event this is not likely to happen at short notice.

4. Public fundraising

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

No

Useful contacts

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Selected bibliography

Then, V. and Walkenhorst, P. (editors), London, 2003, pp.186-192

Majerus, N., *Les associations sans but lucratif et les établissements d'utilité publique au Grand-Duché de Luxembourg*, Luxembourg, Imprimerie Saint-Paul, 1930

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

Schmitt, A., in: *International Charitable Giving: Laws and Taxation*, George, C. (editor), Kluwer Law International, loose-leaf, London, 1994-1999

Elvinger, M., Spielmann, D., *Les associations et groupements de personnes dans la vie juridique luxembourgeoise*, Bulletin du Cercle François Laurent, 1995, p. 157-193.

Giving in Europe

Selected law texts online:

The FA /*Loi du 21 avril 1928 sur les associations et les fondations sans but lucratif*, as modified by later laws and regulations

Income Tax Act of 4 December 1967/ *Loi du 4 décembre 1967 concernant l'impôt sur le revenu*, as modified by later laws and regulations

Loi du 19 décembre 2008

<http://www.legilux.public.lu/leg/a/archives/2008/0198/a198.pdf#page=2>

Loi du 24 décembre 2008

<http://www.legilux.public.lu/leg/a/archives/2008/0>

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

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.