

# EFC LEGAL AND FISCAL COUNTRY PROFILE

*The operating environment for  
foundations*

## NETHERLANDS – 2014

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### *The operating environment for foundations*

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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)?**

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

There are no different types of foundations in the Netherlands. However, a Dutch foundation can be used for different purposes, as explained in answer 2.

A foundation does not necessarily have a public-benefit purpose. Furthermore, charitable activities can be performed by other entities as well. A specific legal entity exists for religious communities (*kerkgemeenschappen*, article 2 Book 2). This is not a foundation, but a legal form in itself for which different rules apply. Some charities have the legal form of an association (*vereniging*), of a public body (*publiekrechtelijke rechtspersoon*, for example a municipal museum) or even – in incidental cases – of a company (some theatres, for example) or do not have a legal form at all. Therefore, in the Dutch context ‘foundation’ is not equal to ‘charity’ as not all foundations are charitable and not all charities have the legal form of a foundation.

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

A foundation can pursue almost any purpose. It does not necessarily have to have a public-benefit purpose: a foundation can pursue a private or commercial purpose. For example, the legal form of a foundation is often used for the issuance of depository receipts by a limited liability company and for the exercise of control by the management board over the shareholders by use of priority shares and preference shares. However, the purpose may not include the making of distributions to any founder or to those participating in its constituent bodies or to other parties, unless, as regards the latter, the distributions have an idealistic or social purpose.

### **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 are established through a notarial deed (also under a will). The deed shall contain the articles of the foundation. The articles must include:

- The name of the foundation, with the word ‘stichting’ as part of its name;
- The purpose of the foundation. As explained in article 2, the foundation can be established for both public and private purposes or a combination of such purposes;
- The procedure for appointment and dismissal of the members of the board;
- The municipality in the Netherlands where it has its seat;
- The application of the surplus after liquidation of the foundation on a winding up or the manner in which such application will be determined.

The initial board has to be named in the deed of incorporation of the foundation.

No minimum capital is needed for establishment or operation of a foundation. According to Art. 2:289 of the Dutch Civil Code, all foundations must be registered in the Register of Commerce (*Handelsregister*). The Chamber of Commerce and Industry (*Kamer van Koophandel*) in the area where the foundation is headquartered keeps the foundation register. The register contains further information about the board that represents the foundation as well as the names and addresses of the founders. The members of the board must procure this registration and must lodge at the register an officially certified copy or officially certified extract of the deed of establishment embodying the articles. Each member of the board is jointly and severally liable together with the foundation for any legal act by which he binds the foundation until the lodging of this registration.

**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? )**

No, State approval is not required.

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

Based on article 289 Book 2 of the Dutch Civil Code, all foundations –irrespective of their purpose - must register in the Register of Commerce (*Handelsregister*). This register does not differentiate between foundations with a charitable purpose and other foundations.

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

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

If foundations are registered, is the Register of Commerce publicly available?

Yes, the Register of Commerce (*Handelsregister*) is publicly available.

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

No, there is not a minimum founding capital required.

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

According to Arts. 2:291 and 2:292 of the Dutch Civil Code, the foundation is governed and represented legally by a management board, to the extent that the contrary does not follow from the law. The board is responsible for the administration of the foundation. There is no specific number of board members required.

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

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

a) Is it mandatory to have a supervisory board?

No, it is not mandatory to have a supervisory board.

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 Dutch Civil Code only lays down a few rules concerning the members of the board. Subject to the restrictions of the articles, they must manage the foundation. They cannot enter into agreements to purchase, dispose of or encumber registered property, unless the articles of the foundation specifically state that they have the authority to do so. The same applies to agreements by which the foundation commits itself as guarantor, or joint and several debtor, guarantees performance by a third party, or undertakes to provide security for a debt of a third party.

The board represents the foundation, to the extent that the contrary does not follow from the law. The articles may also vest representative authority in one of more board members. Furthermore, the articles may also vest representative authority in persons other than board members.

If the articles of the foundation provide for the possibility to change the articles, the board can amend them. Such an amendment has to be effected by notarial deed and the board members must lodge an officially certified copy of such amendment and the amended articles at the Register of Commerce (*Handelsregister*).

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

The founder can also be a member of the board.

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

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

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

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

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

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 is no legal definition of the term 'conflict of interest'. Furthermore, concerning foundations there are no legal rules in place to ensure against it. This in contrast to the private or public limited company (*B.V. or N.V.*) where civil law prohibits the conflict of interest of a director. In Dutch literature it is argued that this prohibition also applies to foundations and associations. As mentioned before in answer 2, the purpose of the foundation cannot be to distribute the foundation's profits to the founder or to members of its organs.

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

The articles of the foundation assign the power of decision making. Therefore, if the articles provide for the possibility of staff participating in decision making this is possible to the extent laid down in the articles.

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

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

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

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

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

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

Internal liability

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

### Liability for registration

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

### Liability for annual accounts

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

### The Second and Third Abuse Act

The Second and Third Abuse Act was enacted in 1987 to prevent abuse of legal entities and to protect creditors. Board members are jointly and severally liable:

- For involuntary liquidation (bankruptcy) of the foundation for the amount of the liabilities to the extent that these cannot be satisfied out of the liquidation of other assets. Liability is only possible if the foundation is subject to corporate income tax. Furthermore, liability is only possible if the board has manifestly performed its duties improperly and it is plausible that this is an important cause of the involuntary liquidation. However, if the board has not complied with the obligations described above under “reporting, accountability, auditing”, it has performed its duties manifestly improperly and it is assumed that this is an important cause of the involuntary liquidation. To escape liability, the board member has to prove that the improper performance has not been attributable to him and that he has not been negligent in taking measures to prevent the consequences of this.
- For the payment of social security premiums, income taxes, VAT obligations and mandatory contributions to a pension fund if the foundation is in default of payment of these. Liability is only possible if the foundation is subject to corporate income tax. Furthermore, liability is only possible if the board has manifestly performed its duties improperly. However, if the board has not given proper notice of the inability to pay taxes or premiums, the burden of proof is reversed. To escape liability, a board member has to prove that the non-notification is not attributable to him and that there has not been a manifestly improper performance of these duties.

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

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

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

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

#### 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?

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

c) What is the liability of executive staff?

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

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

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

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 (by a donor who cannot deduct his gifts in case the loss of the charitable status can be attributed to a board member)			
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)?**

Commercial activities both related and unrelated are allowed provided they are within the objectives of the foundation, as included in the articles of the foundation.

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

Yes, foundations are 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?**

Neither in civil law nor in tax law are there rules or limitations with respect to the asset management of foundations, the articles may, however include such limitations. Please note that if a foundation invests or operates business activities in a very risky manner, the board can be held liable for possible bankruptcy.

**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)**

Yes, as long as it is in accordance with the articles, this is allowed.

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

According to the Dutch Civil Code (Art. 2:293), the articles can only be changed by its constituent bodies if the articles provide for amendment. Such an amendment shall be a nullity if not made by notarial deed. The management board must lodge an officially certified copy of this amendment and the amendment articles at the Register of Commerce (*Handelsregister*).

If the articles do not provide for the possibility of amendment, a request for amendment has to be made to the District Court (*Arrondissementsrechtbank* (Art. 2:294)). The court will only agree to the amendment if this is necessary to achieve the purpose of the foundation. The court is also entitled, where necessary, to amend the articles otherwise than as requested.

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

The board has the duty to maintain financial records and to administer the financial condition of the foundation and everything relating to its activities as such activities may require and keep the records in such manner that its rights and obligations can be ascertained at any time. Within 6 months of the

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<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.

end of each preceding financial year, the board must prepare a balance sheet and a statement of income and expenditures of the foundation. Based on article 10 of Book 2 of the Dutch Civil Code, these records have to be kept for 7 years.

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)

A balance sheet and a statement of income and expenditures of the foundation. If the foundation is liable to corporate income tax (CIT), a CIT return must be filed. In case the foundation has and wants to retain the status of public benefit entity (see below under II Taxation), it must publish an activity report on line.

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)?

Foundations running a business with sales over a two year period of at least EUR 4,4 million per year must submit the annual accounts to the Chamber of Commerce (*Kamer van Koophandel*). A foundation liable to CIT must send the CIT return to the tax authorities like any other entity liable to CIT.

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

The Chamber of Commerce and Industry (*Kamer van Koophandel*) does not check the annual accounts by default. The CIT return is checked by the tax authorities.

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)?

The annual report, prepared by the board, must be made available for inspection by the members of the foundation.

Part 9 of Book 2 of the Dutch Civil Code is applicable to foundations. In principle every commercial foundation has to publish its annual accounts at the Chamber of Commerce (*Kamer van Koophandel*) within 8 days after they are approved. There is, however, an exemption based on the size of the business of the foundation.

All foundations wanting to obtain or retain the status of public benefit entity must publish their annual accounts on line. Please refer to part II regarding all information which foundations must publish on line.

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

An external audit is only required if the commercial foundation is a 'medium or large entity'. An external audit is not required if the commercial foundation is a 'small' entity. An entity is considered 'small' when it meets two of the three following requirements in two consecutive years:

- The value of the assets according to its balance sheet does not exceed €4.4 million;

- The net sales of the fiscal year do not exceed €8.8 million;
- The average number of employees for the year is less than 50.

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

Audits should be undertaken by a certified accountant.

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

Interested parties can ask the Public Prosecutor's Office and the District Court/*arrondissementsrechtbank* for a decision to change the articles, dismiss directors or dissolve a foundation. This applies to charitable and other foundations. The District Court is the competent authority to take such action in the interest of the foundation. Dissolution is the last resort.

The status of public benefit entity is supervised by the tax authorities (please see below under II).

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 supervisory authority is the District Court/*arrondissementsrechtbank*.

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

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

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

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

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

No, it is not 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?

If a foundation is not registered at the Chamber of Commerce (*Kamer van Koophandel*), all board members are jointly and severally liable together with the foundation for any legal act by which he binds the foundation. The board members are also jointly and severally liable if the foundation is required to file yearly accounts and neglects this. Furthermore, a fine can be issued.

Public benefit status is a status for tax purposes only, please see below for information on that status.

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

General provisions exist for the dissolution of all legal entities (Art. 2:19 of the Dutch Civil Code). According to article 21 of book 2 of the Dutch Civil Code, the district court, may dissolve the foundation at the request of the Public Prosecutor's Office or an interested party, if there are defects in its formation, if its articles do not comply with the statutory requirements, if it does not fall within

the statutory description of its legal type or if the foundation transgresses the prohibitions set in the Dutch Civil Code for its legal type or acts to a serious degree contrary to its articles. Every foundation must include in its articles provisions regarding the use of the assets in the event of dissolution.

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

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

**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?**

Civil law allows a foundation to conduct activities abroad.

**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?**

In the Netherlands, special tax incentives apply for so called 'public benefit pursuing entities' which are registered by the Dutch tax authorities (*algemeen nut beogende instellingen* hereafter public benefit entities or PBEs). These PBEs will often be foundations, but this is not necessary. Currently, the Dutch tax authorities have registered 60.000 PBEs. The main criterion is not whether the activities or the entities are not for profit, but whether these activities or entities meet the public benefit criterion. The Dutch tax legislation on PBEs has changed considerably during the past 10 years especially by the introduction of more requirements to become a PBE and an obligation to register to qualify for tax benefits. As of 1 January 2014 new requirements regarding transparency of PBEs will enter into force. The purpose of these requirements is the promotion of the public trust in the charity sector. Furthermore, other changes regarding integrity will probably be introduced as well. The PBE will have to meet all requirements during the whole time it has the PBE-status, The Netherlands does not have a yearly approval process, but the tax authorities perform audits of PBE's in which they check whether the PBE still meets all requirements. Please note: hereinafter 'PBE' will only be used for entities registered by the Dutch tax authorities. It is not relevant where these entities are resident. However it is also not relevant whether they have charitable status abroad: it is only relevant whether the entity is a registered PBE in the Netherlands.

The definition of a PBE and the rules and the requirements for PBEs are the same for the personal income tax, corporate income tax, gift and inheritance tax, real estate transfer tax and energy tax. The only tax for which this definition and these rules and requirements have no meaning is the VAT. As of 1 January 2012 these are included in the General tax Act (*Algemene wet inzake Rijksbelastingen*, hereinafter *AWR*): article 5b AWR.

**A Quantitative public benefit requirement**

In order to obtain the PBE-status, an entity must pursue the public benefit for at least 90%. For a long time, it was unclear how this should be measured. According to the Supreme Court this should not be based on a purely arithmetic measure such as hours spent on public benefit activities and other activities (*Hoge Raad*, 8 January 1997 no. 31.591, FED 1997/106). The Supreme Court is of the opinion that different activities and the time spent on those activities might well be weighted differently in order to decide on the amount of public benefit activities. In 2011, the Ministry of Finance stated that the 90% criterion is not an income criterion (*Tweede Kamer*, 2011–2012, 33 006, no. 6,

p. 9). The proportion of the income from commercial activities in relation to the total income is not of relevance. The basis on which it can be decided whether the 90% public benefit criterion is met, depends on the specific object of the entity. As of 2012, the expenditure of the entity is most important. At least 90% of all expenditures must be aimed at the public benefit. According to the Ministry of Finance, the assessment whether the 90% criterion is met, has to be made on a case by case basis and depends on the facts and circumstances (*Tweede Kamer*, 2011–2012, 33 006, no. 6, p. 10).

#### B Qualitative public benefit criterion

The General Tax Act provides (in article 5b AWR) for an exhaustive list of activities which are regarded a public benefit. This list is as follows:

- a) welfare;
- b) culture;
- c) education, science and research;
- d) protection of the environment, which includes promoting sustainability;
- e) health care;
- f) youth care and elderly care;
- g) development cooperation;
- h) animal welfare;
- i) religion, philosophy and spirituality;
- j) promoting the democratic legal order;
- k) social housing
- l) a combination of these objects; and
- m) financially or otherwise supporting a public benefit entity.

Please note that this list does not include a 'miscellaneous' category. The Dutch government is convinced that this list covers all public benefits. Furthermore, sports, amateur art (such as choirs, theatre groups and brass bands), community centres and social housing are not considered to be a public benefit in the Netherlands. These are only regarded as a social benefit, for which reason the exemption of gift and inheritance tax applies, but the gift deduction does not apply. Political parties are considered to be a public benefit, but labour associations are not regarded as such.

#### C Cultural PBEs

As of 2012, PBEs that are focussed on culture for at least 90%, can request a registration as 'cultural PBE' (article 5b AWR). Such PBEs are entitled to more tax incentives than other PBEs. This was seen as a sort of compensation for the harsh cuts on direct subsidies for cultural institutions and the abolishment of the reduced VAT rate for performing arts. It is not yet clear what 'culture' means in this respect. According to the Ministry of Finance, this should be interpreted as high-quality culture which is accessible for as many people as possible (*Tweede Kamer*, 2011–2012, 33 006, no. 6, p. 21-22). A cultural entity is, according to the Ministry of Finance an entity which activities, based on its regulations and actual activities, for at least 90% aim to realize public accessible cultural facilities, to spread culture or to maintain culture (*Tweede Kamer*, 2011-2012, 33006, no. G, p. 10). A membership of a professional association and receiving direct subsidies seem to be an indication.

#### D Integrity requirement

An entity cannot become or remain a PBE if a Dutch court has convicted the entity, a board member, a person who in fact manages the entity or a person who is vital to the image of the entity of inciting to hatred, violence, or the use of violence (article 5b AWR). If more than four calendar years have passed since the conviction, registration as PBE is possible again. Currently, a Bill is pending before parliament, which contains an extension and a limitation of the integrity requirement as of 1 January 2014. The extension entails that also a conviction for intentionally committing crimes that pose a

threat to the general safety of persons or goods can endanger the PBE status. The limitation is that only if these crimes are committed in the capacity of board member, of a person who in fact manages the entity or of a person who is vital to the image of the entity, the PBE status might be rejected or withdrawn

#### E Formal requirement: registration

An entity has to be registered by the Dutch tax authorities in order to qualify as a PBE (article 5b AWR). Therefore, even if an entity meets all material conditions but the tax authorities did not register the entity as a PBE, it is not a PBE for Dutch tax purposes. Entities have to apply for registration through a simple administrative procedure. The tax authorities decide on the request by a formal decision against which an objection may be lodged. If the tax authorities decide negatively on the objection, the entity can go to court. Whether an entity is a registered PBE can be checked on a public website of the tax authorities ([http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/rekenhulpen/programma\\_anbi\\_opzoeken](http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/rekenhulpen/programma_anbi_opzoeken)).

Once an entity has been registered, it only has to provide information to the tax authorities on request. There is no yearly obligation to spontaneously send information, such as accounts, to the tax authorities. However, as of 1 January 2014 the PBE is obliged to post certain information on a website (see below) and to report this website to the tax authorities. This website is stated on the public website of the tax authorities on all PBEs.

Renewal of the registration is not necessary. As long as the tax authorities do not decide to deregister the PBE because it no longer meets the requirements, the entity keeps its registration. There is no fixed time limit. The tax authorities decide on deregistration of an entity by a formal decision as well. The entity has the right to lodge an objection to this decision and can go to court.

#### F Legal form

Up and until 2011 there were no formal requirements regarding the legal form of a public benefit entity. However, the tax authorities were reluctant to accept entities which did not have the legal form of a foundation (*stichting*), association (*vereniging*) or church (*kerkgenootschap*). In general, the Ministry of Finance is of the opinion that a foundation is the most suitable legal form for a PBE (*Handelingen Tweede Kamer*, 29 October 2009 (*noten*), p. 18-1496).

As of 1 January 2012 the General Tax Act (article 5b AWR) explicitly requires that a public benefit entity is not a corporation (*vennootschap*) with a capital divided in shares, a cooperative (*coöperatie*), a mutual insurance association (*onderlinge waarborgmaatschappij*) or any other entity which can issue certificates of participation (*bewijzen van deelgerechtigdheid*). Under the pre-2012 legislation 7 public limited companies (*naamloze vennootschappen*) and 9 private limited companies (*besloten vennootschappen*) had the PBE-status. Because of a grandfathering rule, these corporations with a capital divided in shares will keep their PBE-status under the new legislation.

As of 1 January 2012, bodies governed by public law are a PBE by law (article 5b AWR). This means that these entities do not have to file a request for registration as PBE or meet any of the other requirements.

## G Additional requirements in ministerial regulation

In order to become and to remain a PBE, an entity must meet several additional requirements which are not included in the legislation, but which are laid down by ministerial regulation (article 1a-1f *Uitvoeringsregeling AWR*). These requirements are as of 1 January 2014:

- a) It should follow from the regulations and the actual activities of the entity that it does not pursue to make a profit with its public benefit activities;
- b) It should follow from the regulations and the actual activities of the entity that it pursues the public benefit for at least 90% ;
- c) It should follow from the regulations and the actual activities of the entity that no natural person or legal entity can have control over the assets of the entity as if it were their own capital;
- d) The entity is not allowed to have more assets than reasonably necessary for the continuity of the activities of the entity. Endowments should be dealt with in accordance with the wishes of the donor;
- e) The members of the ultimate policymaking body are only entitled to receive an allowance for expenses and a reasonable fee for attendance;
- f) The entity must have a current policy plan which gives an insight into the foundation's activities, the way it raises and administers its funds and the way it spends its funds;
- g) Costs of fundraising and administration should be in reasonable proportion to the charitable expenditures ('reasonable' is not defined);
- h) It should follow from the regulations that when the entity is dissolved all proceeds from liquidation must be paid to a PBE with a similar object;
- i) The books and records of the charitable institution must clearly state the allowances of each member of the policy making board, the fundraising and administrative costs, the nature and the amount of income and the possessions of the entity.
- j) (as of 1 January 2014) the entity publishes certain information regarding the way it functions electronically on a public website.

The website must contain the following information about the PBE:

- the name
- the legal persons and collaborative partnerships information number (RSIN number) or tax number
- address or telephone number or email address.
- the objects
- the policy plan
- the composition of the board and the names of the board members (unless the Revenue Service has granted an exemption because of a real safety risk)
  - the remuneration policy
  - a report of the activities performed
  - a financial report (this must be made public within 6 months after the end of the book year).

## H Commercial activities

The question whether a PBE is allowed to undertake commercial activities, has lead to many discussions in the Netherlands. The legislation does not prohibit commercial activities as such. However, the tax authorities were of the opinion that a PBE with commercial activities was not pursuing the public benefit. In 2012 the policy regarding PBEs with commercial activities was eased. The PBE is allowed to have commercial activities as long as it spends the proceeds from commercial activities 'within a reasonable timeframe' for the public benefit.

## I Non-resident and international PBEs

As of 2008, the requirements for most non-resident entities are the same as for resident entities. Entities that meet all requirements can be registered as a public benefit entity without any additional requirements if these are resident in the Kingdom of the Netherlands (i.e. the Netherlands and the Caribbean Islands, Aruba, Curaçao and the Dutch part of Saint-Martin) another EU member state or a state designated by the Ministry of Finance. Designated states are all states with which the Netherlands has concluded some kind of agreement or agreements (e.g. a bilateral tax treaty, the Convention on Mutual Administrative Assistance in Tax Matters, or a Tax Information Exchange Agreement) to exchange documents, information and data carriers concerning the personal income tax, corporate income tax and the gift and inheritance tax.

Entities which are not resident in the Kingdom of the Netherlands, another EU member state or a designated state can still obtain the PBE-status if these meet additional requirements. Such entities must, on a yearly basis, provide the Dutch tax authorities with information based on which the tax authorities can decide whether the PBE-requirements are met. The entity must prove that the information provided gives a true and fair view of the actual situation, for example by an auditors' report.

## J Cultural PBEs

As of 2012, PBEs that are focussed on culture for at least 90%, can request a registration as 'cultural PBE' (article 5b AWR). Such PBEs are entitled to more tax incentives than other PBEs. This was seen as a sort of compensation for the harsh cuts on direct subsidies for cultural institutions and the abolishment of the reduced VAT rate for performing arts. It is not yet clear what 'culture' means in this respect. According to the Ministry of Finance, this should be interpreted as high-quality culture which is accessible for as many people as possible.<sup>2</sup> A cultural entity is, according to the Ministry of Finance an entity which activities, based on its regulations and actual activities, for at least 90% aim to realize public accessible cultural facilities, to spread culture or to maintain culture. The tax authorities are supposed to develop a framework to assess whether a PBE is a cultural entity with the help of the Ministry of Culture. A membership of a professional association and receiving direct subsidies seem to be an indication.<sup>3</sup> There was a serious debate in both the Second and the First Chamber on why cultural PBEs should be treated more favorably than other PBEs. However, the Ministry of Finance was of the opinion that the focus on cultural PBEs was justified.

### **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?)**

As long as the charity has the PBE status, it can claim all benefits related to the PBE status. Up and until 2013 the PBE only had to provide proof to the tax authorities when asked for it, for example after an application for the PBE status or during an audit. However, as of 2014 PBEs must publish certain information on the internet (please refer to II.1.G for the information which has to be published) and report the web address to the tax authorities.

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

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

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

No.

<sup>2</sup> Tweede Kamer, 2011–2012, 33 006, no. 6, p. 21-22.

<sup>3</sup> Tweede Kamer, 2011-2012, 33006, no. G, p. 10.



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

Not for tax purposes. However, fundraising charities which want to obtain the CBF Seal, a private, but widely accepted quality label for fundraising charities ([www.cbf.nl](http://www.cbf.nl)) must prepare their accounts following Guideline 650 (Richtlijn 650) of the Dutch Accounting Guidelines (*Richtlijnen voor de jaarverslaggeving*).

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

**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 the term public benefit purpose in civil law.

**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.**

There is no statutory definition of the term public benefit purpose in tax law. The public benefit of a specific foundation is often determined in Dutch case law. However, as of 1 January 2012 the General Tax Act provides (in article 5b AWR) for an exhaustive list of activities which are regarded a public benefit, please refer to II,1.B. Please note that even if the activity pursued by the entity is listed in this article, it still has to meet the quantitative public benefit test.,

**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			

<b>European and international understanding</b>	X			
<b>Health, well-being and medical care</b>	X			
<b>Consumer protection</b>	X			
<b>Assistance to, or protection of vulnerable and disadvantaged persons</b>	X			
<b>Amateur sports</b>				X*
<b>Infrastructure support for public benefit purpose organisations</b>	X			
<b>Other – please list other purposes accepted in tax law for tax privileges in your country</b>				
<i>Please refer to the list in II.1B, for example religious and political activities can also qualify as public benefit activities.</i>				

\*Amateur sports is not regarded a public benefit, but a social benefit for which not all tax benefits apply (for example: no gift deduction, gifts received are exempt from gift and inheritance tax, but donations by these organizations are not exempt). The same applies, for example, to scouting clubs and amateur choirs and orchestras.

## 9. Support of “the public at large”

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

*Tax exempt is not the most relevant wording for the Netherlands: a corporate tax exemption does, for example, not depend on the charitable status of a foundation. For the Netherlands it is more of relevance to use the term ‘foundation with PBE status’ or PBE.*

No, Already in the 1920’s the Supreme Court decided that a ‘public benefit’ does not mean that everybody agrees on it: all public benefits are in fact limited. As long as it is not a private benefit a limited benefit can be a public benefit. However, the tax authorities are very critical regarding this difference and try to find the border between limited and private. For example: amateur choirs and orchestras and amateur sports are deemed private benefits.

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

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				
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## 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?

*Tax exempt is not the most relevant wording for the Netherlands: a corporate tax exemption does, for example, not depend on the charitable status of a foundation. For the Netherlands it is more of relevance to use the term ‘foundation with PBE status’ or PBE.*

According to the Dutch Civil Code, all foundations in the Netherlands (both charitable and not-charitable) are prohibited to distribute their profits to their founders or to members of their organs. Distributions to other parties are permitted if the distributions have an idealistic or social purpose. In order to obtain or maintain the PBE status, the members of the ultimate policymaking body must only be entitled to receive an allowance for expenses and a reasonable fee for attendance. Furthermore, no natural person or legal entity can have control over the assets of the entity as if it were their own capital.

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

In order to obtain or maintain the PBE status, it should follow from the regulations that when the entity is dissolved that all proceeds from liquidation must be paid to a PBE with a similar object.

## 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**?

According to civil law, remuneration or an expense allowance is allowed but only when this is in accordance with the statutory provisions of the foundation.

In order to obtain or maintain the PBE status, the members of the ultimate policymaking body (this might be the supervisory board and not the board itself in a two tier structure) are only entitled to receive an allowance for expenses and a reasonable fee for attendance. In case of a two tier structure with a board and a supervisory board in which the supervisory board has the highest authority, the board members may receive a remuneration. Furthermore, if the members of the ultimate policymaking body perform other activities for the PBE, such as consultancy activities, it is allowed to provide a remuneration for such activities, as long as no remuneration is paid for the activities in the capacity of member of the ultimate policymaking body.

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)

In order for a donation to qualify as a deductible gift in the personal income tax (PIT), there must not be a direct return. Both for the personal income tax and the value added tax (VAT) discussions can

arise with the tax authorities on whether something is a return which should be taken into account when establishing the amount of the deductible gift or whether VAT is due. When a return is negligible in relation to the amount of the gift, this is usually not a problem (although it can be disputed what can be considered 'negligible'). Various PBEs have come to agreements with tax authorities about the acceptable returns. It would, however, be preferable if safe harbour rules would be introduced as is the case in the UK ([http://www.hmrc.gov.uk/charities/gift\\_aid/benefits.htm](http://www.hmrc.gov.uk/charities/gift_aid/benefits.htm)).

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?

For civil law, the amount must be in accordance with the statutory provisions of the foundation.

In order to obtain or maintain the PBE status, costs of fundraising and administration should be in reasonable proportion to the charitable expenditures. It is not defined what is 'reasonable', this depends on the characteristics of the specific PBE.

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

n/a

## 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.		X			

A foundation distributes a (small) part of its income to the founder or his family.		X			
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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 (assuming >10% of the activities)
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: no one may have control over the assets as if it were their own capital
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 (assuming <10% of the activities)				X (assuming >10% of the activities)

Are there any other examples from your country (in **civil law** and/or **tax law**) regarding such “hybrid structures” (e.g. law provisions, court decisions, etc.)?

A PBE must pursue the public benefit for at least 90%, all other activities must, therefore be less than 10%.

### 13. Distributions and Timely Disbursement

a) Are foundations allowed to spend down their capital?

There are no civil law regulations or limitations with respect to the asset management of foundations. In order to obtain or maintain the PBE status, the entity may not have more assets than reasonably necessary for the continuity of the activities of the entity. Endowments should be dealt with in accordance with the wishes of the donor.

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

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

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?)?

There is no requirement to spend the income within a certain period of time under Dutch civil law.

In order to obtain or maintain the PBE status, the entity may not have more assets than reasonably necessary for the continuity of the activities of the entity. Furthermore, PBEs have to spend proceeds from commercial activities 'within a reasonable timeframe' for the public benefit. It is not defined what is timeframe is 'reasonable': this depends on the characteristics of the specific PBE.

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, however in order to obtain or maintain the PBE status, the entity may not have more assets than reasonably necessary for the continuity of the activities of the entity.

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- depends on the activities		

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

No, as long as the activities meet the Dutch public benefit requirements.

#### 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.

Same tax rules as for other grants.

## 16. Income tax treatment

In the Netherlands, foundations and associations are only liable to corporate income tax (*vennootschapsbelasting*, hereinafter VPB) insofar as they run a business or are in competition with taxable businesses.<sup>4</sup> In this respect, there is no difference between foundations and associations with or without the PBE-status. For example, investment income of foundations and associations will usually not be liable to tax. Gifts will usually not be regarded as business income, either.

If an association or foundation (PBE or not a PBE) runs a business, only the profit attributable to that business is liable to corporate income tax. All other income is not liable to corporate income tax. Cultural PBEs have the option to be liable to tax over their whole income, including their non-business income.<sup>5</sup> The idea is that if the non-business income is negative, the option for full tax liability enables the entity to reduce its business income. The full tax liability will apply for at least 10 years and can only be terminated every 10 years.

Certain business activities, such as maintaining a designated country estate, pension funds, hospitals, care for old people and libraries are exempt.<sup>6</sup> Next to these specific exemptions a general exemption applies.<sup>7</sup> As of 2012 this exemption applies to all associations and foundations (including similar foreign entities which are liable to tax as non-residents). The PBE-status is therefore not necessary for this exemption. The exemption applies if the profit in a year was less than € 15,000 or the profit in the year and the 4 preceding years was less than € 75,000. It is not relevant whether the exempt profit is used to support public benefit activities. A foundation or association may request the tax authorities not to apply for the exemption. However, this means that the exemption will not apply for at least 5 years. The entity can only terminate this every 5 years.

PBEs and certain social benefit entities may deduct a notional amount of cost regarding volunteers.<sup>8</sup> In principle, the minimum wage which should otherwise have been paid had the persons not been volunteers, is deductible. This can be used to reduce the taxable profit of PBEs that are liable to corporate income tax.

PBEs which are liable to corporate income tax may deduct income from fundraising activities.<sup>9</sup> Such activities are activities with volunteers such as the sale of goods or providing services at a higher price than the market price or at the market price but at lower costs because of volunteers and collecting goods if it is made known that the proceeds will be used for the public benefit.

Fundraisers which are not PBEs and only conduct fundraising activities as mentioned above and which are obliged to transfer all income to a PBE, may deduct this payment to the PBE from their profit.

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

### Grants and donations

Even if an entity is liable to corporate income tax because it carries out business activities, grants and donations will usually not be regarded as business income and will therefore be attributed to the tax free part of the entity.

### Investment income (asset administration)

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- 4 Article 2(1)(e) Vpb.
  - 5 Article 2(9) Vpb.
  - 6 Article 5 Vpb.
  - 7 Article 6 Vpb.
  - 8 Article 9 Vpb.
  - 9 Article 9a Vpb.

- Interest from fixed rate bonds

Even if an entity is liable to corporate income tax because it carries out business activities, bonds will usually not be regarded as part of the business and will be attributed to the tax free part of the entity. Investing in property or capital (investment income) will usually not qualify as a business activity, provided that the activities do not entail more than regular asset management as performed by individuals.

- Equities

Even if an entity is liable to corporate income tax because it carries out business activities, equities will usually not be regarded as part of the business and will be attributed to the tax free part of the entity. Investing in property or capital (investment income) will usually not qualify as a business activity, provided that the activities do not entail more than regular asset management as performed by individuals.

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

Even if an entity is liable to corporate income tax because it carries out business activities, leasing of a property will usually not be regarded as part of the business and will be attributed to the tax free part of the entity. Investing in property or capital (investment income) will usually not qualify as a business activity, provided that the activities do not entail more than regular asset management as performed by individuals.

#### Economic activities related/unrelated)

Only business activities are liable to Dutch corporate income tax. However, if the profit is below the thresholds of the general exemption (see above), it will not be taxed. Below it will be assumed that the profit is not below these thresholds. In the Netherlands it is not relevant whether economic activities are related or unrelated, the only relevant questions is whether the activities are a business activity.

- Income from running a hospital/museum/opera

Usually running a museum or an opera does not lead to positive income, but if this could be done on a commercial basis, it would probably be taxable. An exemption applies for hospitals.

- Income from producing/selling books (e.g. art books sold by a cultural foundation)

Yes

- Income from running a bookshop inside a museum/opera run by the foundation

Yes

- Income from running a café in the hospital/museum run by the foundation

Yes

- Income from selling T-shirts (activity not related to the pursuance of the public benefit purpose)

Yes

- Income from intellectual property (e.g. royalties and licence fees)



Not if the activities do not entail more than regular asset management as performed by individuals. However, the tax authorities may take the point of view that exploiting intellectual property is a business activity and therefore taxable.

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

The tax authorities might regard the granting of loans, guarantees and equities as business activities if more risks and activities are undertaken than would fit regular asset management as performed by individuals.

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

Even if the major shareholding could be attributed to a business activity (which seems unlikely), probably the participation exemption would apply.

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

First it must be established whether the entity is liable to corporate income tax and, if this is the case, whether the asset causing the capital gain can be attributed to the business. An example would be a machine used to make goods which the entity sells. If this is the case, the capital gain will be taxable, unless it is a gain on a shareholding qualifying for the participation exemption.

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

No.

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

No.

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

Dutch real estate transfer tax is levied from the acquirer of real estate at a rate of 6%. An exemption applies in case of a merger or transfer of tasks between listed public benefit entities and/or associations with at least 25 members and which are not liable to (including being exempt from) corporate income tax.<sup>10</sup> Commercial factors may not play a part in the merger or transfer. Furthermore, not only real estate must be acquired and the acquired real estate must be used for the public benefit activities. The tax exemption is withdrawn if the acquiring entity ceases to exist within three years after the merger or transfer or is, within that period, no longer a listed public benefit entity or association with at least 25 members which is not liable to corporate income tax unless this is caused by a subsequent merger or transfer of tasks.

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<sup>10</sup> Article 15(1)(h) Real Estate Transfer Tax Act (*Wet op belastingen van rechtsverkeer*) together with article 5d Implementing Decree Real Estate Transfer Tax (*Uitvoeringsbesluit belastingen van rechtsverkeer*).

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

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

One of the Dutch environmental taxes is the energy tax. This tax is levied on the use of electricity and gas through the bill of the electricity company. Public benefit and social benefit organizations can apply for a refund of 50% of the energy tax if certain requirements are met.<sup>11</sup> Clearly, the organization must have a connection to the gas and/or electricity network. An important requirement is that the organization must not be an organization in the field of sports, education or health or a public law company) as these entities are compensated for the energy tax through a direct subsidy. The activities of social benefit organizations must be performed by volunteers in order to qualify for the exemption.

**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:**

- Articles (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?

As of 2008, the PBE requirements for most non-resident entities are the same as for resident entities. Entities that meet all requirements can be registered as a public benefit entity without any additional requirements if these are resident in the Kingdom of the Netherlands (i.e. the Netherlands and the Caribbean Islands, Aruba, Curaçao and the Dutch part of Saint-Martin) another EU member state or a state designated by the Ministry of Finance.<sup>12</sup> Designated states are all states with which the Netherlands has concluded some kind of agreement or agreements (e.g. a bilateral tax treaty, the Convention on Mutual Administrative Assistance in Tax Matters, or a Tax Information Exchange Agreement) to exchange documents, information and data carriers concerning the personal income tax, corporate income tax and the gift and inheritance tax.

Entities which are not resident in the Kingdom of the Netherlands, another EU member state or a designated state can still obtain the PBE-status if these meet additional requirements.<sup>13</sup> Such entities must, on a yearly basis, provide the Dutch tax authorities with information based on which the tax authorities can decide whether the PBE-requirements are met. The entity must prove that the information provided gives a true and fair view of the actual situation, for example by an auditors' report.

The tax authorities require foreign entities to attach certain documents to their application for the Dutch PBE status. In this respect the application procedure for foreign PBEs differs from the procedure for resident PBEs which do not have to attach documents to their application, but only

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<sup>11</sup> Article 69 Act on Environmental Taxes (*Wet belastingen op milieugrondslag*).

<sup>12</sup> Article 5b AWR.

<sup>13</sup> Article 5b AWR.

have to provide these upon request. Furthermore, unlike the application form for resident entities, the application form for non-resident entities is not posted on the website of the tax authorities. These procedural differences are not made in legislation but are introduced by the tax authorities. Therefore, the documents which have to be provided might vary depending on the moment the application is filed and maybe even depending on the tax inspector handling the application as it is not clear whether there is a standard form for the application of foreign charities. For two applications which Allen & Overy filed in autumn 2012, the following documents had to be attached (even though there were only three months between these two applications, there was a difference in the documents which had to be attached):

- the articles. If these are not in English, German or Dutch, a translation must be provided.
- a copy of a statement of the tax authorities of the country of residence and a copy of the registration with the Chamber of Commerce in the resident country. This requirement is based on the way Dutch foundations are registered. This may – of course – differ very much from how this is done in other countries. For example, not all countries require a tax registration of charities. In practice, the tax authorities accept other proof of registration if the procedure in the other country is explained.
- a copy of the most recent accounts.
- a list with names and addresses of the board members.
- a copy of the passport of the person filing the request.
- a copy of the civil law regulations on which the incorporation of the entity was based (this was only required on one occasion, in which a link to the website on which the legislation was placed, sufficed).

The form only requires a translation of the articles if these are not in English, German or Dutch. As all charities for which Allen & Overy has filed an application met these language requirements, we do not know whether translations of the other documents are requested as well if these are in other languages than English, German or Dutch.

**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?**

The Netherlands only has a dividend withholding tax. If the dividend would be exempt under the participation exemption in the corporate income tax or if the entity is resident in an EU or EEA member state and the participation exemption would apply had it been resident in the Netherlands, no dividend withholding tax has to be withheld. If the entity is resident in the Netherlands and is exempt from corporate income tax, or if it is an EU or EEA resident but had been exempt had it been resident in the Netherlands, the entity can request a refund of dividend withholding tax. Furthermore, under some double tax treaties charities might be specifically addressed (for example, the Netherlands-US tax treaty).

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

**1. System of tax credit<sup>14</sup> or tax deduction<sup>15</sup>?**

Tax deduction.

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<sup>14</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>15</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?

The personal income tax distinguishes between periodic gifts and other gifts. Periodic gifts are gifts which the donor is, by notarial gift deed (as of 2014 it will also be possible to use a private deed), obliged to pay annually during at least five years while he is alive.<sup>16</sup> These gifts are fully deductible without a threshold and up to 100% of the income of a certain year. If the periodic gift exceeds the income of a certain year, the remainder can be deducted in a following year. All other gifts taken together in a year are deductible up to 10% of the gross income.<sup>17</sup> No deduction is possible for the total of other gifts below the highest of 1% of the gross income or € 60.

From 2012-2017 gifts to cultural entities can be taken into account for 125%, provided the European Commission deems this multiplier compatible state aid.<sup>18</sup> For example, if a person gives € 1000 to a cultural entity, he can deduct € 1250. If he is in the top tax bracket of 52% (which is already reached at an income of over € 56,000), the tax benefit is € 650. The person only pays 35% of the gift. The maximum additional deduction is € 1250. This means that the maximum effect of the multiplier is reached if the total amount of gifts to cultural PBEs is € 5000 per year, resulting in a deduction of € 6250. This temporal multiplier is introduced to help cultural PBEs.

### b) Which assets qualify for tax deductibility?

In principle all assets can qualify.

## 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?

Expenditures with a business reason are, as a basic principle, fully deductible in the Netherlands. In general, sponsoring and corporate patronage should be deductible as regular business costs. Companies will almost always have a business reason for supporting PBEs, it can just be improving the corporate image both internally and externally.

However, the Dutch corporate income tax does provide for a possibility to deduct gifts. Gifts are deductible up to a maximum of 50% of the profit with a maximum of € 100,000.<sup>19</sup>

From 2012-2017 gifts to cultural entities can be taken into account for 150%. However, the maximum additional deduction is € 5000.<sup>20</sup>

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<sup>16</sup> Article 6.34 and 6.38 IB.

<sup>17</sup> Article 6.35 and 6.39 IB.

<sup>18</sup> Article 6.39a IB, mid July 2012 the European Commission had not yet given its permission.

<sup>19</sup> Article 16 Vpb.

<sup>20</sup> Article 16 Vpb.

b) Which assets qualify for tax deductibility?

In principle all assets can qualify.

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

Yes.

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

No.

**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?)?

The donation must be given to a PBE registered in the Netherlands. For periodic gifts a notarial deed or – as of 2014 – a private deed must be available and for other gifts written proof of the gifts (such as bank statements) should be available. Only upon request of the tax authorities such information must be provided.

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

No.

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?)?

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

##### **1. Individuals**

Gifts received from a PBE registered in the Netherlands are exempt from gift and inheritance tax. Gifts received from social benefit entities are not exempt.

##### **2. Legal entities**

Gifts received from a PBE registered in the Netherlands are exempt from gift and inheritance tax. Gifts received from social benefit entities are not exempt.

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

Dutch gift and inheritance tax is levied only if the donor or deceased is resident of the Netherlands. The nationality or residence of the beneficiary is irrelevant for Dutch gift and inheritance tax purposes.

#### **V. Gift and inheritance 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)?**

Dutch gift and inheritance tax is levied from the beneficiary. If the beneficiary is a PBE registered in the Netherlands no gift and inheritance tax is due.

##### **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?**

If the beneficiary is a PBE registered in the Netherlands no gift and inheritance tax is due. If the PBE is not registered in the Netherlands the regular rates for third parties apply, in 2013 30% for gifts up to 118,254 and 40% for the remainder.

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

If the beneficiary is a PBE registered in the Netherlands no gift and inheritance tax is due. If the PBO is not registered in the Netherlands the regular rates for third parties apply, in 2013 30% for gifts up to 118,254 and 40% for the remainder. A general exemption of EUR 2057 (2013) applies.

##### **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?**

Yes, the deceased's descendants (children or – if the children are already deceased – their children) are entitled to inherit a so called 'legitimate' or 'reserved' portion. This amounts to half of the value of the legal inheritance of the heir.

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

If the non-resident public benefit foundation is a PBE registered in the Netherlands, the legacy is exempt, Otherwise the regular rates for third parties apply, in 2013 30% for legacies up to 118,254 and 40% for the remainder. A general exemption of EUR 2057 (2013) applies.

## **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?**

As of 2008, in reaction to the Stauffer case and subsequent case law of the Dutch Supreme Court, the PBE requirements for most non-resident entities are the same as for resident entities.

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

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

No.

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?

n/a

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?

No.

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

More transparency is required of PBEs.

## **4. Public fundraising**

### **Useful contacts**

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Ineke Koele, in: Clive Cutbill, Alison Paines, and Murray Hallam (ed), *International Charitable Giving*, Oxford University Press 2012.

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

Please list here the links to relevant national laws where these are available online

All national legislation can be found on [www.wetten.nl](http://www.wetten.nl) (in Dutch only).



### **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.