

3. BELGIUM

3.1. Civil Law Framework

General

Foundations were introduced with the law of June 1921 under the term „institution for public utility“ exclusively for philanthropic, religious, scientific, artistic or educational purposes within the framework of the Association and Foundation Act (*Vereins- und Stiftungsgesetz - VStG*). The institution of the private foundation was not introduced until 2003.

Since 1921, 110,000 legal persons were formed under the Association and Foundation Act, out of which roughly 300 were foundations for public utility. More than one half of these were founded after 1980. The remaining legal persons are non-profit associations; current statistics on private foundations are not available⁵.

The entire (book) value in the foundations amounts to approximately EUR 550,000,000, with 85% belonging to the top 15 foundations⁶. Expenses for subsidies, own programs and administration amounted to a total of approximately EUR 150,000,000 in 2001. 92% of total expenses are attributable to the top 15 foundations.

Establishment

The foundation can be established by a natural or legal person. Due to the objective prohibition of dividend distributions, the foundation may not create any material benefit for the founder, the managing directors or a third party. Material benefits may be granted to third parties if the granting of such benefits serves the purpose pursued or if the public utility purpose⁷ is not undermined by doing so.

Belgium has stricter publication requirements than for example Liechtenstein; thus their significance is also lower. The concept of publicity serves to protect third parties, in particular the creditors of the foundation and the donors. “Large⁸ “ foundations are subject to additional

⁵ Cf. Theisinger (2006), p. 1.

⁶ Cf. Develtere et.al. (2004), p. 8.

⁷ Public utility purpose as defined by law: sustaining family members in need of provision, maintenance of an art collection, development aid for a region, preserving the family character of a business or the integrity of an inheritance.

⁸ Large foundations are foundations with an average of 50 employees and that realise an income of more than EUR 6,250,000 and a net annual result of EUR 3,125,000.

control by means of an external audit. Private foundations with assets of more than EUR 25,000 must deposit their financial statements at the Belgian national bank.

Dissolution of a foundation is conducted under the control of the court; this rule intends to prevent the misuse of private foundations for personal interests. Dissolution of a foundation occurs by court decision and as a result of an application filed by the founder, its successor, the managing director or the public prosecutor's office pursuant to Article 39 of the Association and Foundation Act, irregardless of whether the termination was originally set forth to take place upon the expiration of a specified period of time or upon occurrence of specified circumstances (e.g. fulfilment of the purpose)⁹.

Belgian law does not explicitly use the term of the "foundation", but the corresponding public constructions fulfil the characteristics of a foundation. A foundation is an institutionalised, private (even if it is in public ownership) and self-organised entity with legal personality that pursues non-profit purposes; it can distribute funds for specific purposes to the benefit of the public.

Prior to the establishment of the foundation, the government verifies whether requirements concerning the purpose of the foundation are met. A capital paid in of EUR 1 million is not a statutory requirement but is required by the Ministry of Justice. Usually, the registration of the foundation and the preparation and deposit of the foundation documents are made by a notary. The costs for publication amounted to EUR 139.03 in 2007; moreover, a one-time fee in the amount of EUR 25 has to be paid for the registration. For every foundation, a file which is forwarded to the Company Registry is opened at the Commercial Court. If real estate is entered into the foundation, this transaction must be entered in the Mortgage Registry; for this proceeding, a fee is charged. When these steps have been completed, the creation is published in the Belgian Official and Law Gazette.

Since the amendment of the applicable laws on 1 July 2003 the Belgian legislation recognises private foundations. Previously, only what was called the "institution for public utility" (now "public utility foundation") existed. Pursuant to Article 27 Association and Foundation Act, a public utility foundation is characterised by philanthropic, philosophical, religious, scientific, artistic, educational or cultural goals. A foundation is not permitted to make profit for itself although engagement in economic activity is not prohibited if the profits largely serve the non-profit goal of the original foundation purpose. The main motive for allowing the establishment of private foundations was, on the one hand, to achieve certification of securities (analogous to the Dutch "administrative office")¹⁰, and, on the other hand, to facilitate provision for families with disabled children. When the foundation is set up, the principle according to which the foundation assets must not serve the interests of the founder is to be observed.

⁹ Cf. Theisinger (2006), p. 5.

¹⁰ Cf. *ibid*, p. 13.

The founder has no influence on the administration of the assets nor a share in the foundation assets, but receives a right of (co-)determination. Provisions can also be made to ensure that after achievement of the foundation purpose, part or all of the total assets go back to the founder(s). In accordance with Article 28 of the Association and Foundation Act, the private foundation must have its registered seat in Belgium. If the registered seat is moved abroad, this automatically results in the foundation being wound up if the legal system of the country into which the foundation's registered seat is to be moved does permit such a transfer.

The deposit of assets with the foundation is considered a gift if no or only minor consideration is given. In this context, it has to be noted that under the law of succession, gifts may have considerable consequences with regard to the bequest.

The foundation's statutes must already contain provisions for the use of the foundation assets upon dissolution. In any case, the assets must serve a purpose which is not related to personal interest. In case that the donor is to receive the originally endowed asset upon achievement of the purpose, this must also be stated in the foundation statutes.

Disclosure Requirements

In general, the strict reporting requirements in accordance with Article 32 Association and Foundation Act must be adhered to. The obligation to keep books and to prepare annual financial statements depends on the size of the foundation. If two of the following thresholds are exceeded, the strict regulations with regard to accountability and control mechanisms are applicable:

- Annual average of 5 employees
- total income of more than EUR 25,000
- Assets according to annual financial statement of more than EUR 1,000,000

Foundations that do not meet these requirements are subject to a simplified system. Private foundations with an income of or exceeding EUR 25,000 must deposit their balance sheets with the Belgian national bank¹¹.

Types of Foundations

▪ Foundations of public utility (instelling van openbaar nut)

This is the oldest form of foundation. It distinguishes itself from the private foundation in particular through its goal of pursuing a philanthropic, philosophical, religious, scientific, artistic, educational or cultural purpose. While supervision of public utility foundations is not obligatory, the tax authorities make inquiries into the nature of the non-profit activities and dona-

¹¹ Cf. Kocks (2007), p. 687 et seq.

tions and examine whether the major part of the income is given to charitable institutions. The stricter approval process further distinguishes this type of foundation from the private foundation.

- **The Belgian „administrative office“**

This private foundation for the certification of securities was created on the basis of the Dutch model.¹² It enables ownership rights to securities to be divided with the result that the assets and membership rights to one and the same security are in multiple hands. This so-called administrative office is involved in the process and issues the certificates. Thus, the securities are uniformly managed and offer management a protection mechanism against hostile company takeovers. This type of private foundation has been particularly criticised because the requirement of an ideal purpose is not met with the administrative office, which is operated according to economic principles.

- **Foundations not subject to the Association and Foundation Act**

This category includes foundations for the benefit of public education with the main task of granting scholarships. University foundations or foundations under administrative law are also included in this group.

In Belgium, foundations with an artistic, religious or scientific purposes („public utility foundations“) cannot be established unless their capital amounts to EUR 1 million. Private foundations do not have to meet this minimum capital requirement, nor are they subject to the strict supervision provisions that exist for public foundations.¹³

3.2. Tax Treatment of Foundations

3.2.1. Taxation upon establishment

Registration fee

A one-time fee of EUR 25 is charged upon registration. Taxation of the transfer of assets to foundations depends on the nature of the transaction from a legal perspective.

- An acquisition tax of 10% in Flanders and 12.5% in Wallonia and Brussels Capital is levied on **real estate transfers without consideration**. The tax is based on the purchase price. The transfer of movable goods against consideration is not taxable. The transfer of real properties located outside Belgium is subject to the flat fee of EUR 25.

¹² Cf. *ibid*, p. 690.

¹³ Cf. <http://www.efc.be/cgi-bin/articlepublisher.pl?filename=BG-SE--G-3.html>

- **Deposits against consideration**, such as the transfer of shares to a foundation – “administrative office” – are subject to a one-time fee of EUR 25. The consideration of the donors consists in the certificates issued by the foundation.
- In the case of **deposits without consideration**, clarification must be made on whether or not the transfer is a gift. In contrast to a gift, there is no “donative intent” (*animus donandi*) in connection with a deposit without consideration on the part of the donor. In the regions of Wallonia and Brussels Capital, a general fee of EUR 25 is charged on the deposit without consideration of both movable and immovable goods.

Gift tax

The gift tax makes a clear distinction between the donor’s assets and the assets of the foundation¹⁴. The foundation is thus liable for the payment of the gift tax. In Flanders, the tax rate for gifts to private foundations is 7%. Gifts from an association or a public utility foundation are charged with a flat fee of EUR 100.

Gifts to public utility foundations are taxed at 6.6% in Wallonia and Brussels Capital and at 7% in Flanders (Article 140 of the Belgian Transaction Tax Act). It is possible to avoid the gift tax by means of certifying the gift abroad, making hand to hand gifts or including a retraction clause in the foundation statutes when establishing the foundation. Such a clause ensures that upon achieving the foundation’s purpose, the assets go back to the donor.¹⁵

Pursuant to Article 33 Association and Foundation Act, any gift of more than EUR 100,000 must be approved by royal resolution. This amount is adjusted annually. The general formal requirements are also valid for gifts.

The donor may deduct gifts of a value exceeding EUR 25 from his or her taxable income if the foundation serves a purpose that falls in the scope of Article 110 in connection with Article 104 of the Belgian Income Tax Act. This is for instance the case for foundations with cultural activities or serving the purpose of scientific research¹⁶.

Inheritance tax

Legacies of foundations are subject to inheritance tax, which is based on the value and the composition of the bequest. As a rule, the tax rate for third parties is applies. In Flanders, a tax rate of 8.8% is levied upon legacies of public utility foundations and private foundations according to Article 59 of the Belgian Inheritance Tax Law.

¹⁴ Cf. *ibid*, p 16.

¹⁵ Cf. *ibid*, p. 16.

¹⁶ Cf. Kocks (2007), p 688.

Legal persons engaged in a non-profit activity, legal estates and associations are subject to an annual tax rate of 0.17% in lieu of inheritance tax if their assets amount to more than EUR 25,000.

In connection with the establishment of a foundation upon death, the inheritance regulations of “reduction” and “restitution/allowance” are to be considered. Endowments may not amount to more than fifty percent of the assets if the endower leaves behind one child; one third if the endower leaves behind two children and one fourth in the case of three or more children. Relating to spouses endowments may correspond to the full amount to the assets.

3.2.2. Current taxation

Taxation of the Foundation

Pursuant to Article 150, an annual amount of 0.17% is to be paid, as a tax compensation for the inheritance tax, on the entire property of the foundation (with the exception of securities that the foundation holds in own trading companies). In accordance with Article 220 of the Belgian Income Tax Act, the foundation is subject to taxation for legal persons with its income. The tax assessment basis is composed of the following forms of income:

- **Income from immoveable assets**

if the real property is used commercially, the net rental is to be taxed on the amount that exceeds the indexed cadastral income. The net rental corresponds to the gross rental less the rental costs (flat rate of 40% for developed properties or 10% for non-developed properties). The applicable tax rate amounts to 20 %¹⁷. If the real property is not used commercially, only land and building tax is levied.

- **Income from moveable assets and capital**

is subject to withholding tax at source which has the effect of final taxation for the recipient (15% or 25% depending on the type of income).

- **Income from „diverse sources“ and „non justified payments“**

This includes the added value realized in the sale of properties, which is taxed at a rate of 16.5% or 33%. A tax of 309% may be levied for payments the recipients of which are not disclosed to the financial authorities; these payments also include unjustified salaries and remuneration payments.

Taxation of the administrative office

In accordance with Article 181 of the Income Tax Act, different rules may apply to foundations that are operated as administrative offices; these are treated as legal persons for tax

¹⁷ Cf. *ibid*, p. 696

purposes if certain conditions are met. In this case, the foundation must comply with the regulations on certification and pursue its activity without the aim of making profit; moreover, the dividends must be directly assigned to the certificate holders based on the size of their shares.¹⁸

Application of corporate taxation

In the case of extensive commercial activity of the foundation, its income may be subject to corporate tax of 33.99% applicable to domestic companies.

Certification

Dividends held in the foundation assets in the framework of the activity of securities certification are not included in the tax assessment base as these are directly attributed to the certificate holders in accordance with the principal of fiscal transparency. In this case, the issuer of the certificates pays the final withholding tax at source levied on the dividends directly to the tax authorities.

For certificate holders, the income from the disposal of certificates is tax-exempt (in the case of companies). The same applies to private persons; however, under certain conditions, their income from the disposal of certificates may be subject to taxation under the category of "Miscellaneous income".

Income from certificates is considered as dividends at the level of a company; as a result of arrangements for parent and subsidiary companies, it is tax-exempt to the extent of 95%.

3.2.3. Dissolution

Dissolution of a foundation occurs upon application by a founder or its legal successor, the managing director, the public prosecutor's office in accordance with Article 39 Association and Foundation Act after a court decision, regardless of whether or not the termination was originally provided for upon expiration of a period of time or occurrence of certain circumstances (e.g. fulfilment of the purpose).¹⁹

The dissolution occurs when the conditions defined in the statutes are met or through court decision if the foundation is no longer able to perform its activities. The court appoints liquidators to distribute the assets. If this is not possible, the government is responsible for undertaking a distribution that comes closest to the original purpose of the foundation. However, the statutes should contain a provision which precisely defines the proceedings in the event of dissolution.

¹⁸ Cf. *ibid*, p. 697.

¹⁹ Cf. *ibid*, p. 692 et seq.

The distribution of assets to the donors results in no taxes levied; it is merely a form of ownership transfer subject to a general fee of EUR 25. If the foundation is subject to corporate tax, a tax of 10% will be levied on reserves paid out to donors upon dissolution.

3.3. International Context

The Belgian International Private Law is based on the company seat theory, which means that the legal capacity of a foundation is judged in accordance with the law of the country in which the registered office is located. In determining which domestic law is applicable, not the registered seat set out in the statutes is relevant, but the place where the business activity is actually performed. A foundation relocated from abroad to Belgium is strictly subject to Belgian law.

In Belgium, abroad-based foundations are subject to the same reporting regulations and supervision as foundations established under Belgian law²⁰. Tax advantages are listed in Article 104, which apply under the following conditions:

The beneficiary must have legal capacity under Belgian law.

The foundation may not be aimed at profit-making (neither for the benefit of the founder nor for that of its members).

The foundation must engage in special activities: scientific, cultural, environmental activities or activities for the benefit of developing countries, disabled, elderly or needy people or victims of natural disasters.

The general management costs or administrative costs may not exceed 20% of the total foundation resources. Public approval is granted for 3 years at a time.

3.4. Conclusion

Generally, it can be said that the private foundation in Belgium is not yet developed very far. The statutory regulations in the Association and Foundation Act are not always precise and clear.²¹ (For Kocks&Partners2006, it was not possible to comprehensively evaluate the actual importance of private foundations).

- Given to the strict reporting and supervisory regulations and the right of third parties to inspect the files of foundations, Belgian foundation law does not offer the same global conditions as Liechtenstein. Private foundations primarily serve the certification of securities.

²⁰ Cf. *ibid*, p. 694.

²¹ Cf. Theisinger (2006), p. 19.

- In the event of a transferral of assets to a foundation, a creditor may engage in oblique or indirect action (*action oblique / indirekte vordering*), which allows a creditor to exert, in the name of its debtor, the rights of the debtor if the debtor refuses to exert them.
- In general no major tax advantages for establishing a foundation exist.
- While earnings realised by public foundations are tax-exempt, capital income and gains from the disposal of companies or shareholdings are subject to taxation.
- Individual donors may deduct their contributions up to a maximum of 10% of their total net income or, in absolute terms, up to a maximum of EUR 250,000. Corporate donors may deduct a maximum of 5% of their gross income but may not exceed the maximum limit of EUR 500,000.
- Limitations and requirements/preconditions
According to applicable law, the government must supervise all public utility foundations with assets exceeding EUR 10,000. A draft law suggests that this amount be increased to EUR 100,000.

The government supervision includes:

- Approval of statutes
- Annual financial statements and budgets must be published (in the Belgian State Gazette)
- Endowments exceeding EUR 10,000 are subject to approval by the government
- The government has the right to determine whether a foundation still fulfils its purpose
- The Belgian Ministries of Finance and Justice control and/or supervise the foundations and may apply sanctions (including their liquidation).

In Belgium, there is a strong protection of creditors and heirs in connection with the transfer of the donor's assets to a foundation. There are no mixed foundations (foundations pursuing a purpose other than a public utility purpose to an extent of more than 50%).