

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>