

5. FRANCE

5.1. General

In international comparison, the number of foundations is relatively low in France. Moreover, these foundations only have a comparatively small amount of assets at their disposition. Among the roughly 1,200 existing foundations, approx. 500 are foundations for public utility (*fondation reconnue d'utilité publique*), 70 are business foundations (*foundation d'entreprise*) and 1,530 are foundations operating under the aegis of other foundations (*fondation abritée par une fondation reconnue d'utilité publique*); in contrast, there are approx. 800,000 associations in France. The small number of foundations is explained, among other things, by the tax system which provides only few incentives for the establishment of a foundation. The institution of the foundation was not designed for the purpose of asset management²².

Foundations are governed by the Act 87-571 of 23 July 1987 on the development of patronage (*Loi du 23 juillet 1987 sur le développement du mécénat*), which was recently changed by the Act 2003-709 from 1 August 2003 as well as by the related application decree 91-1005 from 30 September 1991.

5.2. Establishment

If explicitly stated, the following provisions refer to public utility foundations. Foundations can be established by natural full age persons or by one or several legal persons, either by means of an endowment or a transfer of assets to the foundation. In most cases, an association is set up in the first place, which is then replaced by a foundation. Also foreign natural and legal persons can set up a foundation in France, unless otherwise provided by their national law.

According to French law, the founder has to pursue a particular purpose when endowing the foundation with assets. This purpose may be to directly realise income or to use the funds for a specific aim. Moreover, the founder is obliged to provide sufficient funds to effectively pursue the purpose of the foundation.

The public utility status and the assets of the foundation are subject to approval by the state regulatory authorities. The control of the foundation is in principle the responsibility of the Ministry of the Interior, which is assisted by other ministries concerned.

²² Cf. HELLIO et al (2007), p. 885.

Endowments *inter vivos* are effected by means of a gift. To become effective, the gift must be certified by a notary according to the general rules governing gifts.

If a foundation is established *causa mortis*, the testator bequeaths particular assets to the foundation to be established for public utility purposes. The assets, rights and funds are transferred to the foundation exclusively for public utility purposes and without the aim of profit-making²³. The definition of “public utility” is very broad and includes philanthropic, educational, scientific, social, humanitarian, sport- or family-related or environmental purposes. However, when the purpose of the foundation benefits solely the family of the founder or where it is political or religious in nature (in the sense of serving a political party or religion), it can no longer be deemed a public utility purpose.

The organisational structure of public utility foundations consists of an administrative board (*conseil d'administration*) or a supervisory board (*conseil de surveillance*) working together with a board of directors (*directoire*). The foundation statutes need to be approved by the Ministry of the Interior. In addition to these bodies, a foundation needs to have sufficient funds to pursue its purpose. The recognition of the foundation is established by means of a decree by the *Conseil d'Etat* and published in the *Journal Officiel*²⁴.

5.3. Types of foundations

5.3.1. Public Utility foundation (fondation reconnue d'utilité publique)

Given their public utility, these foundations may claim public subsidies. Subject to approval by the regulatory authorities, the foundation can receive endowments as long as these are made without consideration. The foundation becomes a legal person upon publication of its establishment.

In principle, foundations benefit from the same tax advantages as organisations with non-profit purpose or public utility associations.

Private persons may deduct 66% of their donations to public utility foundations from income tax, but not more than 20% of their taxable income. Companies can deduct 60% of their donations, but not more than 5‰ of their revenues. Excess amounts can be carried forward for five financial years, if applicable.

To the French tax authorities, not the registered seat, but the place where the foundation carries out its activities is relevant. These have to be performed in France, at least partly. The same rule applies to donations to foundations based abroad that carry out a small part of their activities in favour of a limited number of persons in France. Here, the tax deductibility depends on whether the foundation is recognised as a public utility foundation under the

²³ Cf. *ibid*, p. 888.

²⁴ Cf. *ibid*. p. 897 et seq.

rules of the country where it is based; moreover, its activities have to be carried out in France (at least partly). This poses a problem with regard to EU law, because donations to foundations based in another European Union Member State receive a less favourable tax treatment than donations to foundations carrying out activities in France.

Under French tax law a usufructuary is subject to wealth tax on the total of his or her assets. A temporary transfer of a usufruct to an institution serving the common interest results in a reduction of the wealth tax payable, because the value of the property can be deducted from the assessment basis for the wealth tax during the period for which the usufruct is transferred.

Heirs and donees may endow a public utility association, a public utility foundation, the State or regional and local authorities with a part of the assets received by them. The value of the assets donated is not subject to estate tax. However, a gift tax deduction cannot be cumulated with an income tax deduction. As regards donations to foundations based abroad, an application for a tax exemption can be made at the Ministry of Finance provided that such exemption is laid down in a double taxation agreement²⁵.

The assets of the foundation are subject to a reduced corporate tax rate. Pursuant to the Finance Act 2005, income referred to in Art. 219 realised by public utility foundations is entirely exempt from corporate tax. To be eligible for tax exemption, the foundation must pursue a non-profit purpose. Income from rent and lease, agriculture and forestry or securities is subject to a tax rate of 10% instead of the standard rate of 33%, whereas income realised in the framework of a business activity is subject to the standard corporate tax rate. Public utility foundations benefit from the reduced corporate tax rate and a tax allowance in the amount of EUR 50,000.

Income from a business activity poses some problems from a tax law perspective even if the business activity is carried out in pursuit of the foundation purpose, as it can result in a change in the legal status of the foundation. Foundations with income from a business activity are in principle subject to trade tax, corporate income tax and value-added tax. They may claim a tax allowance in the amount of EUR 60,000 provided that the foundation is managed without consideration and that the non-business activity clearly outweighs the business activity.

Gifts and legacies for the benefit of a foundation, with the exception of gifts from hand to hand (*don manuel*), are subject to a register fee in the amount of 35% for the portion of the gift or legacy under and up to EUR 23,000; any exceeding amount is subject to a 45% register fee.

²⁵ Cf. European Tax Handbook (2006), p. 251 et seq.

5.3.2. Particular types of foundations

The business foundation (*fondation d'entreprise*)

By their nature, business foundations are very similar to public utility foundations: They also pursue a public utility purpose and do not intend to make any profits; moreover, endowments to a business foundation are also irrevocable. The duration of a business foundation is limited at the outset. However, it must be set up for a minimum period of five years subsequently extendable for at least another three years. Business foundations only pursue short- and medium-term objectives.

They are established by one or several companies which endow the foundation with an amount defined in the foundation statutes. The minimum capital resources of a foundation are EUR 150,000. Any adjustments to the specified amounts require a change in the foundation statutes and, as a result, an approval by the relevant public authority. The foundation acquires its legal capacity upon the publication of its establishment in the *Journal Officiel*. The business foundation is not allowed to receive any gifts unless these gifts are made by the staff of a company which has co-founded the foundation²⁶.

The Act 87-571 stipulates in Art. 19-8 which sources of financing are permissible. Permissible sources are in particular endowments by the founders, subsidies by the state and regional or local authorities, remunerations for services provided or income related to these services (such as interest received).

Business foundations are dissolved either as a result of time lapse or a unanimous decision of the founders (provided that the endowments guaranteed at the establishment were effectively made). The state authorities may also revoke their approval.

In principle, business foundations are subject to the same tax rules as public utility foundations. Upon the establishment of a foundation, companies may deduct 60% of their endowments to the foundation; however, the total amount deducted must not exceed 5‰ of the company revenues. Payments by the company staff are tax-deductible to the extent of 66%; the deductible amount is limited to 20% of their taxable income pursuant to Art. 200 *Code Général des Impôts*.

As regards the taxation of foundation assets, business foundations with a non-profit purpose are subject to a reduced corporate tax rate of 25%; the corporate tax rate for income from rent and lease, agriculture and forestry and securities is only 10%.

²⁶ Cf. Hellio et al (2007), p. 901.

Foundations operating under the aegis of other foundations (*fondation sous égide*)

In its Art. 5, the law on the development of patronage sets forth the advantages granted in the event of the establishment of a trust structure comparable to that of the Anglo-Saxon trust. Pursuant to this law, foundations pursuing public utility purposes may receive endowments to support another foundation (*fondation sous égide*) having the same purpose but which are not recognised as serving the public interest. In this case, the funds of the foundation are administered by another institution (*fondation abritante*).

Foundation with special status (*fondation à statut particulier*)

Such as the business foundation, this type of foundation is a legal person governed by private law and subject to the provisions on public utility foundations. The *fondation du patrimoine* is one example for this foundation.

5.4. Dissolution

If a foundation is endowed with irrevocable funds, it is considered as established on a permanent basis. In this case, the founders cannot reserve the right to reclaim their endowments in the event of dissolution. Liquidation proceeds may not be distributed among the founders, if applicable²⁷.

Public utility foundations cannot change their legal form (in particular, they cannot be transformed into a public utility association).

5.5. The International context

The foundation is deemed to be based in the country where it has its registered seat. The registered seat may in principle be transferred to another country if an adequate agreement exists between this country and France.

²⁷ Cf. *ibid*, p. 903.