

7.2. Establishment

Pursuant to Art 27, anyone may use his assets, either in full or in part, to establish a foundation through a deed or testament and upon approval by Grand-Ducal Decree³⁷. The certified declaration of foundation establishment is presented to the Ministry of Justice for approval. Upon receipt of the approval, the establishment is published in the Luxembourgian Official Gazette, the *Mémorial, Recueil des Sociétés et Associations*, and is also entered in the commercial and company register. Moreover, the members of the administrative board must present and publish the annual financial statements and a budget.

The administrative board constitutes the only statutory body of a foundation. The founders may determine the content of the foundation statutes. The foundation statutes include the use of the foundation's assets in the event of dissolution. The Foundation Act does not stipulate a minimum amount of capital; however, in general practice a minimum initial capital of EUR 25,000 is required. If the foundation statutes do not state otherwise, the foundation is established for an indeterminate period of time.

7.3. Existing foundation

The exclusion of the aim to make profit does not mean that the foundation may not own any funds. Funds are required in particular for the pursuit of the set foundation purpose; also ancillary economic activity is permitted as a rule if the profits are exclusively used for the foundation purpose.³⁸ The foundation Act explicitly limits the ownership of real property; foundations may only own land or buildings insofar as these are required to achieve the foundation purpose.

Gifts may be made to a foundation during a person's lifetime (*inter vivos*) or upon death (*causa mortis*).

The Tax Act has not taken up the definition of "foundation" included in the Foundation Act. Art. 12 and 25 of the Corporation Tax Act stipulate that contributions in cash and in kind in the framework of the establishment of a foundation are exempt both from capital tax as well as from the registration fee. This is only valid in the case of legally recognised foundations in accordance with the Foundation Act.

Foundations are in principle liable to corporate income tax, wealth tax and trade income tax. Corporate tax exemptions exist for foundations directly performing church-related, charitable or public utility activities. The same requirements for exemption are also valid for wealth tax and trade income tax. As a general rule, only the income earned on commercial activity or assets is taxed, while the foundation in itself remains tax-exempt. This partial taxation only

³⁷ Cf. *ibid.*, p 1142.

³⁸ Cf. *ibid.*, p. 1147.

applies if that the commercial activity is performed as on an ancillary basis; this means that the profits related to this activity may only be used to pursue the foundation purpose.

Thus, income from a business activity is subject to income taxation. The profit is determined by means of comparing the assets of a company in two subsequent years on the basis of the annual financial statements. Depreciations, amortisations and write-offs and provisions as well as operating expenses are deductible. Contributions out of tax-exempt private assets are deemed part of the foundation capital; however, the profit for tax purposes is reduced by the amount of such deposits. Conversely, so-called private withdrawals are to be added to the profits for tax purposes. Contributions as well as private withdrawals are to be stated with their current value on the respective date.

The assets used for the business activity are subject to wealth tax of 0.5%. For tax purposes, donations to foundations are treated as income (as described above). As a general rule, donations, gifts and contributions to foundations may not be deducted from taxable income. Pursuant to Art 109 Income Tax Act, however, these may be considered eligible for deduction as special expenses within the meaning of Art 112 Income Tax Act. Certified registered donations are subject to a register entry fee in the amount of 6 percent.

Payments by a foundation to a third party are subject to gift tax³⁹.

7.4. Alternatives to the foundation

There are no special foundation forms in Luxembourg. Similar legal institutions exist, however, namely trusts and the Luxembourgian fiduciary contract (*contrat fiduciaire*). These legal entities may, in addition to public utility purposes, also serve purely financial or economic interests; thus, they are similar to a private law foundation, at least with regard to the purpose. Luxembourg has approved their legal recognition with its law of 27 July 2003.

In recognising these alternative forms, Luxembourg recognises in particular the dichotomy of the basis of ownership. The beneficiary (in most cases the founder of the trust) is granted rights which are similar to ownership rights; these rights stand independently and in addition to the ownership rights transferred to the trustee (the administrator of the trust). Thus, the beneficiary may for instance claim that a third person (with no ownership rights) or, in the event of solvency, the liquidator return the trust property to him. From a legal perspective, the trustee is treated as an owner; the trust assets and the private assets are considered as two separated properties.

In contrast to the trust, the trustor forfeits his basis of ownership in full in the case of a Luxembourgian fiduciary contract. The law exclusively applies to fiduciary contracts in which the

³⁹ Cf. Fort (2007), p. 36 et seq.