

Luxembourg

This document summarises information provided by national experts as to the tax treatment by the relevant EU Member State of public-benefit foundations and their donors both domestically and in cross-border scenarios. The information was collected for a joint project of the Transnational Giving Europe network (TGE) and the European Foundation Centre (EFC), “Taxation of cross-border philanthropy in Europe after Persche and Stauffer – from landlock to free movement?”, which resulted in a comparative study to be downloaded in full, [here](#). Following the ground-breaking decisions of the European Court of Justice, “Stauffer” (ECJ C-386/04) and “Persche” (ECJ C-381/07), most Member States have adapted their laws in order to comply with provisions of the Treaty on the Functioning of the European Union. The project mapped relevant laws and procedures across the European Union: Does a donor giving to a public-benefit organisation in another EU Member State obtain the same tax reliefs as they would get if they donated to a local organisation? What do foreign EU based public-benefit foundations need to do to have their public-benefit status recognised by foreign tax authorities? Are the procedures in place adequate and are they clear for users? How close are we to genuine free movement for philanthropy? And what steps must be taken to bring us closer?

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To receive a hard copy of the full study or for further information, please contact: legal@efc.be.

1. Persche: A donor resident in Luxembourg donates to a public-benefit foundation registered in another EU country – does the donor get a tax incentive?

1.1. Legal situation

Are there tax incentives for giving?

Luxembourg tax law foresees tax incentives for donations to public-benefit foundations. According to Article 109 and Article 112 Luxembourg Income Tax Act the donor can deduct the amount of the donation in his/her tax declaration (tax deduction) in the following way:

There is a minimum of €120 per year (*règlement grand-ducal du 18 mars 1990 portant exécution de l'article 112 alinéa 2 L.I.R.*).

The maximum ceiling is fixed at 20% of the annual total net income or at one million euro (Article 109 *alinéa 1 numéro 3 L.I.R.*).

Exceeding amounts may be carried forward for the two subsequent taxable years within the same conditions and limits.

Do the incentives apply in cross-border scenarios?

Following a recent reform in 2009 Luxembourg tax law no longer makes a distinction according to whether the recipient public-benefit foundation is resident in Luxembourg or in another EU or EEA country. However, donations to foundations based in other countries are excluded. The foreign EU or EEA based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil. Thus the Luxembourg law corresponds with the Persche decision of the ECJ by requiring a comparability test.

1.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the donor must state in his/her tax declaration that the EU or EEA based public-benefit foundation, which received his/her donation, fulfils Luxembourg tax law requirements (pursues directly and exclusively a public-benefit purpose) and is recognised as a tax exempt public-benefit organisation in its state of residence. Foreign EU/EEA based organisations are qualified to receive tax-deductible donations from a resident Luxembourg donor if it is recognised by its state of residence as a public benefit body and as such entitled to receive tax-deductible donations from residents of its state and is also tax exempt from income tax and wealth tax.

See circulaire L.I.R. n° 112/2 of 7 April 2010 (*déductibilité des dons versés à des organismes ayant leur siège dans un autre Etat et reconnus d'intérêt général selon le droit de ce dernier*), which also includes as an annex a model certificate that the recipient organisation has to fill in and sign (available in French, German and English).

The model certificate lists 4 requirements:

1. Date of establishment of the organisation in accordance of the laws of State XX
2. Directly and exclusively pursues one or more of the following nine purposes: Art, Education, Philanthropy, Worship/Religion, Science, Social issues, Sports, Tourism or Development Co-operation
3. These purposes are recognised as leading to tax incentives in the State of establishment
4. The organisation is exempt from income tax and wealth tax in its country of establishment; and resident donors would get tax incentives for donations to the organisation

http://www.impotsdirects.public.lu/legislation/legi10/Circulaire_L_I_R_n_112-2_du_7_avril_2010.pdf

The responsible Luxembourg tax authority performs the comparability test only for this specific case/request for a tax incentive by the donor. This individual decision is not kept in any register/list and may be judged differently for the same foundation by another donor's responsible local tax authority.

The donor has the burden of proof and the authority may apart from the above mentioned certificate signed by the organisation also require translated documents to prove the donation and the status of the recipient organisation, such as a receipt of the donation, the statutes of the foundation and the financial report of the recipient organisation.

1.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of Luxembourg tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public-benefit purpose (it can either be an organisation listed in Articles 112 Tax Code or recognised as being of public benefit by a special law/grand ducal decree). This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public-benefit purpose has to be exclusive. That means, there exists a non-distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and for board members only costs can be reimbursed and the administration costs must not be excessive.

2. Missionswerk/Gift and inheritance tax: Donor stipulates in their last will that a foreign EU-based public-benefit foundation should inherit a certain amount of money – is the donation subject to gift and inheritance tax?

2.1. Legal situation

Are there tax exemptions for legacies to public-benefit organisations?

A gift/legacy is taxed in Luxembourg as the state where the testator at his/her last residence.

Luxembourg tax law foresees a gift and inheritance tax. It is the heir or the recipient who have to pay the taxes.

However, there also exists a tax benefit for public benefit foundations and other public benefit organisations. According to Luxembourg tax law there will be a reduced gift tax of 4.8% and an inheritance tax of 4%.

Do the exemptions apply in cross-border scenarios?

Following a recent reform Luxembourg tax law no longer makes a distinction according to whether the recipient public-benefit foundation is resident in Luxembourg or in another EU or EEA country. However donations to foundations based in other countries are excluded. The foreign EU or EEA based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil. Thus the Luxembourg law corresponds with the Missionswerk decision of the ECJ by requiring a comparability test.

2.2. Procedures for tax incentives/the comparability test

The responsible Luxembourg tax authority (head of the competent local office of the Administration of Registration and Public Property) will perform the comparability test to assess whether the foreign EU or EEA based public benefit foundation fulfils the requirements of Luxembourg tax law. It performs the comparability test only for this specific case. This individual decision is not kept in any register/list and may be judged differently for the same foundation by another testator's responsible local tax authority. The decision can be appealed at a court.

The heir/recipient has the burden of proof and the authority may require translated documents to prove the status of the recipient organisation, such as statutes and a financial report of the recipient organisation. In case of an inheritance tax declaration, a deed is needed and the chamber of notaries may provide more information www.notariat.lu.

2.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of Luxembourg tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose (it can either be an organisation listed in Articles 112 Tax Code or recognised as being of public benefit by a special law/grand ducal decree). This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a non-distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and for board members only costs can be reimbursed and the administration costs must not be excessive.

3. Stauffer: Foreign EU-based public-benefit foundation generates income in Luxembourg – does the foreign foundation get a tax exemption?

3.1. Legal situation

A foreign-based foundation is taxed in Luxembourg as far as it generates income in Luxembourg. Examples are:

- Income generated from purpose-related economic activities (e.g. Museum which promotes the foundation's public benefit purpose (art and culture).
- Income generated from purpose-unrelated economic activities (e.g. noodle factory which just generates income that is used to promote the public-benefit purpose, but does not in itself directly promote the public-benefit purpose).
- Income generated from renting out property, fixed rates bonds, dividends

According to article 161.1.1. Luxembourg tax code foresees (partial) tax incentives for public-benefit foundations in the following cases:

Fully exempt is income generated by related economic activity, asset administration (including fixed-rate bonds and asset management)

Purpose unrelated economic activity and income from leasing our property/real estate is taxed. Public benefit organisations are not allowed to own more real estate than is needed for the pursuance of the public benefit purpose.

The present wording of the tax law gives the impression that the tax exemptions are not explicitly applicable to foreign based public benefit foundations. According to article 160 L.I.R. non-resident organisations are liable to corporate income tax in Luxembourg on behalf of their native income in the sense of article 156 L.I.R. In the light of the TFEU the Luxembourg tax law must however be interpreted in such a way that also non-resident EU based public benefit foundations and other NPOs would need to receive the same tax treatment/incentives as local tax exempt organisations if they are comparable. The foreign EU based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil. Thus the Luxembourg law has to be interpreted that it corresponds with the Stauffer decision of the ECJ by requiring a comparability test.

http://www.impotsdirects.public.lu/legislation/LIR/Loi_modifie_du_4_d_cembre_1967_concernant_l_impot_sur_le_revenu_-_texte_coordonne_au_1er_janvier_2011.pdf

3.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the EU or EEA based public-benefit foundation must state in its tax declaration that it fulfils Luxembourg tax law requirements.

The tax exempt status of public-benefit foundations is usually not decided upon for the future, meaning that the tax exempt status not is granted in a formal procedure beforehand (ex ante) but instead when dealing with the tax declaration of the foundation, the tax authority checks annually if the foundation fulfilled the requirements for tax exemption (ex post).

The responsible Luxembourg tax authority (*administration des contributions directes*) will perform the comparability test to assess whether the foreign EU or EEA based public benefit foundation fulfils the requirements of Luxembourg tax law. It performs the comparability test only for this specific case/request for a tax incentive by the foreign EU or EEA based public-benefit foundation.

This individual decision is not kept in any register/list and may be judged differently for the same foundation by another responsible local tax authority.

The foundation has the burden of proof and the authority may require translated documents to prove the foundation's status, such as statutes and a financial report of the foundation.

3.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of Luxembourg tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public-benefit purpose (it can either be an organisation listed in Articles 112 Tax Code or recognised as being of public benefit by a special law/grand ducal decree). This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public-benefit purpose has to be exclusive. That means, there exists a non-distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and for board members only costs can be reimbursed and the administration costs must not be excessive.

4. Practical information

4.1. Further resources

- www.Legilux.lu
- www.Impotsdirects.public.lu
- www.Aed.public.lu

4.2. Useful contacts

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