

CROSS-BORDER GIVING IN EUROPE AFTER PERSCHE AND STAUFFER

BELGIUM

Following the ground-breaking decisions of the European Court of Justice of “Stauffer” (ECJ C-386/04) and “Persche” (ECJ C-381/07), there is a clear momentum around the issue of tax treatment of foreign EU based public-benefit organisations and cross-border giving in the European Union. In light of this [Transnational Giving Europe](#) (TGE) and the [European Foundation Centre](#) (EFC) have launched a joint project to explore the fiscal environment for cross-border philanthropy and giving across Europe.

The cross-border giving country profiles on the TGE and EFC websites aim to provide practical information for donors, fundraisers, advisors and beneficiaries working across borders in the European Union and EEA, on the legislative changes brought into force in the wake of the Persche and Stauffer cases and their application – How have Member States reacted? How do Member States’ new rules work in practice? What are the procedures that foundations and donors need to follow in each case in order to receive non-discriminatory tax treatment and how should they pursue them? What, if any, costs are involved at each stage and for whom?

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Questionnaire for Belgium

1. Domestic giving:

1.1 Income tax deductibility/tax incentives for donors giving to a resident organisation:

- *Which Public Benefit Organisations (PBOs) qualify?*

In order to “qualify” the organization should fulfil the following conditions

a) It should carry out its activity only in the following domains

- Culture (Cultural institutions)
- Protection of monuments or sites
- Scientific research
- Protection of animals
- Protection of the environment
- Supporting victims of war
- Supporting disabled persons, elderly people, protected minors or poor people
- Supporting victims of natural disasters
- Supporting victims of major industrial disasters
- Supporting developing countries

- Supporting sustainable development
- b) It should be recognized by Royal Decree (for the first two categories of the abovementioned list) or by Ministerial Decree (for the other categories)

It should be noted that next to these categories, some public or private institutions have been individually recognized by the law:

- Universities falling under the decree June 12, 1991 on universities in the Flemish Community, or the decree of 5 September 1994 on the universities in the French Community, hospitals depending from universities, or to similar institutions of another member State of the European Economic Area;
- Royal academies, Federal Fund for Scientific research - «FFWO/FFRS », au « - Fund for Scientific research Flanders - FWO », au «Fund for Scientific research - FRS-FNRS or similar institutions of another member State of the European Economic Area;
- Public Centers of Social Action;
- The Red Cross of Belgium or any another national section of the Red Cross in another member State of the European Economic Area;
- The King Baudouin Foundation
- The European Centre for Missing & Sexually Exploited Children
- The « Palais des Beaux-Arts »
- The « Théâtre royal de la Monnaie »
- State Museums
- Communities, Regions Provinces, Communes, provided that they affect the gifts made to them to Museums or to Public Centers of Social Action depending from them

You will find more detailed information as well as a complete list through following link : <http://fiscus.fgov.be/interfaoiffr/Giften/Instellingen/inleiding.htm>

Individual donors:

- *What tax relief is provided for individual donors?*

Individual donors can benefit from an income tax reduction on the amount of their gift.

- *Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?*

There is a minimum of 40 Euro per gift. The aggregate value of the gifts cannot exceed 10% of the taxable income, with an absolute maximum of 376 350 Euro for the total of the gifts (tax year 2016).

The tax benefit will be 45% of the value of the gift, which means that the net value paid out of pocket is 55%.

- *Which assets qualify for tax deductibility?*

In principle only gifts in cash can benefit from tax reduction. The only exception to this principle concerns gifts in works of art. If the gift is made to a state museum, the Regions, the Communities (Flemish- or French -speaking Communities), the Provinces, or the Public Centres of Social Assistance (CPAS - OCMW), and provided that these bodies transfer these assets to their museums, gifts of works of art are tax deductible under certain conditions.

Corporate donors:

- *What tax relief is provided for corporate donors?*

Corporate donors can deduct their gifts from the taxable basis.

- *Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?*

There is a minimum of 40 Euro per gift. The aggregate value of the gifts cannot exceed 5% of the taxable income, with an absolute ceiling of 500 000 Euro for the total of the gifts.

For a gift of 40 Euro to a qualifying organization the effective charge is 26,41 Euro for a company which is taxed at the normal rate (33,99%)

- *Which assets qualify for tax deductibility?*

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1.2 Gift and inheritance tax/transfer tax for donors giving to a resident organisation:

- *Does gift and inheritance tax/transfer tax exist in Belgium and if yes, who has to pay the tax in the case of a donation/legacy to a public-benefit organisation (the donor or the recipient organisation)?*

Gifts and inheritance tax exist in Belgium and are organized respectively by the code of registration duties and by the code of inheritance tax.

For Brussels Region and Wallonia as far as formal donations (enacted in a notarial deed) are concerned, there is no legal provision stipulating that gift taxes should be paid by the beneficiary. The concerned parties are free to determine who will pay the duties. Since payment of the registration duties by the donor is not considered as an indirect donation, it is more interesting to have the duties paid by the donor.

In Flanders the new "Flemish Codex" stipulates that the beneficiary is the taxpayer. The doctrine concerning the new regime in Flanders estimates that if the donor pays the tax, this payment will not be considered as an indirect donation.

Informal gifts are not subject to registration duties, but the parties (donor or beneficiary) may decide afterwards to register the donation voluntarily and to pay the registration duties on it. Such possibility may be used in order to avoid inheritance tax which would be due in case the donor would die less than three years after the gift has been made (see below). The person who takes the initiative to register the deed (donor or beneficiary) should pay the duties.

As far as inheritance tax is concerned, the heirs and the legatees should pay the tax, each of them for the portion of the estate he has received. It should be noted that the testator can stipulate that a legacy to certain beneficiaries is free of inheritance taxes. In that case the heirs should pay inheritance tax on these legacies.

- *What are the tax rates? Is there a preferential system for donations and legacies to PBO's? Donations/legacies to which PBO's qualify? Is there a difference according to the region and/or the legal form of the PBO?*

There is a preferential system for donations and legacies to charities, consisting in reduced rates for donations and for legacies. As we will see below, the applicable rates depend from the Region where the donor or the testator resides. There might also be differences in the reduced rates depending from the legal form of the benefitting PBO. In some regions public benefit foundations might benefit from lower rates than private foundations or associations.

1) Donations

-Reduced rates for donations to qualifying charities

FLANDERS

For a donation made by an individual domiciled in Flanders or for a donation of real estate located in Flanders and belonging to a non-resident, the beneficiary will pay 5,5% per cent if it is structured in one of the following forms:

Non-profit associations (ASBL-VZW), international (scientific) non-profit associations (AISBL-IVZW), institutions for public benefit (fondations d'utilité publique - stichtingen van openbaar nut), private foundations, or professional unions.

BRUSSELS-REGION

For a donation by a person who is domiciled in the Brussels Region or for a donation of real estate located in Brussels and belonging to a non- resident the beneficiary will pay:

- 7% per cent for donations made to Belgian non-profit associations (ASBL-VZW), international non-profit associations (AISBL-IVZW), professional unions, or and private foundations;
- 6.6% per cent for donations made to public institutions (établissements publics- openbare instellingen); —depending from Brussels Region or from communes located in the Brussels Region —and to foundations for the public benefit.

WALLONIA

If the donor qualifies as a resident of Wallonia, the reduced rate will be 7% per cent for donations made to Belgian non-profit associations (ASBL-VZW), to international (scientific) non-profit associations (AISBL-IVZW), to institutions for the public benefit (fondations d'utilité publique—stichtingen van openbaar nut), to private foundations, or and to professional unions;

The reduced rate of 7% only applies if the benefitting entity pursues predominantly and in a non profit perspective an objective of environmental, philanthropic, philosophic, religious, scientific, artistic, educational, cultural, sportive, politic, trade union, professional, humanitarian, patriotic or civic nature or pursues the objective of providing care to persons or animals or providing social assistance at the time the donation is made.. This requirement does not exist in the two other regions of Belgium.

-Progressive rates (standard rates for third parties)

Unrelated parties, including non qualifying charities, are subject to the following rates

FLANDERS

Nature of assets	A	B	C
Movable assets	Flat rate	7%	
Other assets (real estate)	Progressive rates Shares		
	Amount (€)	Rate per share	Cumulative amount (€)
	0.01–150 000	10%	
	12,500–250,000	20%	15 000
	25,000–450.000	30%	35 000
	Above 450000	40%	95 000

BRUSSELS REGION

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	25,000–450.000	30%	35 000
	Above 450000	40%	95 000

WALLONIA

Qualifying movable assets*	Flat rate		7,7%	
Other assets (real estate or non-qualifying movable assets)	Progressive rates : amount between/and		Rate per share	Cumulative amount
	0,01	50.000	20%	-
	50.000,01	75.000	30%	10.000
	75.000,01	150.000	30%	17.500
	150.000,01	175.000	40%	40.000
	175.000,01	300.000	40%	50.000
	300.000,01	450.000	50%	125.000
	Above	450.000	50%	175.000

Movable assets for which the donation is affected by the condition precedent of the donor's decease, are excluded from the flat rate of 7,7% and subject to progressive rates, unless the reduced rate for qualifying charities would apply.

It should be noted that for movable assets the flat rate between unrelated parties (standard rate) is quite the same (7,7%) as the reduced tax rates for qualifying charities.(7%)

It should finally be reminded that informal gifts (gifts from hand to hand) are not subject to registration duties, unless the donor presents voluntarily a deed to the administration of the registration.

2) Legacies

-Reduced rates for donations to qualifying charities

Charities which are structured in one of the legal forms foreseen by the law of 27 June 1921, are subject to reduced rates, as specified below. (art 59 of the inheritance tax code)

FLANDERS

If the testator qualifies as a resident of Flanders, the reduced rates are as follows:

8.8% per cent for legacies to non-profit associations (ASBL/-VZW), international non-profit associations (AISBL/—IVZW), private foundations and foundations for public benefit, (fondations d'utilité publique—stichtingen van openbaar nut) and to professional unions; and

6.6% per cent for legacies to public institutions (établissements publics—openbare instellingen) located in Flanders relying on assistance from a province or from a commune.;

BRUSSEL REGION

If the testator qualifies as a resident of the Brussels Region, the reduced rates are as follows:

6.6% per cent for legacies to public institutions (établissements publics—openbare instellingen) dependent upon a province or a commune and for legacies to public institutions dependent upon the French or the Flemish Community; or to the public scientific or cultural institutions dependent upon the Belgian State. This rate of 6,6% also applies to foundations for the public benefit (fondations d'utilité publique—stichtingen van openbaar nut);

12.5% per cent for legacies to non-profit associations (ASBL-VZW) and other non-profit legal entities which are recognized as qualifying organizations eligible to receive tax-deductible gifts;

25% per cent for legacies to Belgian non-profit associations (ASBL-VZW), international non-profit associations (AISBL-IVZW), private foundations, or professional unions.;

WALLONIA

If the testator qualifies as a resident of Wallonia, the reduced rate will be as follows:

7% per cent for legacies made to Belgian non-profit associations (ASBL-VZW), to international non-profit associations (AISBL-IVZW), to public benefit foundations (fondations d'utilité publique—stichtingen van openbaar nut), to private foundations, or and to professional unions;

The reduced rate of 7% only applies if the benefitting entity pursues predominantly and in a non profit perspective an objective of environmental, philanthropic, philosophic, religious, scientific, artistic, educational, cultural, sportive, politic, trade union, professional, humanitarian, patriotic or civic nature or pursues an objective of providing care to persons or animals or to providing social assistance at the time the donation is made.. This requirement does not exist in the two other regions of Belgium.

-Progressive rates (standard rates for third parties)

Unrelated parties, including non qualifying charities, are subject to the following rates

FLANDERS

Amount (€)	Rate per share	Cumulative amount (€)
0.01–75,000	45%	
75,000–125,000	55%	33,750
125,000+	65%	61,250

BRUSSELS REGION

Amount (€)	Rate per share	Cumulative amount (€)
0.01–50,000	40%	
50,000–75,000	55%	20,000
75,000–175,000	65%	33,750
175,000+	80%	98,750

WALLONIA

Amount (€)	Rate per share	Cumulative amount (€)
0.01–12,500	30%	
12,500–25,000	35%	3,750
25,000–75,000	60%	8,125
75,000–175,000	80%	38,125
175,000+	80%	118,125

- *Is there a threshold (non-taxable amount) from gift and inheritance tax for donations/legacies to public-benefit organisations?*

No, there is no threshold for third parties or for charities

Is there a legal part of the estate that is reserved for certain protected heirs and which a donor cannot give to third parties?

A part of his assets is reserved to certain heirs. The heirs who are protected are the descendants, the ascendants and the surviving spouse.

The “reserved share” represents the part of the estate, which the testator cannot dispose of freely. The “reserved share” is calculated as follows:

If the testator has one child the “reserved share” will be $\frac{1}{2}$ of the estate.

If the testator has two children the “reserved share” will be $\frac{2}{3}$ of the estate.

If the testator has three or more children, the “reserved share” will be $\frac{3}{4}$.

For more details, consult the table below.

Freely disposable part of the estate, for legacies to third parties

Heirs	Reserve for surviving spouse SS	Reserved part of the succession for the heirs		Freely disposable part		
		Usufruct (life interest)	Bare ownership	Full ownership	Bare ownership	Full ownership
Surviving spouse (SS)	1/2				1/2	1/2
1 child				1/2		1/2
1 child + SS	1/2	1/4		1/4	1/4	1/4
2 children				2/3		1/3
2 child, + SS	1/2	1/3		1/3	1/6	1/6
3 children				3/4		1/4
3 child, + SS	1/2	3/8		3/8	1/8	1/4
Brother or sister						1
idem + SS	1/2				1/2	1/2
Brother/Sist+parents				1/2		1/2
idem + SS	1/2	1/4		1/4	1/4	1/4

If the testator does not respect the rules concerning the reserved share, the heirs will be entitled to claim that a legacy should be reintegrated into the estate or reduced in such a way that the reserved share can be fully reconstituted. Before making a will the testator should check this issue carefully, preferably with his notary.

Account should be taken of the European Regulation 650/2012 on succession matters, which entered into force on August 17, 2015. As a consequence of this regulation, a Belgian resident having the nationality of another EU member state (for instance expats living in Belgium) will have the possibility to choose the application of the legislation of the state of which he has the nationality. In such a case and if the law of this last state does not contain provisions restricting the disposition of assets to other persons than heirs, the testator will no longer be subject to the restrictions imposed by the Belgian law, as mentioned above..

It should finally be noted that the European Regulation on succession matters on August 17, 2015 (and the possibility it gives to choose for another legal system) does not concern the tax treatment of the succession.

- *Are there consequences linked to a gift as far as inheritance taxes are concerned? What if the donor dies shortly after making a gift? Will it impact inheritance taxes?*

Inheritance tax is due on assets that are given through an informal gift (gift from hand-to-hand or gift by bank transfer) during the three-year period immediately preceding the donor's death. Consequently, if the donor who made a gift to a charity dies shortly after making an informal gift, the gift will be subject to inheritance taxes.

However, a charity receiving the gift, will be entitled to benefit from tax relief (reduction or exemption) if it qualifies for such a reduction.

For donation of real estate by a resident of Brussels Region or of Wallonia, it should also be noted that if the beneficiary is a third party (which includes non qualifying charities located in Belgium or charities located in a non EU or non EEA country) and if the donor dies within a period of less than three years after the donation, the value of this asset will be added to the succession, which means that this asset will be subject to inheritance tax at a higher rate than the rate applicable to the donation. The beneficiary of the donation will have to pay the positive difference between the registration duties and the (in principle higher) amount of the inheritance tax.

The tax regime of Flanders is more favourable for donors established in that region: the "three years rule" does not exist for the donation of real estate.

1.3 Tax-benefits/exemptions for resident public-benefit organisations/foundations?

- *Is the local income of a resident public-benefit organisation from the following sources taxed?*

- *Economic activity which is related to the public benefit purpose (fundraising gala dinners; charitable sales, running a cafeteria, museum, hospital...)? Are there some limits?*

Public benefit organizations are normally exempt from corporate tax, but they are subject to the tax on legal entities, which only applies on certain categories of income.

In order to keep the exemption from corporate tax they should fulfil the following condition: the organization may not carry out profit-making operations. However, certain operations will not be considered as profit making

for the application of corporate income tax, amongst others isolated or exceptional operations and “activities that include only incidentally...commercial operations or are not performed by using industrial or commercial methods”. Fundraising, gala dinners and charitable sales are incidental or ancillary to the main charitable activity and do not put the exempt status at risk. It can be considered that museums and hospitals are not organized as a commercial activity or do not involve the use of commercial methods.

Exemption from corporate tax is also applicable to non-profit organizations (NPOs) operating in the so-called privileged sectors as foreseen by the law (Art. 181 Income Tax Code), i.e. distributing social allowances, helping families or elderly people, securing professional interests or working in the field of exhibitions or providing education. This exemption applies, even if the organization carries out more than incidental economic activities.

Economic activities as mentioned above are not subject to the tax on legal entities

- *Leasing a property that belongs to the organisation*
 - a) Exemption from corporate tax (still applicable in this case)
The list of activities that are not considered by the law as profit making mentions: “operations consisting in investment of funds obtained within the scope of the statutory non-profit purpose”. A foundation which invests its funds in movable assets or in real estate and rents this real estate will not lose its exemption from corporate tax for that sole reason.
 - b) Taxation at the tax on legal entities
Certain categories of real estate income will be subject to the tax on legal entities at a rate of 20%
- *Interest from fixed-rate bonds*
 - a) Exemption from corporate tax (still applicable in this case)
An organization which perceives interest from fixed rate bonds will not lose its exemption from corporate tax for the same reason as mentioned above.
 - b) Taxation at the tax on legal entities
Interest will however be subject to a tax which corresponds to the withholding tax (27 %)
- *Are unrelated economic activities accepted? Are there limits?*

Unrelated economic activities could put the corporate tax exempt status in danger if they are not incidental or if they are too substantial compared with the statutory charitable activities
- *Sources on information on the exemption from corporate tax: legal provisions*

See articles 180 to 182 of the income tax code

- *Is there a threshold under which no income tax is due?*

No, such a threshold does not exist

1.4 Sources of information in general:

- *Which sources (websites and experts) can be contacted or consulted to obtain more detailed information on 1.1, 1.2 and 1.3?*

Website of the Ministry of Finance (Fisconet Plus) www.fisconet.fgov.be

For inheritance and gift taxes: Website of the “Chambre des Notaires” www.notaire.be

The European Foundation country profiles :

http://www.efc.be/programmes_services/resources/Pages/Legal-and-fiscal-country-profiles.aspx

The King Baudouin Foundation : www.kbs-frb.be

Legal & Tax Management SPRL: www.legal-tax-mgt.com info@legal-tax-mgt.com

2. Giving to a foreign beneficiary

2.1 Income tax deductibility/tax incentives for donors giving to a foreign organisation (Persche)

- *Is there a special law/decreed/article in the tax law outlining when a donor giving cross-border gets tax incentives (if yes please give the reference)?*

Yes, the section of the Belgian income tax code dealing with income tax reduction for cross border gifts to charities located in another EU or EEA member state is art 145/33, 2° (see link below and go to 2°)

<http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&nav=1&id=a730d427-e31c-4c7d-87ef-03b168ee2deb&disableHighlighting=true#findHighlighted>

- *Are gifts to a foreign PBO deductible for income tax purposes in Belgium? If so, under what conditions? What tax relief is provided? Which foreign PBO's could qualify? Must PBO's be based in the EU, EU+ EEA, other...?*

In principle, cross border gifts cannot benefit from income tax reduction. However, the Belgian law has been amended in order to comply with the EU rules.

Consequently, gifts made to a foreign charity located in one of the EU or EEA countries benefit from an income tax reduction for the individual or are tax deductible by the corporate donor for Belgian income tax purposes, if the foreign recipient institution can be considered as similar to one of the types of institutions which are listed in the Belgian law (see article 145/33, § 1, 1° from a) to l) and 2°, 3° and 4° of the income tax code) and if it has been recognized in its own country as being eligible for receiving tax deductible gifts. However, as we will see below, uncertainties remain for the application of the amended law.

- *What are the necessary and practical steps the donor or the foreign beneficiary should undertake to allow/ensure income tax deductibility for the donor?*

- a) In case the foreign charity does not intervene in Belgium to ensure the donor's position

The donor should keep at the disposal of the Belgian tax authorities evidences that the foreign charity to which he made a gift can be compared to a Belgian qualifying charity. Since there is no legal or administrative provision with a list of documents that the taxpayer should provide, we can only assume that these documents should at least consist in a copy of the statutes of the foreign organization (including the description of the charitable purpose), a document showing that the charity has been recognized in its country and the financial accounts

The Belgian tax inspector of the donor's jurisdiction will verify whether the evidences are sufficient. There is no automatic verification at a centralized or higher level, which means that the verification of the documents provided by another donor depending from another inspector for a gift made to the same foreign entity could lead to a different conclusion..

- b) In case the foreign charity proactively intervenes in Belgium

Foreign charities willing to collect funds in Belgium can secure their position as well as the position of their potential donors by initiating a specific procedure on a voluntary basis: they can request a ruling at the ruling commission (In French "Service des Décisions Anticipées", in Dutch "Dienst van de Voorafgaande Beslissingen"). The ruling commission will perform a "comparability test": it will examine whether the foreign organization can reasonably be compared with a Belgian qualifying organization. Once a favourable decision is issued, the inspectors of all the Belgian jurisdictions where the donors are located will be bound by this decision. By following this procedure, the foreign charities are no longer confronted with the inconveniencies described sub a)

- *Which requirements does the foreign-based PBO have to fulfil so that donors would get tax incentives when giving to them (e.g. all tax law requirements that resident PBOs have to fulfil? Fewer requirements than resident PBOs? Tax exempt status of the foreign-based PBO is recognised without further verification procedures)?*

There are no registration procedure and no specific requirements towards foreign entities as such. It would not be exact to say that a foreign organization should follow precisely all the tax law requirements applicable to Belgian entities. In the framework of the ruling procedure (comparability test), it must be shown that the foreign entity complies with "similar" or "comparable" requirements in its own country. The terms "comparable" or "similar" imply a certain degree of flexibility. If some figures (percentages, ratio's) are foreseen in the Belgian law, it could reasonably be defended that the foreign legislation should not use exactly the same figures as criteria.

Obviously, Transnational Giving Europe does remain another possibility for benefitting of tax deductible cross border gifts. A foreign beneficiary can consider to advise donors to make their gifts through Transnational Giving Europe.

- *What information do donors to foreign-based organisations have to provide in order receive tax incentives for their donation (e.g. Statutes (translation required)? Annual financial report (translation required)? Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?*

As mentioned above, there is no official list with specific documents that donors should communicate to their respective tax inspector or keep at their disposal.. The best way to avoid these inconveniences and to ensure tax deduction/reduction is the ruling procedure as indicated above.

- *Who decides if a foreign-based organisation gets special tax status? When is the check done? For how long is the special tax status valid? Is any additional registration of the organisation in Belgium necessary? If yes, with whom?*

The Belgian law does not require from the foreign organization to get a special tax status in Belgium beforehand.

Each time a gift is made, the income tax inspector of the donor's jurisdiction will check whether the documents attached to the tax return are sufficient to show that the foreign organization is comparable to a Belgian organization as listed by the law and reject the deduction in case of insufficient documentation. Such decisions will be made gift per gift by different inspectors. In other words, there is no centralized decision about the status of one particular foreign organization.

- *How long is the process? What costs are related (e.g. administrative charge, translation costs, legal fees etc.)?*

This question can only be answered as far the ruling procedure is concerned. It should be noted that the ruling procedure can be divided in two phases:

- the preliminary phase which is called the "prefiling" This phase is not compulsory, but this step might be interesting because there is a possibility to have a meeting with the commission during which there will be an agreement upon the documents that should be provided in that specific case. It should be reminded that there is no standard list
- the request of ruling itself.

There is no legal term imposed to the ruling commission to issue its decision. There is only a purely indicative term of three months.

It should be noted that the ruling commission does not charge fees for issuing a ruling.

There is no provision stipulating that the documents to communicate should be translated or not. This point should be discussed during the meeting with the representatives of the ruling commission.

- *Which sources can be contacted or consulted to obtain more detailed information?*

Website of the Ministry of Finance: (« déduction des libéralités faites en argent à des institutions d'un autre Etat membre de l'Espace Economique Européen »)
<http://fiscus.fgov.be/interfaoiffr/giften/instellingen/inleiding.htm#institutions>

www.vef-aerf.be

For the ruling procedure : in French: www.ruling.be/fr in Dutch: www.ruling.be/nl

- *Can the Transnational Giving Europe network help a donor in Belgium wanting to support a foreign PBO and how?*

Transnational Giving Europe (TGE) is a very practical solution to support a beneficiary located in a foreign country with all the tax advantages in the country of residence of the donor. Donors can give their gifts to the national TGE partner, the King Baudouin Foundation in Belgium, that will transfer the gift to the foreign beneficiary and provide all the national fiscal advantages to the donor (income tax deduction/reduction).

2.2 Gift and inheritance tax/transfer tax for donors giving to a foreign organisation (Persche and Missionswerk ECJ cases):

- *Is there a special law/decreet/article in the tax law outlining when a donor, making a cross-border registered donation or bequest, gets preferential gift or inheritance tax rates (if yes please give the reference)?*

For the regions of Wallonia and Brussels Region, this matter is governed by article 140 of the code of registration duties for donations and by articles 59 and 60 of the inheritance tax code for the legacies.

For art 140 (registration duties), please click <http://ccff02.minfin.fgov.be/KMWWeb/browseCategory.do?method=browse¶ms.selectEdCategoryId=4100> and click on the line the line corresponding to Brussels Region, or Wallonia, then select article 140

For art 59 and 60 (inheritance tax), please click <http://ccff02.minfin.fgov.be/KMWWeb/browseCategory.do?method=browse¶ms.selectEdCategoryId=4450> and click on the line corresponding to Brussels Region, or Wallonia, then select articles 59 and 60

For Flanders

Registration duties on donations (in French): please click <http://ccff02.minfin.fgov.be/KMWWeb/document.do?method=view&nav=1&id=e0285075-0b5d-4b2a-9e09-6b3ae7a70b2f&disableHighlightning=true#Hoofdstuk8-2> and go to article 2.8.4.1.1 §3

for the Dutch version, please click <http://ccff02.minfin.fgov.be/KMWWeb/document.do?method=view&nav=1&id=e7cc29af-1479-4c5c-93aa-bbe9b7b42ccf&disableHighlightning=true#Hoofdstuk8-2> and go to article 2.8.4.1.1 §3

Inheritance tax (in French) please click <http://ccff02.minfin.fgov.be/KMWWeb/document.do?method=view&id=142c4959-f245-464c-a573-f6047eda6d3f#findHighlighted> and go to art. 2.7.4.2.1.

For the Dutch version, please click <http://ccff02.minfin.fgov.be/KMWWeb/document.do?method=view&nav=1&id=e7cc29af-1479-4c5c-93aa-bbe9b7b42ccf&disableHighlightning=true#Hoofdstuk7-2> and go to article. 2.7.4.2.1.

- *Gift and Inheritance taxes: Is there a preferential system for registered donations and legacies to foreign PBOs? If so, donations/legacies to which foreign organisations qualify and what are the preferential rates? Who is tax liable? Must the foreign PBO be based in the EU, EU+ EEA, other...? ...? Would the foreign PBO have to fulfill all requirements that resident PBOs have to fulfill?*

According to the legislation of the three Belgian regions, which has been harmonized with the EU law, the privileged regime (i.e the same reduced rate as for domestic transfer) has been extended to donations and legacies to foreign organizations if the legacy or the donation has been made to a charity with its registered office in one of the European countries (EU and/or EEA countries).

- *If the preferential rate is not applicable, what are the standard rates?*
See answer to question 1.2 (second question)
- *What are the necessary and practical steps the donor or the foreign beneficiary should undertake to allow/ensure reduced rates/the preferential system? How long is the process? What costs are related (e.g. administrative charge, translation costs, legal fees etc.)? Which sources can be contacted or consulted to obtain more detailed information?*

The conditions are less complex than those for obtaining tax deduction/reduction for cross border gifts.

However, it is important to check whether the foreign organization has the legal personality in its country. Gifts or legacies to an informal association or to a religious congregation which would not be structured as a non profit association or foundation, would not benefit from the reduced rate. A UK charitable trust would in principle not qualify, but in a quite recent case, the court ruled in favour of such a trust. (Court of Appeal of Brussels September 9, 2009).

- *Who decides if a donation/legacy to a foreign-based organisation gets special tax status? When is the check done? For how long is the special tax status valid? Is any additional registration of the organisation in Belgium necessary? If yes, with whom?*

The receiver of the Administration of registration duties, inheritance and domains will check whether the conditions to apply the reduced rate are fulfilled. The benefiting organization does not need preliminarily to register or to obtain a special tax status. It should be noted that a first check will be made by the notary before the donation deed (in case of a registered donation) or at the moment of the opening of the succession in case of a legacy.

- *How long is the process? What costs are related (e.g. administrative charge, translation costs, legal fees etc.)?*

The process is a part of the notary's intervention and will normally not have an impact on the notary fees, except maybe for certain costs such as translations or in more complex cases, for instance the legacy of real estate located in a third country, with possibilities of triple taxation.

- *Which sources can be contacted or consulted to obtain more detailed information?*

These points could be discussed with the notary who will enact the will or the donation. More generally, to find a notary or to have information, please click www.notaire.be

You can also contact

The King Baudouin Foundation : www.kbs-frb.be

Legal & Tax Management SPRL www.legal-tax-mgt.com info@legal-tax-mgt.com

- *Are there any other preferential systems with some countries (e.g., based on tax treaties)? What are the relevant tax treaties with relevant provisions for cross-border donations and legacies to foreign PBOs?*

There is only one inheritance and tax treaty which provide the same equal treatment as foreseen by the European legislation: the inheritance and tax treaty between Belgium and France signed January 20, 1969. It contains a stipulation concerning donations or legacies to PBO's. This means that a French qualifying beneficiary will pay the same gift or inheritance taxes as a Belgian one.

2.3 Tax-benefits/exemptions for foreign public-benefit organisations/foundations in Belgium (Stauffer case)?

- *Is there a special law/decreet/article in the tax law outlining when a foreign-based public-benefit organisation gets a tax-exempt status (if yes please give the reference)?*

Article 227 of the Belgian income tax code (ITC) which refers to article 182 ITC

- *Do foreign-based public-benefit organisations gaining income in Belgium through an activity (e.g. income from leasing a property, income from charitable sales,...), benefit from the same tax benefits/exemptions resident public benefit organisations undertaking the same activities? If so under what conditions? Must the foreign PBO be based in the EU, EU + EAA, other? Would the foreign PBO have to fulfill all tax law requirements that resident PBOs have to fulfill or fewer requirements than resident PBOs?*

It should first be noted that income derived from economical activities, like charitable sales, by a non resident organization are not taxable in Belgium, unless the activity of that organization is carried out through a permanent establishment (an office, a branch, situated in Belgium.)

If this is the case it should be noted that a foreign organization operating in Belgium is in principle treated the same way as a Belgian entity. The corporate tax exemption can be obtained based on one of the two following grounds. 1) The organization can be exempted if it does not carry out operations of a for-profit nature. The exemption based on this criterion can be claimed by both resident and non-resident entities. 2) An organization can also claim the exemption on the sole basis that it belongs to one of the privileged sectors enumerated by Article 181 of the Income Tax Code (for instance, education). However, the criterion of privileged sectors is only applicable to resident organizations. A foreign organization operating in Belgium that only meets the second criterion would be subject to corporate tax. The Belgian legislation should be amended on this point as far as organizations of European countries are concerned, since it violates the Treaty of Rome.

- *What information do foreign based organisations have to provide in order to hold tax privileged status?*
 - *Statutes (translation required?)*
 - *Last annual financial report (translation required?)*
 - *Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes, which may not be required by the organisation's country of seat but are required according to the legislation of the country from which tax benefits are sought?*
 - *Other?*

The foreign based organization does not need to provide spontaneously information to the tax authorities. It is up to the inspector to take the initiative to perform a tax audit or send a questionnaire and ask all relevant information which is necessary to check the exempt status

- *What are the necessary and practical steps the foreign PBO should undertake to allow/ensure a special tax status? How long is the process? What costs are related (e.g. administrative charge, translation costs, legal fees etc.)? Which sources can be contacted or consulted to obtain more detailed information?*

There is no formal procedure according to which an exempt status would be granted or recognized by the tax authorities. The organization which estimates it fulfils the conditions for exemption may complete the part of the tax return for entities which are corporate tax exempted (tax on legal entities).

- *Who decides if a foreign-based organisation gets special tax status? When is the check done? For how long is the special tax status valid? Is any additional registration of the organisation in Belgium necessary? If yes, with whom?*

There is no procedure for obtaining an exempt status. The tax inspector decides, during a tax audit or after an investigation, whether a non-profit organization which considers itself as exempt should lose its exempt status. Tax audits can be performed at any time.

2.4 Background information/publications

- *Did Belgium adapt any aspects of its legislation on the tax treatment of cross-border gifts and legacies according to the European court of justice judgments: Persche (C-318/07), Stauffer (C-386/04), Missionswerk (C-25/10) or Laboratoires Fournier (C-39/04)? If yes when and how?*

Belgium was the first country against which the European Commission launched an infringement procedure (in October 2002) concerning inheritance and gift taxes on gifts to foreign charities. The three Belgian Regions adapted their legislation between 2003 and 2005. After the ruling of the E.C.J. in the Heine Persche case, Belgium modified its legislation on income tax deduction.

A second, infringement procedure was launched against Belgium in 2006 concerning the inheritance tax legislation of Wallonia. After the modification of that part legislation, in December 2003 it appeared that some of the conditions imposed by the Walloon decree in order to obtain the equal treatment were still contrary to the treaty of Rome, namely the

restriction of this equal treatment to donors or testators who previously resided or worked in the country where the beneficiary is established.

In the ruling in the so called *Missionswerk Werner Heukelbach* (C-25/10), the ECJ confirmed that the conditions of the Walloon decree were contrary to the principle of free movement of capital. As a consequence, Wallonia modified its legislation by the decree of May 10, 2012

The ruling in the so called “*Laboratoires Fournier* case” had also an impact on the Belgian legislation. Until 2010 organizations applying for the eligibility to receive income tax deductible gifts had to satisfy a territorial condition, namely that the scope of their activity should cover at least one Belgian Region or the National territory, but should not exceed these national limits. In the law of February 21, 2011 the scope of the permissible activities has been extended to all the EU and EEA countries.

- *Was there an infringement procedure launched concerning your country on this issue? If yes, when and is it still open and what information is available (Official announcement, official reports/opinions, case number)?*

For the launching of infringement procedures, see the answer on above question.

The infringement procedures against Belgium (October 2002 and December 2006) were closed since the concerned legislation was modified in a sense which is now compatible with the Treaty of Rome).

- *Have there been reactions in Belgium to one or more of the following ECJ judgments: Persche (C-318/07), Stauffer (C-386/04), Missionswerk (C-25/10), Laboratoires Fournier (C-39/04)? What form have these taken?*
 - *Commentaries/articles of academics or practitioners in journals and/or online?*
 - *Official reports/opinions (e.g. from the tax authorities)?*
 - *Other*

Belgium reacted positively to these Court cases, namely to the *Heine Persche* and *Laboratoires Fournier* cases by modifying the concerned legislation. The application of the new rules (equal treatment) concerning gift and inheritance do not seem to raise problems.

However, for the application of the new legislation (equal treatment) for income tax deduction there are no detailed administrative instructions and no Royal Decree has been taken. As above outlined, the verification as to whether a foreign organization could be compared to one of the categories of organizations listed in the Code has been left to the local inspectors.

In order to seek for concrete solutions that could possibly be taken in administrative regulations, it was suggested to reactivate the so called “*Contact Group on Gifts*” (“*Groupe de Contact Libéralités*” – “*Contactgroep Giften*”), which is a group with representatives of the non-profit sector and representatives of the Belgian tax administration. Ultimately, this last did not respond positively to the suggestion, but confirmed officially that the ruling procedure could be used by the foreign charities wanting to ensure the tax position of their Belgian donors. During this procedure the ruling commission determines whether the foreign charity can be considered as comparable to a Belgian qualifying charity or not.