

France

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-318/07), 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 France 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?

The French tax law foresees tax incentives for donations to public benefit foundations and other public benefit organisations. According to articles 200-1 bis, 885-V and 238 bis of the French General Tax Code the donor can benefit from a tax deduction in the following way:

Individuals making gifts to qualifying PBOs benefit from a tax reduction equal to 66% of the value of their gift (75% for gifts made to foundations and other organisations which supply free meals or care to, or favouring the housing of, persons in difficult situations), up to 20% of the donor's taxable income. When the amount of the gift exceeds this threshold, the excess is carried forward over the next 5 years (Art. 200-1 bis of the General Tax Code). Alternatively, individual donors may opt to benefit

from a wealth tax reduction with respect to gifts of cash and/or listed shares made to public benefit foundations. The wealth tax reduction is equal to 75% of the value of the gift, but is limited to €50,000. This tax advantage has not been extended to gifts made to endowment funds (Art. 885-0 V bis A of the General Tax Code).

Corporate donors can benefit from a tax reduction equal to 60% of the donations to qualifying PBOs up to 0.5% of their annual turnover. Should there be no profits in the following years, the deduction can be carried forward over the next five years. The deduction may also be carried forward over the following five years, if the donations are beyond the 0.5% limit. (Art. 238 bis of the General Tax Code)

Do the incentives apply in cross-border scenarios?

Following a recent reform in 2009 French tax law (see Article 200 bis, §4 of the French tax code - voted by amending law to the 2009 budget law, n°2009-1674 of 30 December 2009, art. 35-I and IV) no longer makes a distinction according to whether the recipient public-benefit foundation is resident in France or in another EU or EEA country. However, donations to foundations based in other countries are excluded. French tax residents making gifts to public benefit organisations established in the EEA will get the same tax advantages as those granted to French tax resident making gift to French non-profit organisations, subject to the following conditions:

- The foreign organisation is established in a country which has signed a tax treaty with France containing a clause for assistance against tax fraud or evasion and the foreign organisation has obtained a specific agreement from the French tax authorities
- In the case where the organisation has not got this agreement, the donors may still benefit from the tax advantages provided that they file evidences that the organisation is comparable to a French tax exempt organisation.

Thus the French law corresponds with the Persche decision of the ECJ by requiring either an agreement from the French tax authorities or the filing of enough evidence for comparability to a French tax exempt organisation.

1.2. Procedures for tax incentives/the comparability test

Based on the current legal provisions, the foreign-based public-benefit organisation must obtain a specific agreement from the French-tax authorities.

The conditions to get such agreement are detailed in the decree n° 2011-225 dated February 28, 2011 and tax doctrine BOI-SJ-AGR-60-10-20170510.

In the case where the organisation does not have the agreement from the French tax authorities, it is assumed that 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, is comparable and hence fulfils French tax law requirements. It is assumed that the responsible French tax authority (in the region where the donor is registered) will perform 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 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 is comparable, whether it fulfils the requirements of French tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose within the meaning given by tax authorities. 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 is regarded as fulfilled when (i) the activity of the foundation is a non-for-profit one, (ii) the management of the foundation is non-profit-minded, (iii) no advantage is obtained for the founders (that means, there exists a non-distribution constraint. In case

of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members is not allowed and the administration costs must not be excessive) and (iv) the foundation's activities do not benefit a limited group of persons.

□ The foundation performs its activities in one or more of the following fields: philanthropy, education, science, social, humanitarian activities, sports, family, culture or, contributes to highlight the artistic heritage, the environment protection or the spreading of French culture, language and scientific knowledge.

The French tax authorities, intending to comment this new law, had tried to add as an additional requirement the fact that the EU or EEA based public-benefit foundation should pursue main part of its activities in the French territory. As the sector of foundations and associations contested this position, the French government decided in July 2013 to withdraw the tax administration comment and to consult the foundations and associations' sector for the drafting of a new comment.

The aforementioned BOI dated May 2017 mentions now that the organizations must carry out an activity eligible for sponsorship in France or in the European area.

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

It is emphasized that from a French point of view, any (French) association may, without special authorization, receive some kind of donation called "gifts by hand" (dons manuels). On the other hand, only certain (French) associations can receive donations and legacies. It is so necessary to clarify if the state where the foreign organisation is settled limits the liability to receive gift and legacy. It is recommended to take advice from a local legal expert.

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

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

French tax law foresees a gift and inheritance tax. It is paid by the recipients of the gift/legacy. In the case of a donation/legacy to a public-benefit organisation, the burden of the gift/inheritance tax is thus on the recipient organisation.

The tax rate for gifts and legacies made to third parties is 60%, and is reduced to 45% (35% for gifts under 24 430€) when made to a public or public-utility (organisme reconnu d'utilité publique) organisation (Art. 777 of the General Tax Code).

However, exemptions exist in the General Tax Code (articles 794 and 795 of the General Tax Code).

Specific exemptions are for example provided for some categories of public benefit organisations: public or public-utility (organisme reconnu d'utilité publique) organisations, which use their resources exclusively for non-profit scientific, cultural or artistic purposes; public-utility (organisme reconnu d'utilité publique) organisations, which use their resources for assistance (bienfaisance) or for the protection of environment or animals; university and partnership foundations; religious associations and authorized congregations; public-benefit endowment funds (Art. 795 of the General Tax Code).

Article 795, 2 ° of the General Tax Code as recently been modified : all establishments engaged in activities of general interest of a philanthropic, educational, scientific, social, humanitarian, sports, family or cultural nature, or contributing to the enhancement of the artistic heritage, the defense of the natural environment or the dissemination of the French culture, language and scientific knowledge or leading concrete actions in favor of the pluralism of the press (establishments that meet the characteristics mentioned in b and f bis of article 200, 1 of the CGI) are henceforth exempt from donations and legacies they receive.

Do the exemptions apply in cross-border scenarios?

Article 795-0 A of the General Tax Code exempts gifts and legacies for the benefit of legal entities or organizations of the same nature as those mentioned in articles 794 and 795 of the General Tax Code, whose registered office is located in a Member State of the European Union (EU) or Party to the Agreement on the European Economic Area (EEA) having concluded an administrative assistance agreement with France to combat tax evasion and tax avoidance .

The exemption is in principle reserved for donations and legacies granted to agreed organizations.

The exemptions also apply to gifts and legacies to organisations settled in states party to the EEA agreement having concluded an administrative assistance agreement with France for the purpose of combating tax evasion and tax avoidance, all conditions being fulfilled.

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

3.1. Legal situation

According to the applicable double tax treaties a foreign-based foundation is taxed in France as far as it generates income in France.

French tax law foresees (partial) tax incentives for French public-benefit foundations in the following cases:

Purpose related economic activity:

Ancillary economic activities of public-benefit organisations that are directly linked to the public benefit purpose of organisation are exempt from corporate tax up to a ceiling of (around) 60,000 euros exclusive of VAT.

Unrelated economic activity:

Profits derived from an unrelated commercial activity are regularly taxed at the normal corporate income tax rate. If undertaking more substantial unrelated economic activities, the non-profit status of the organisation may be challenged by the French tax authorities.

Asset administration (fixed-rate bonds):

Public-utility foundations, as well as endowment funds whose by-laws do not allow their capital to be consumed, are tax exempt with respect to income derived from their estate, including interest and dividends. All other public-benefit organisations are taxable with respect to interest from fixed-rate bonds at reduced rates of 10 % or 24% (interest from fixed-rates bonds issued prior to 1st January 1987 are tax exempt) and with respect to dividends at reduced rate of 15%.

Leasing a property:

Public-utility foundations, as well as endowment funds whose by-laws do not allow their capital to be consumed, are tax exempt with respect to income derived from their estate, including income derived from the leasing of a property belonging to them. All other public-benefit organisations are taxable with respect to rental income at a reduced rate of 24%.

3.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the foreign based public-benefit foundation must state in its tax declaration that it fulfils French 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 French tax authority will perform the comparability test to assess whether the foreign based public benefit foundation fulfils the requirements of French tax law. It performs the comparability test only for this specific case/request for a tax incentive by the foreign 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 French tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose within the meaning given by tax authorities. 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 is regarded as fulfilled when (i) the activity of the foundation is a non-for-profit one, (ii) the management of the foundation is non-profit- minded, (iii) no advantage is obtained for the founders (that means, there exists a non- distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members is not allowed and the administration costs must not be excessive) and (iv) the foundation's activities do not benefit a limited group of persons.
- The foundation performs its activities in one or more of the following fields: philanthropy, education, science, social, humanitarian activities, sports, family, culture or, contributes to highlight the artistic heritage, the environment protection or the spreading of French culture, language and scientific knowledge.

4. Practical information

4.1. Useful contacts

Fondation de France
40 avenue Hoche 75008 Paris - France
Tel: +33.1.44 21.31 00
Fax: +33.1.44 21.31 01
Web: <http://www.fdf.org>