



Advocates for International Development
Lawyers Eradicating Poverty

EU registration options for NGOs

Preparing UK-based NGOs for Brexit

A guide to establishing NGOs in Europe

February 2017



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Introduction

Advocates for International Development (A4ID) is at the centre of collaboration between the legal and development sectors. We are a charity that believes the law can, and should, be used more effectively to eradicate global poverty.

We work to ensure that lawyers and development organisations have the skills and knowledge to use the law as an effective development tool through our practical training courses, our pro bono broker service, and our contributions to global policy. With access to over 50,000 lawyers and 700 development partners we have facilitated projects with far-reaching impact in more than 120 countries across the world.

Preparing UK-based NGOs for Brexit

With the UK referendum decision in 2016 in favour of leaving the EU ('Brexit'), increasing numbers of our UK-based development partners have been considering whether to establish an additional or alternative presence in the EU. For some, this is because they wish to remain able to access grants from the EU, on which they are heavily reliant. Others wish to remain engaged in EU-led debates and processes. This publication explores the options for registration as an NGO or social enterprise in five countries in Europe to help organisations decide which may be most suitable for them.

We have chosen to focus on jurisdictions which we expected to be of significant interest to international development organisations established in the UK. The aim was to collate enough information for these NGOs to consider their options for establishing an entity in another EU Member State, while still remaining high level and short enough to digest. We trust that the following responses from the five law firms will assist Boards and managers to choose an appropriate new legal form, if they decide that relocating or adding to their existing presence is strategically important for them.

We have sought to make this publication relevant to NGOs in a broad sense – that is, non-profit entities of any legal form, as well as entities with a restricted distribution of profit/assets mechanism, where the primary aim of the organisation is to achieve social impact or a public purpose rather than to benefit shareholders/owners. This means that some of the entities mentioned may not be relevant to every type of NGO.

As part of their deliberations, organisations are likely to need detailed advice from lawyers.

Organisations working towards the UN Sustainable Development Goals are welcome to contact us at probono@a4id.org to become an A4ID development partner and access pro bono (free) legal advice on this and any other legal need.

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This document provides general information and comments on the subject matter covered and is not a comprehensive treatment of the subject. It is not intended to provide legal advice. With respect to the subject matter, viewers should not rely on this information, but seek specific legal advice before taking any legal action.

Any opinions expressed in this document are those of the law firm contributors and do not necessarily reflect the position and/or opinions of A4ID.

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Executive Summary

Below is a comparison of the most recommended legal forms across the five jurisdictions assessed in this guide. It is designed to highlight features which may be of interest and are easily comparable.

Most common / recommended entities in each jurisdiction

	Set up time	Residency / nationality requirements?	Limited Liability?	Initial Capital needed?
Belgium International Non-Profit Association	6 - 10 weeks	There are no residency or nationality requirements for directors.	Yes, but terms & conditions apply to Board of Directors.	No
Germany Registered Association	2-3 months	There are no residency or nationality requirements for the members of committee or directors.	Yes	No
Ireland Company Limited by Guarantee	Up to 15 working days for registration	The company must have one director resident in the EEA. If the company is a charity that intends to apply for a charitable tax exemption, the majority of directors (minimum three) must be resident in the Republic of Ireland.	Yes	No, but a guarantee of a nominal sum (usually EUR 1) is required.
The Netherlands Foundation	2-5 days	There are no residency or nationality requirements for directors.	Yes, but terms & conditions apply to board members.	No
Spain Foundation	2-3 months	There are no residency or nationality requirements for directors.	No	Yes, EUR 30,000

NGOs in Belgium

Overview of legal forms available to NGOs

NGOs in Belgium can use the legal form of a **Foundation** or **Association**

- In Belgium, an NGO with legal personality may assume various legal forms. There are a **'not for profit association' (NPA)**, a **foundation** (which can either be private or serve a public interest) and an **'international not for profit association' (INPA)**.
- All Belgian NGOs should (1) serve an altruistic purpose, (2) respect limitations on the development of economic / market activities and (3) are not allowed to distribute profits to their members or other insiders. They are generally described as a generic group of **"non-profit organisations" (NPOs)**. Under Belgian law the term "NGO" is used to describe NPOs with activities supporting developing countries.
- These NPOs are governed by the law of 27th June 1921 concerning not-for-profit organisations, international not-for-profit organisations and foundations, published in the *Belgian State Gazette* on 1st July 1921, as modified by later laws (**hereinafter referred to as 'NPO-law'**).
- It is also possible to establish an NGO / NPO without a specific legal procedure, which is called a **'de facto association'**. As soon as two or more people (meaning physical persons or legal entities) agree to work together to realise a common purpose on a long-term basis without pursuing profit, this cooperation is considered a *de facto* association. There is no specific legislation regarding *de facto* associations, so the applicable rules are the general rules regarding contracts as laid down in the Civil Code and the Companies Code.
- A **Company with Social Purpose (CSP)** is a legal form that exists outside of the group of NPOs. The CSP is a variation of a "classic" company structure that can combine a (1) social purpose (as opposed to the classic corporate companies) with (2) unlimited commercial activities (as opposed to the classic NPOs mentioned above).
- The shareholders of the CSP can choose whether they opt for a CSP with **limited profit distribution** or **without any profit distribution**. When they choose the latter option (no profit distribution) one can consider the **CSP without profit distribution as part of the family of NPOs**.
- In principle, any company listed in the Belgian Companies Code (company limited by shares, private limited liability company, cooperative company) can take the status of a CSP. However, the company structure most often chosen for a CSP is that of a **cooperative company with limited liability**.

Belgian Law and the regulation of NGOs

There are **no specific legal barriers for setting up an NPO under the NPO law**, other than the requirements relating to formalities and registration (in one of the official languages in Belgium: English can only be the working language, so **translation in Dutch and/or French of official documents is required**).



1. Creating an NPA is easy and can be done by private deed, signed by a minimum of 3 founding members, to be deposited at the Registry of the Commercial Court in order to obtain legal personality.
2. INPAs and foundations can only be incorporated by authentic deed before notary public.
3. Whenever an INPA or foundation serving a public interest must be set up, the federal Minister of Justice must be involved: both types of Chief Security Officers (CSO) can only obtain legal personality after approval by Royal Decree. INPAs will be granted legal personality if they pursue a non-profit purpose of an international nature. Foundations serving a public interest will be granted legal personality if their purpose is of a philanthropic, philosophical, religious, scientific, artistic, pedagogic, or cultural nature.

There is no equivalent of the Charity Commission of England & Wales, but NPOs wanting to accept tax deductible gifts from donors need to respect the **specific conditions of tax deductibility**. In general, recognition by the tax authorities is **not granted for a start-up NPO**. However, certain organisations have an “**umbrella**” recognition allowing them to team up with start-up NGOs so that the latter can obtain tax deductible gifts.

Barriers to economic activity

Attention should be paid to the **limitations to engage in economic activities**. Belgian NPAs and INPAs are allowed to engage in economic activities, but this possibility is not unlimited: economic activities are only permitted if they are **incidental / accessory / subordinated to the non-economic activities**. Such incidental or accessory economic activities are subject to the following conditions:

1. they are incidental to the non-commercial activities on a **quantitative level**, taking into account the turnover or the allocation of means or personnel;
2. they are directly or indirectly related to the **non-commercial activities**;
3. the profits derived from these economic activities are attributed to the **development of the non-commercial activities**.

For foundations, the limits are not as strict and only require that these activities should be undertaken in order to achieve the altruistic purpose.

There is a great deal of case law regarding disputes on the exact boundaries of these limitations. Possibly, in the future these limits will no longer be of concern. The Minister of Justice is preparing a legal initiative to allow NPOs to develop **unlimited economic activities**. Whether this initiative will make it into law still must be determined.

- From a **direct income tax** perspective, Belgian NPOs are in principle subject to a favorable tax regime (meaning the **legal entities tax** regime, almost a zero-taxation except for certain types of income of wealthy NPOs). NPOs which undertake economic activities run the risk of taxation under the **corporate income tax** regime if they do not meet the requirements put forward by the tax legislation.
- There also is a small **patrimony tax of 0.17 %** on the total reserves (= the amount of profit which is capitalized and not used for the activities during the year) of the NPO, except for the public interest foundation which is exempted.
- **VAT-regulations** need to be monitored when the NPO engages in economic activities leading to an income of more than 25.000 euro/year.
- **Specific legislation relating to the field** the NPO works in needs to be respected (e.g. care for the elderly or the handicapped).



The Minister of Justice is preparing a legal initiative to **include the NPO law into the Company Code**. The most important advantage would be that NPOs could develop **unlimited economic activities**. The most important disadvantage will be that NPOs will be subject to **specific regulations on (liability in case of) bankruptcy**.

In general, NPOs are confronted with a reduction of subsidies, thus implying that they need to look for partnerships and network with for-profit organisations or look to scale up their models through mergers and collaboration with other NPOs.

Supporting NGOs

Belgian NPOs are in principle subject to a **favorable income tax regime** (meaning the legal entities tax regime, almost a zero-taxation except for certain types of income of wealthy NPOs), except when they are developing considerable economic activities.

VAT is only applicable in case of economic activities generating an income of more than **25.000 euro/year**.

There are many **sector-federations** in specific fields of activities (NGO-federation, federations for hospitals, care, etc.) and supporting platforms for smaller NPOs. All of which lobby on behalf of the sector and support and advise NPOs on mainstream questions (Scwitch, Procura, etc.). It is not unusual for a minister and his/her cabinet to consult with representatives of the sector.

The Belgian **welfare state** is very strongly developed so generally the public is favorable towards NPOs.

Civil society institutions are very active as well as **volunteer** platforms.

More recently initiatives relating to **social impact investing** appear to be beginning to build bridges between NPOs and for-profit corporations.

Recommendations

Recommendations for a non-EU NGO looking to establish an entity in Belgium would depend on the type of activity and the governance of the NGO in question.

1. Membership organisations that want to create an NPO **as soon as possible**, should set-up an NPA.
2. Membership organisations with a **cross-border activity**, aiming for maximum **flexibility** in their governance, should consider the INPA.
3. If **autonomy and control** is important, the foundation is a good legal form.
4. For fundraising purposes, the INPA and the public interest foundation have an extra advantage of “**credibility**” given their **recognition by Royal Decree**.

It should be noted that no legal form offers more flexibility than others for allowing non-EU staff hires.

International non-profit Association (INPA / IVZW / AISBL) (title III NPO-law)

Features

- A specific feature of INPAs is that they also serve an **international interest**, which is why INPAs are generally used for international / cross-border not-for-profit collaboration.
- Many of the “international” or “European” federations or umbrella-organisations in a specific sector or industry (e.g. academic research, medical disciplines, food industry) active in/out of Brussels are set up as an INPA by “national” NPOs of different countries, joining their efforts for campaigning or lobbying.

Setting up an INPA

To set up an INPA in Belgium, the requirements are:

1. **Authentic deed** before notary public for all foundations + royal decree
2. **Forms** required: http://www.ejustice.just.fgov.be/tsv_pub/index_n.htm

Fees for incorporation formalities at the Registry of commercial court:

1. On paper = 219,40 euro + 21% B.T.W (VAT): **265,47 euro**
2. Electronically= 177,20 euro + 21% B.T.W. (VAT): **214,41 euro**

Fees for legal advice by a specialist lawyer will depend on the level of service.

Cost of the notarial deed is estimated to be between **€1.500 and €2.500 (excluding VAT)**.

In general, setting up an INPA will take between **6 - 10 weeks**.

Ongoing filing and reporting

1. Once a year: deposit and publish the **annual accounts** and file **tax sheet**.
2. Whenever applicable: deposit and publish amendments to the **Articles of Association**, changes to the **Board of Directors**, information on **dissolution and liquidation**
3. Certain amendments to the Articles of Association of the public interest Foundation needs to be **approved by Royal Decree**.

Governing an INPA

An INPA requires a minimum of **three partners**. It is governed by a **General Assembly, Board of Directors, Daily Management Body** and **representative body**.

INPAs are offered full protection in terms of liabilities for the members of the

General Assembly.

The Board of Directors are also offered **limited liability** but are open to the general principles of personal liability in case of misconduct or tort.

Governance

NPOs are governed by a separate NPO-law. Since there is a non-distribution constraint, there are **no capital requirements** and many possibilities when organising governance. INPAs have their own logic and are still very comparable to the standard functioning of a legal entity.

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of the legal form.

Operations

There is a **need for a physical address in Belgium** (which can be a PO Box that is emptied on a regular basis).

Meetings of this entity can be held virtually, if provided for in the articles of association.

There are **no residency or nationality requirements for Board of Directors**.

The INPA legal form gives the NGO the legal capacity to do things in its own name, for example employ staff, deliver services, enter into commercial contracts and leases in its own name.

External Activities of an INPA

Are there restrictions on the INPA's ability to trade?

Yes, only limited / accessory commercial activities are allowed.

Are there restrictions on the INPA's ability to campaign?

No, as long as campaigning serves a legitimate purpose (non-discrimination, etc.).

Would the INPA be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes

Would there be any restrictions on the INPA sharing resources with a non-EU entity (i.e. the UK)?

No, but tax treaties need to be checked in case of transnational giving/funding.

Tax

An INPA has the same tax status as NPAs and foundations. In terms of maximising fundraising from taxpayers in the jurisdiction, if the NPO has obtained tax deductibility, gifts by European citizens or residents will be deductible within certain limits.

Non-profit Association (NPA / VZW / ASBL) (title I NPO-law)

Setting up a NPA

To set up an NPA in Belgium, the requirements are:

1. **Private deed**, no notary.
2. **Forms** required: http://www.ejustice.just.fgov.be/tsv_pub/index_n.htm

Fees for incorporation formalities at the Registry of commercial court:

1. On paper = 219,40 euro + 21% B.T.W (VAT): **265,47 euro**
2. Electronically = 177,20 euro + 21% B.T.W (VAT): **214,41 euro**

Fees for legal advice by a specialist lawyer will depend on the level of service.

Ongoing filing and reporting:

1. Once a year: deposit and publish the **annual accounts** and file **tax sheet**.
2. Whenever applicable: deposit and publish amendments to the **articles of association, changes to the Board of Directors** and information on **dissolution and liquidation**.

Governing a NPA

This form is governed through **the General Assembly, the Board of Directors, a daily management body** and a **representative body**.

This form offers **limited liability**, thus giving full protection to the members of the General Assembly.

For the **Board of Directors** general principles of **personal liability in case of misconduct or tort** apply.

Governance

NPOs are governed by a separate NPO law. Since there is a non-distribution constraint, there are **no capital requirements** and many possibilities when organising governance. NPAs have their own logic but are very comparable to the standard functioning of a legal entity.

It is possible for an overseas entity (such as the UK a non-EU member state) to have control of the legal form.

Operations

An NPA has the legal capacity to do things in its own name, for example employ

staff, deliver services, enter into commercial contacts and leases in its own name.

A **physical address in Belgium** (which can be a PO Box that is emptied on a regular basis) is needed for this legal form. There are **no residency or nationality requirements for the Board of Directors**.

Meetings of the entities can be held virtually, if provided for in the articles of association.

External Activities of an NPA

Are there restrictions on the NPA's ability to trade?	Yes, only limited/accessory commercial activities are allowed.
Are there restrictions on the Registered Association's ability to campaign?	No, as long as campaigning serves a legitimate purpose (non-discrimination etc.).
Would the NPA be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes
Would there be any restrictions on the NPA sharing resources with a non-EU entity (i.e. the UK)?	No, but tax treaties need to be checked in case of transnational giving/funding.

Foundation (title II NPO-law)

Features

- Foundations that serve a public interest must aim to realise projects of a **philanthropic, philosophic, religious, scientific, artistic, pedagogic** or of a **cultural nature**.

Setting up a Foundation

To set up a Foundation in Belgium, the requirements are:

- Authentic deed** before notary public for all foundations + royal decree for public interest foundation
- Forms** required: http://www.ejustice.just.fgov.be/tsv_pub/index_n.htm



Fees for incorporation formalities at the Registry of commercial court:

1. On paper = 219,40 euro + 21% B.T.W (VAT): **265,47 euro**
2. Electronically= 177,20 euro + 21% B.T.W (VAT): **214,41 euro**

Fees for legal advice by a specialist lawyer will depend on the level of service.

The cost of the notarial deed is estimated to be between **€1.500 and €2.500 (excl VAT)**.

Ongoing filing and reporting

1. Once a year: deposit and publish the **annual accounts** and file **tax sheet**.
2. Whenever applicable: deposit and publish amendments to the **Articles of Association, changes to the Board of Directors**, information on **dissolution and liquidation**
3. Certain amendments to the Articles of Association of the public interest Foundation needs to be **approved by Royal Decree**.

Governing a Foundation

A Foundation is governed by a **Board of Directors**, a **daily management body** and a **representative body**.

Foundations offer **limited liability** to the Board of Directors but are open to the general principles of **personal liability in case of misconduct or tort**.

Governance

NPOs are governed by a **separate NPO law**. Since there is a non-distribution constraint, there are **no capital requirements** and many possibilities when organising governance. Foundations have their own logic and are still very comparable to the standard functioning of a legal entity.

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of a Foundation.

Operations

To establish a Foundation there is a **need for a physical address in Belgium** (which can be a PO Box that is emptied on a regular basis). There are **no residency or nationality requirements** for the Board of Directors.

Meetings of a Foundation can be held virtually, if provided for in the Articles of Association.

This form gives the NGO the legal capacity to do things in its own name, for example employ staff, deliver services, enter into commercial contracts and leases in its own name.

External Activities of a Foundation

Are there restrictions on the NPA's ability to trade?	No formal limitations, but only allowed to "achieve the altruistic purpose".
Are there restrictions on the Registered Association's ability to campaign?	No, as long as campaigning serves a legitimate purpose (non-discrimination etc).
Would the NPA be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes
Would there be any restrictions on the NPA sharing resources with a non-EU entity (i.e. the UK)?	No (but tax treaties need to be checked in case of transnational giving/funding).

Tax

A Foundation attracts the tax benefit Cfr. Section B. In terms of maximising fundraising from taxpayers in the jurisdiction, if the NPO has obtained tax deductibility, gifts by Belgian citizens or residents will be deductible within certain limits.

NGOs in Germany

Overview of legal forms available to NGOs

NGOs as such are not subject to specific regulations in Germany. NGOs can therefore freely choose a legal form that is suitable for their demands.

Legal forms generally available in Germany include:

- **Registered or Unregistered Association** (Verein)
- **Civil Law Partnership** (Gesellschaft bürgerlichen Rechts – GbR)
- **General Partnership** (Offene Handelsgesellschaft – OHG)
- **Limited Partnership** (Kommanditgesellschaft – KG)
- **Entrepreneurial Company** (Unternehmergeellschaft – UG)
- **Limited Liability Company** (Gesellschaft mit beschränkter Haftung – GmbH)
- **Stock Corporation** (Aktiengesellschaft – AktG)
- **Societas Europaea** (SE)
- **Partnership Limited by Shares** (Kommanditgesellschaft auf Aktien – KGaA)
- **Foundation** (Stiftung)
- **Cooperative** (Genossenschaft)

German Law and the regulation of NGOs

Traditionally, German tax law has operated with a **very broad definition of charity** and the prerequisites for granting charitable status for tax purposes have not been very restricting. Relevant tax laws continue to develop in this tradition, with recent years bringing reforms that facilitate the establishment and operation of an NGO with charitable status. This has been encouraged by streamlining the recognition process for charitable corporations, increasing the limit on tax-free revenue from commercial business, easing the requirements on the time frame during which received funds need to be spent, harmonising the eligibility to tax exemptions and the prerequisites for donors to minimise their income tax burden.

Supporting NGOs

The development and engagement of NGOs in Germany is encouraged by **granting tax incentives**. The regulations in order to benefit from tax incentives apply to all legal forms. An NGO can apply for a specific tax status for its charitable activities / non-profit

status with the competent tax authority, allowing the NGO to profit from tax benefits in two ways: **membership fees** and **donations** can be received tax free, as well as **grants** and **heritages**.

The NGO would be exempted from paying particular taxes, such as corporate tax, trade tax as well as land tax and, in certain cases, VAT. Although the **economic activities** of an NGO (in particular social entrepreneurship) are generally taxable, they may be considered tax exempted provided that such economic activities (i) support the charitable purpose of the corporation which can only be achieved by such economic activities, and (ii) do not compete with non-tax-exempted businesses other than to an extent which may be considered unavoidable for achieving the NGO's purposes.

Barriers to entry in Germany

While most legal forms in Germany are in general suitable for NGOs purposes, **no regulatory or corporate law barriers exist for establishing and operating an NGO in Germany**. From a public perspective, no particular legal form would be regarded rather positively or negatively, however, Registered Associations and Foundations are perceived as the typical legal forms used by NGOs while Limited Liability Companies and Stock Corporations are perceived as for-profit entities.

Laws specifically relating to NGOs, however, can be found in German tax laws offering **tax exemptions to charitable NGOs**. German tax laws grant NGOs a charitable status (so-called Gemeinnützigkeit) only in case their legal form is an Association (Verein), an Entrepreneurial Company (Unternehmergesellschaft – UG), a Limited Liability Company (Gesellschaft mit beschränkter Haftung – GmbH), a Stock Corporation (Aktiengesellschaft – AktG), a Partnership Limited by Shares (Kommanditgesellschaft auf Aktien – KGaA), a Foundation (Stiftung) or a Cooperative (Genossenschaft).

Although it is legally permissible to have the tax authorities check the prerequisites for the tax exemption in the course of the assessment of corporate income tax after expiration of the first fiscal year of the NGO, **the general approach is to seek for the approval of the charitable status by the German tax authorities before establishing the charitable corporation**. This is for two reasons: First, the founders of an NGO can still react to potential comments from the tax authorities, e.g., by adjusting the NGO's articles or charter documents accordingly, to ensure that tax exemptions are available for the NGO. Second, the approval of the charitable status by the tax authorities allows the NGO to issue donation receipts to donors enabling them to deduct donations from their taxable income.

Recommendations

It is usually recommended to use a **Registered Association, a Limited Liability Company / Entrepreneurial Company or a Foundation**, which in each case should apply to obtain a charitable status under German tax law. Selecting the corporate form should be made depending on the activities of the NGO, the amounts of funds available to achieve the intended purpose (financial capacity), whether it may become necessary to change the purpose of the NGO in the future and the number of members that shall participate in such entity / NGO (size). It should be noted that no legal form offers more flexibility than others for allowing non-EU staff hires.

Registered Association

Features

- A Registered Association is an association established for a **non-commercial purpose** that obtains legal personality upon registration at the association register.
- A Registered Association functions as a **corporate body** and its members benefit from **limited liability**. In order to be registered, the organisation must have **at least seven members** and if this number falls below three after its registration, the status of a legal person can be revoked (either upon application of the management board or ex officio). The Registered Association is one of the most commonly used forms for NGOs in Germany.

Setting up a Registered Association

Generally speaking, the legal regime applicable to Registered Associations is quite flexible. Most rules are not mandatory and can be modified in the articles of association. For example, the articles of association may provide for additional bodies, such as an advisory or supervisory board. The member's meeting may also appoint special directors to represent the Registered Association with regard to specific matters.

Setting up a Registered Association is a relatively easy albeit bureaucratic exercise involving a notary and the competent register of associations. There **is no nominal or minimal capital requirement** however, the articles of association usually provide for yearly membership fees, as the Registered Association in general may not engage in commercial activities. Including the registration process with the register of associations but excluding the process with the tax authorities for recognition of its charitable status, **2-3 months** should be anticipated for the formation of a Registered Association.

Key documents required for the register of associations include:

1. The **application for registration** signed by the board and certified by a German notary
2. The **articles of association** signed by at least 7 members
3. A **protocol documenting the appointment of the board** by the founding members

The application for registration must be certified by a notary and then submitted to the local court at the association's seat. In practice, the notary helps draft the required documents and handle the entry in the register of association.

The fees for the registration process and the certification by the notary amount to **approx. EUR 100**. Additional fees may be raised by the notary in case the notary assists in setting up the articles of association, etc.

Governing a Registered Association

The Registered Association is represented by the **board**, which is appointed by the member's meeting.

The main body of the Registered Association is the **member's meeting**, which is responsible inter alia for amending the articles of association, the appointment of the board, the issuance of any instructions to the committee, as well as, generally speaking, all matters that do not fall within the competence of other bodies of the association.

Governance

Generally, there are no mandatory provisions needed within the form's governing document / constitution, other than those which would be found in a standard for-profit company's governing document.

However, in order to recognise an NGO's charitable status for tax purposes, the Registered Association's articles need to show that its activities exclusively and directly serve tax preferred purposes, such as public-benefit, charitable or religious purposes conducted in a selfless way. Furthermore, the articles should expressly state that the Registered Association's funds and proceeds may only be used for achieving the tax privileged purposes and may not be distributed to its members. In order to meet such requirements, German tax law provides model articles of association which is generally recognised by the German tax authorities but is not mandatory to be used.

Liability is generally limited to the assets of the Registered Association.

Registered Associations are under a duty to render accounts to their members. Except for financial monitoring for taxation purposes, the Registered Association is not subject to state supervision. The amount of ongoing costs related to accounting and taxation largely depends on the size and the structure of the Registered Association.

Subsequent changes to the articles of association must be filed with the register of associations. It is also recommended to register changes to the composition of the board.

Operations

The Registered Association **must have a registered office in Germany**.

Once registered, the association obtains legal personality. The Registered Association can then be subject of rights and liabilities, act in its own name, sue and be sued in its own name and hold assets including real estate. However, economic activities are generally restricted by the non-commercial purpose of the Registered Association.

Physical meetings may be replaced by virtual meetings, if all members give their

consent to such procedure in either written or electronic form.

An overseas entity (such as the UK as a non-EU member state) can have control of the legal form. This is because no nationality or residency requirements apply on the membership in the association. Although generally each member of the Registered Association has one vote, the articles of association can specify that certain members are entitled to multiple votes.

No nationality or residency requirements apply to the members of the committee or any special directors.

The foreign residency of the director of a charitable NGO does not have tax impacts for the NGO in Germany. However, the foreign state of residence may impose taxes in case it qualifies the NGO as being tax resident in the foreign state due to any provisions in the respective double treaty.

External Activities of a Registered Association

Are there restrictions on the Registered Association's ability to trade?

Generally, a Registered Association is prohibited from engaging in commercial activity. Depending on the circumstances, small-scale auxiliary commercial activities in support of the non-profit purpose may be permitted.

However, in case such economic activity (i) does not support the charitable purpose of the corporation which can only be achieved by such economic activity, or (ii) could potentially compete with non-tax-exempted businesses other than to an extent which may be considered unavoidable for achieving the NGO's purposes, such economic activity of the Registered Association forms a taxable economic business (*wirtschaftlicher Geschäftsbetrieb*) and is therefore generally not tax-exempted. This will in particular become relevant for social entrepreneurship.

Are there restrictions on the Registered Association's ability to campaign?

No

Would the Registered Association's be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes

Would there be any restrictions on the Registered Association's sharing resources with a non-EU entity (i.e. the UK)?

No

Tax

If its charitable status is recognized by tax authorities, the Registered Association has access to a range of tax reliefs and other benefits. The key reliefs and benefits are as follows:

1. exemption from **corporate income tax** and **trade tax**;
2. exemption from **land tax**; however, no exemption for real estate transfer tax;
3. certain exemptions from **VAT**.

If the charitable status of the Registered Association is recognized by tax authorities, membership fees and donations as well as grants and estates can be received tax free, irrespective of the citizenship of the member / donor.

Furthermore, donations to NGOs benefit from tax deduction regulations, and therefore encourage taxpayers to donate parts of their income to charities.

Limited Liability Company (GmbH) and Entrepreneurial Company (UG)

Features

- A Limited Liability Company is the most commonly used **corporate form** for business purposes and is increasingly used by NGOs.
- It is a legal entity which offers its shareholders **protection from personal liability** for the entity's liabilities.
- A Limited Liability Company can be established for any legally permissible purpose, including for non-economic or charitable purposes. The **minimum share capital** of a Limited Liability Company amounts to **EUR 25,000**.
- Where the minimum share capital of EUR 25,000 cannot be raised, the German Limited Liability Company Act offers the form of an **Entrepreneurial Company (UG)** which requires a minimum share capital



of **EUR 1.00** (in cash).

- In regards to an Entrepreneurial Company, contributions in kind are not permissible and a statutory annual reserve in the amount of at least 25% of the annual profit has to be retained until a share capital of EUR 25,000 is met (in which case the Entrepreneurial Company turns into a Limited Liability Company).
- Note that an Entrepreneurial Company is not a distinct type of legal entity but a "small Limited Liability Company" with the above specifics.

Setting up a Limited Liability Company and an Entrepreneurial Company

Overall, not much effort is required to set up a Limited Liability Company. Including the registration process with the commercial register but excluding the process with the tax authorities for recognition of its charitable status, **3-6 weeks** should be anticipated for the formation of a Limited Liability Company or an Entrepreneurial Company.

One or more (co-)founders can set up the company. Certain written documentation and applications are required. In particular, the **formation document** and the **articles of association** need to be notarised and a **registration** of the Limited Liability Company and its articles of association with the competent commercial register is required.

The minimum share capital amounts to EUR 25,000 which can be contributed in cash or in kind (in case of cash contribution, at least 50% of the share capital must have been contributed to the company at the time of its registration).

Key required documents include:

1. An **act of formation** which needs to be notarised by a German notary;
2. The **articles of association** which are annexed to the act of formation (i.e., in notarised form);
3. A **shareholders' resolution** appointing the one or more managing directors;
4. A **shareholders' list** signed by the managing director(s).

It should be noted that the articles should expressly state the Limited Liability Company's funds and proceeds may only be used for achieving tax-privileged purposes and may not be distributed to its shareholders. In order to meet such requirements, German tax law provides model articles of associations which are generally recognised by the German tax authorities but is not mandatory to be used.

The **notary's fees** are regulated by law and depend on the amount of the share capital. As a rule of thumb, the notary's fees for the formation of a Limited Liability Company with a share capital of EUR 25,000 (cash contribution) or an Entrepreneurial Company with a share capital of EUR 1.00 amount to approximately **EUR 480 (plus VAT)**, provided that the notary also takes care of the drafting of all required documents. The notary's fees may be paid by the company from its equity.

The foregoing documents need to be filed with the competent commercial register, together with a filing document which needs to be signed by the managing director(s) and certified by the German notary. The notary then submits the filing document to the commercial register electronically. The filing document sets out, among other things:

1. That the minimum contributions have been made and are at the managing directors' free disposal;
2. That no circumstances exist which disqualify them becoming managing directors (certain statutory grounds of disqualification apply); and
3. The German business address of the Limited Liability Company.

The **notary's fees** for preparing and submitting the filing document amount to approx. **EUR 100 (plus VAT)**. **Registration fees** raised by the commercial register amount to approx. **EUR 150**. It is permissible that the fees will be paid by the company out of its equity.

For the Entrepreneurial Company, a statutory obligation to create special reserves in the amount of at least 25% of the annual profit until a share capital of EUR 25,000 is met applies. The founders may therefore consider a fiscal year in the Entrepreneurial Company's articles which does not end on 31 December of a calendar year if the NGO will likely be dependent on fund-raising campaigns at year end (holiday season) and cannot spend the funds before year end.

Ongoing filing and reporting

The Limited Liability Company is subject to ongoing **financial reporting**, generally by submitting an annual financial report. The financial statements must at least include a balance sheet, a profit and loss account and the **notes in German language**, and eventually published in the electronic federal gazette.

Further, any **amendment of its articles of association** (incl. capital increases) needs to be notarised by a German notary and needs to be filed with the competent commercial register. Any change of its managing directors and its shareholders also needs to be filed with the commercial register.

Governing a Limited Liability Company

The company is generally governed by its shareholders' meeting and one or several managing directors.

A Limited Liability Company may have an **advisory board, supervisory board or similar an additional board** on a voluntary basis and the articles of association may assign certain competencies of the shareholders' meeting to such voluntary board. Limited Liability Companies with more than 499 employees are required to establish a supervisory board – although this may not become relevant for most NGOs.

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of the legal form.

A Limited Liability Company can be established by **one or more (co-)founders**. The main corporate body is the **shareholders' meeting** that resolves upon material decisions of the company, i.e., approval of the annual financial statements and the appropriation of the annual profit, appointment and removal, as well as discharge of the managing directors and changes to the articles of association. The shareholders' meeting is entitled to give instructions to the managing director(s) in respect of any matters.

The managing director(s) conducts the company's ordinary business and represents the company. The company must have **at least one managing director, who is of legal age**, fully legally competent and not convicted of any relevant white-collar crimes in the past five years. Shareholders as well as third persons can be appointed as managing directors. The directors (the same for employees) can be paid for their services without the charitable status of the company being affected, for as long as the compensation is adequate.

Governance

There are generally **no provisions which are mandatory** in the form's governing document / constitution, other than those which would be found in a standard for-profit company's governing document. However, in order to recognize an NGO's charitable status for tax purposes, the Limited Liability Company's articles needs to show that its activities exclusively and directly serve tax-preferred purposes, such as public benefit, charitable or religious purposes conducted in a selfless way.

Only the Limited Liability Company itself is liable for its debts, but in general not its shareholders.

A registered office in Germany is required but the administrative headquarters may be abroad.

This form gives the NGO the legal capacity to do things in its own name such as employ staff, deliver services and enter commercial contracts.

Operations

A foreign residency of the director of a charitable NGO does not have tax impacts for the NGO in Germany. However, the foreign state of residence may impose taxes if the NGO qualifies as being resident for tax purposes in the foreign state, due to provisions in the relevant double tax treaty.

No residency or nationality requirements apply to managing directors. However, the directors are required to be able to perform their duties at all times, in particular the duty to keep accounts. Therefore, it is practical – although not mandatory under German law – for a managing director to have residency in Germany, or to at least be able to travel to Germany freely, without having to apply for a visa.

Meetings of the entity can be held virtually but there are explicit rules in regards to this and therefore should be included in the articles of associations in order to avoid legal disputes.

External Activities of a Limited Liability Company (Gesellschaft mit beschränkter Haftung – GmbH) and Entrepreneurial Company (Unternehmergesellschaft – UG)

Are there restrictions on the Company's ability to trade?

No

However, in case such economic activity (i) does not support the charitable purpose of the corporation which can only be achieved by such economic activity, or (ii) could potentially compete with non-tax-exempted businesses other than to an extent which may be considered unavoidable for achieving the NGOs purposes, such economic activity of the Limited Liability Company forms a taxable economic business (*wirtschaftlicher Geschäftsbetrieb*) and is therefore generally not tax-exempted. This will in particular become relevant for social entrepreneurship.

Are there restrictions on the Company's ability to campaign?

No

Would the Company be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes

Would there be any restrictions on the Company sharing resources with a non-EU entity (i.e. the UK)?

No

Tax

If its charitable status is recognised by tax authorities, the Limited Liability Company has access to a range of tax reliefs and other benefits. The key reliefs and benefits are as follows:

1. exemption from **corporate income tax** and **trade tax**;
2. exemption from **land tax**; however, no exemption for real estate transfer tax;
3. certain exemptions from **VAT**.

If the charitable status of the Limited Liability Company is recognised by tax authorities, membership fees and donations as well as grants and estates can be received tax free, irrespective of the citizenship of the member / donor.

Furthermore, donations to NGOs benefit from tax deduction regulations and therefore encourage taxpayers to donate parts of their income to charities.

Foundation (Stiftung)

Features

- A Foundation is a legal entity that has **no owners, shareholders or members**. It is perceived as a special fund, comprising assets that are dedicated to a specific purpose. A Foundation acquires legal capacity with recognition by the competent state authorities. Because its asset base shall be retained and not be used up, endowments of founders have to be high enough so that the Foundation's objectives can be achieved through proceeds and donations.
- Depending on applicable state laws, **endowments of less than EUR 25,000 will not be accepted by the competent state authorities** however, the asset base is usually considerably higher. Foundations are highly regarded in Germany as legal forms for NGOs.
- Foundations are subject to **only few legal regulations** and the governance of the Foundation can freely be governed by the Foundation's charter. However, changing the charter requires the competent state authorities' approval, which makes later adjustments of

Setting up a Foundation

the Foundation's governance burdensome.

It is a rather complex and lengthy process (approximately **3 months**), as it requires the recognition of competent state authorities. A Foundation will not be recognised by the authorities if:

- the endowment or the charter document do not meet the statutory minimum requirements;
- the assets endowed to the Foundation will likely not suffice to fulfil the Foundation's objects without using up such assets;
- or if the Foundation's objective may endanger common good / public welfare.

Key required documents include:

1. An **act of formation** (endowment), which shall set forth the founder's will to set up the Foundation and that he or she will dedicate certain specified assets to achieve an objective specified by the founder;
2. The **Foundation's charter**, which shall include its name, seat, objects, assets and the composition of its board;
3. A **proof** that the founder actually **owns the assets** endowed to the Foundation;
4. **Consent** of the board members;
5. A **form** of the competent authority for the **recognition** process.

The registration fees depend on the state where the Foundation is seated, but in most cases there are none.

Ongoing filing and reporting

Filing requirements depend on the various state laws governing the Foundation. In general:

- **Amendments of the Foundation's charter**, to the extent within the limits permitted by the act of formation (endowment) and the founder's will, require an approval by the competent state authorities
- **Any change of the Foundation's board** needs to be filed, but not approved, by the competent state authorities
- **Annual accounts** need to be filed with the competent state authorities, including a statement of assets and liabilities (balance sheet) and a report about the activities undertaken in fulfilment of the Foundation's objects

Apart from the above filing requirements, the competent state authorities more



Governing a Registered Association

generally supervise whether the Foundation's objects are being pursued and whether the board acts in compliance with laws and regulations.

Foundations are required to have a **management board** that has the extensive right (and obligation) to represent the Foundation. Typically, Foundations also have an **advisory board, board of trustees** or **similar optional boards**, because the management board may otherwise not be controlled due to a lack of shareholders / members / owners of the Foundation.

The initial management board members are usually appointed by the founder. The Foundation's charter sets forth how the board members can be replaced. Usually, an advisory board / board of trustees, if provided for, would be competent to appoint new management board members.

Governance

Generally, there are **no provisions which are mandatory** in the form's governing document / constitution, other than those which would be found in a standard for-profit company's governing document.

However, in order to recognise an NGO's charitable status for tax purposes, the Foundation's charter needs to show that its activities exclusively and directly serve tax-preferred purposes, such as public-benefit, charitable or religious purposes conducted in a selfless way.

Furthermore, the articles should state that the Foundation's funds and proceeds may only be used for achieving the tax-privileged purposes. In order to meet such requirements, German tax law provides a model article of association which is generally recognised by the German tax authorities but is not mandatory to be used.

This form offers **limited liability** as the Foundation has **no owners, shareholders or members**. In limited cases such as fraudulent behaviour or the like, it cannot be excluded that the board may be held directly liable by third parties. But in general, the Foundation is liable for acts and omissions of its board members.

A foreign residency of the director of a charitable NGO does not have tax impacts for the NGO in Germany. However, the foreign state of residence may impose taxes in case it qualifies the NGO as being tax resident in the foreign state due to any provisions in the respective double treaty.

Operations

There are **no requirements to having a physical presence in Germany** other than as set forth in the formation act (endowment) or the Foundation's charter.

Board meetings can be held virtually, unless the Foundation's charter provides for otherwise.

This form gives the NGO the legal capacity to do things in its own name such as employ staff, deliver services and enter into commercial contracts.

It is **not possible for an overseas entity (such as the UK as a non-EU member state) to have control of the legal form** since a Foundation has no owners, shareholders or members. However, an overseas entity can become a founder of a Foundation and thereby set the governance rules in the Foundation's charter.

External activities of a Foundation (Stiftung)

Are there restrictions on the Foundation's ability to trade?

Yes, the Foundation is bound to its objectives set by the act of formation (endowment) and its charter. Within these boundaries, a Foundation can trade.

However, in case such economic activity (i) does not support the charitable purpose of the corporation which can only be achieved by such economic activity, or (ii) could potentially compete with non-tax-exempted businesses other than to an extent which may be considered unavoidable for achieving the NGOs purposes, such economic activity of the Foundation forms a taxable economic business (*wirtschaftlicher Geschäftsbetrieb*) and is therefore generally not tax-exempted. This will in particular become relevant for social entrepreneurship.

Are there restrictions on the Foundation's ability to campaign?

No

Would the Foundation be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes

Would there be any restrictions on the Foundation's sharing resources with a non-EU entity (i.e. the UK)?

No

Tax

If its charitable status is recognised by tax authorities, the Foundation has access to a range of tax reliefs and other benefits. The key reliefs and benefits are as follows:

- exemption from **corporate income tax** and **trade tax**;
- exemption from **land tax**; however, no exemption for real estate transfer tax;
- certain exemptions from **VAT**.

If the charitable status of the Foundation is recognised by tax authorities, membership fees and donations as well as grants and estates can be received tax free, irrespective of the citizenship of the member / donor.

Furthermore, donations to NGOs benefit from tax deduction regulations and therefore encourage taxpayers to donate parts of their income to charities.

Stock Corporation (Aktiengesellschaft-AG)

Features

- A Stock Corporation, under German law, is typically used for **publicly held companies** as its shares can be traded on a stock market. The shareholders of the Stock Corporation are not liable for the entities' debts. A German Stock Corporation has a **two-tier board structure**, which consists of a supervisory board and a management board. The minimum share capital of a Stock Corporation amounts to **EUR 50,000**.
- A Stock Corporation can be established for any legally permissible purpose, including non-economic or charitable purposes. Although it appears not to be commonly used by German NGOs, it may be an alternative form for social entrepreneurship.
- Generally, the Societas Europaea (SE) could serve as an alternative to a Stock Corporation, however, SEs are not used by NGOs in Germany.

Setting up a Stock Corporation

Overall, not much effort is required to set up a Stock Corporation. Including the registration process with the commercial register but excluding the process with the tax authorities for recognition of its charitable status, **4-8 weeks** should be anticipated for the formation of a Stock Corporation.

A Stock Corporation can be established by one or more (co-)founders.

In particular, the formation document and the articles of association need to be notarised and a registration of the Stock Corporation and its articles of association with the competent commercial register is required.

The minimum share capital amounts to EUR 50,000 which can be contributed in cash or in kind (in case of cash contribution at least 25% of the share capital must

have been contributed to the company at the time of its registration).

Key required documents include:

1. **An act of formation** which needs to be notarised by a German notary;
2. The **articles of association** which are annexed to the act of formation (i.e., in notarised form);
3. A **written formation report**;
4. In case of in-kind contribution of the share capital, a written **valuation report**;
5. **Appointment of the supervisory board** and of the **Stock Corporation's statutory auditors** by the founders in notarised form;
6. **Appointment of the management board** by the supervisory board.

The **notary's fees** are regulated by law and depend on the amount of the share capital. As a rule of thumb, the notary's fees for the formation of a Stock Corporation with a share capital of EUR 50,000 (cash contribution) amount to approx. **EUR 660 (plus VAT)**, provided that the notary also drafts of all required documents. The notary's fees may be paid by the company out of its equity.

The foregoing documents need to be filed with the competent commercial register together with a filing document which needs to be signed by the management board members and certified by the German notary. The notary then submits the filing document to the commercial register electronically. The filing document includes, among other things:

- That the minimum contributions have been made and are at the management board's free disposal;
- That no circumstances exist which disqualify them becoming managing directors (certain statutory grounds of disqualification apply); and
- Proof of payment of the share capital.

The **notary's fees** for preparing and submitting the filing document amount to approx. **EUR 82.50 (plus VAT)**. **Registration fees** raised by the commercial register amount to approx. **EUR 300**. The fees may be paid by the company out of its equity.

Ongoing filing and reporting

Filing and reporting requirements of a Stock Corporation are burdensome. They include:

- Any **amendment of the articles of association** (incl. capital increases) needs to be notarised and registered with the competent commercial register.
- **Annual accounts** need to be filed with and published via the competent state authorities, which includes inter alia a balance sheet and a profit and loss statement.

Governing a Stock Corporation

A Stock Corporation has three corporate bodies:

Management board: The management board represents the Stock Corporation vis-à-vis third parties and manages its day to day business independently. In particular, neither shareholders nor in general the supervisory board can give instructions to the management board.

Its members can be shareholders, but usually the form of a Stock Corporation is chosen to keep the management independent from the shareholders. It can consist of one or more person(s). They are appointed by the supervisory board for a maximum term of five years. Repeated appointment is permissible.

Supervisory board: The main task of the supervisory board is the appointment, recall and monitoring of the management board (control function). It is also responsible inter alia for convening general meetings of the shareholders, approving the audited annual financial statements and the proposal for the appropriation of profits. It is constituted of no less than three members. The maximum term for the members of the supervisory board is four years.

General meeting: The general meeting is the body of the shareholders in which they exercise their rights in relationship to the Stock Corporation. Convocation of the general meeting is the responsibility of the management board however, shareholders representing 5% of the share capital may demand the assembly of extraordinary meetings.

The capabilities of the general meeting are generally limited to those enlisted in the German Stock Corporation Act or in the **articles of association**, and in general include only basic matters of the Stock Corporation (incl. amendments of the articles of association, capital measures, appointing supervisory board members, resolving upon the appropriation of profits, discharging the management board and the supervisory board, etc.).

Governance

In general, there are **no provisions which are mandatory** in the firm's governing document / constitution, other than those which would be found in a standard for-

profit company's governing document.

However, in order to recognise an NGO's charitable status for tax purposes, the Stock Corporation's articles need to show that its activities exclusively and directly serve tax-preferred purposes, such as public-benefit, charitable or religious purposes conducted in a selfless way.

Furthermore, the articles should state that the Stock Corporation's funds and proceeds may only be used for achieving the tax-privileged purposes and may not be distributed to its shareholders. In order to meet such requirements, German tax law provides a model article of associations which are generally recognised by the German tax authorities but is not mandatory to be used.

This form gives the NGO the legal capacity to do things in its own name, for example employ staff, deliver services, enter into commercial contracts and leases in its own name.

This form offers **limited liability**, as only the Stock Corporation itself is liable for its debts, but in general not its shareholders.

Operations

A **registered office in Germany is required** but the administrative headquarters may be abroad.

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of the legal form.

No residency or nationality requirements apply to managing directors. However, the directors are required to be able to perform their duties at all times, in particular the duty to keep accounts. Therefore, it is practical – although not mandatory under German law – for a managing director to have residency in Germany, or to at least be able to travel to Germany freely, without having to apply for a visa.

The management board and supervisory board meetings and decisions may be held virtually if the articles of association allow this. But general meetings of the shareholders must be held in person.

External activities of a Stock Corporation (Aktiengesellschaft – AG)

Are there restrictions on
the Stock Corporations's

No

However, in case such economic activity (i) does not support the charitable

ability to trade?	purpose of the corporation which can only be achieved by such economic activity, or (ii) could potentially compete with non-tax-exempted businesses other than to an extent which may be considered unavoidable for achieving the NGO's purposes, such economic activity of the Stock Corporation forms a taxable economic business (<i>wirtschaftlicher Geschäftsbetrieb</i>) and is therefore generally not tax-exempted. This will in particular become relevant for social entrepreneurship.
Are there restrictions on the Stock Corporation's ability to campaign?	No
Would the Stock Corporation be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes
Would there be any restrictions on the Stock Corporation sharing resources with a non-EU entity (i.e. the UK)?	No

Tax

If its charitable status is recognised by tax authorities, the Stock Corporation has access to a range of tax reliefs and other benefits. The key reliefs and benefits are as follows:

- exemption from **corporate income tax** and **trade tax**;
- exemption from **land tax**; however, no exemption for real estate transfer tax;
- certain exemptions from **VAT**.

If the charitable status of the Stock Corporation is recognised by tax authorities, membership fees and donations as well as grants and estates can be received tax free, irrespective of the citizenship of the member / donor.

Cooperative (Genossenschaft)

Features

- A Cooperative is an **autonomous association** of an unlimited number of members. Its purpose is aimed at promoting the income or economic businesses of its members or their social or cultural interests by way of a

joint operation. Unlike, for example, a Stock Corporation or a Limited Liability Company, a Cooperative can consequently **not be used for any legal purpose, but the purpose stated**. A Cooperative under German law is characterised by the principles of mutual self-help and self-administration of the members of the Cooperative who are at the same time customers of the Cooperative.

- Examples of entities operating in the legal form of a Cooperative under German law include credit associations (cooperative banks), associations for the joint sale of products (sales cooperatives such as wine-grower cooperatives), associations for the production of goods and their sale for joint account (production cooperatives), associations for the joint purchase of goods on a wholesale basis and sale on a retail basis (consumer cooperatives), housing construction cooperatives, and kindergarten or school cooperatives.
- A Cooperative may prove to be an alternative legal form under specific circumstances or for specific purposes but is not commonly used by NGOs in Germany.

Setting up a Cooperative

The form of a Cooperative is rather seldom and the inspection and registration processes may take longer than for other forms. As a rule of thumb, up to approximately **6 months** should be anticipated.

Key required documents include:

1. An **act of formation** made by a minimum of three members;
2. The Cooperative's **articles of association**, signed by the members;
3. A **resolution appointing the executive board and the supervisory board**;
4. A **certificate** by a state recognised inspection association that the **Cooperative is admissible for membership in the association**;
5. An **expert opinion** by the inspection association **whether the interests of the Cooperative members or creditors are endangered** due to personal or commercial circumstances, in particular the Cooperative's financial condition.

These documents need to be filed and the Cooperative be registered with the competent cooperative register.

The **registration fee** amounts to **EUR 210**.

Ongoing filing and reporting

Cooperatives are subject to an **extensive mandatory regular specific inspection by a state-recognised inspection association of which a Cooperative has to be a member**. The inspection must take place annually if the balance sheet total exceeds **EUR 2,000,000**, otherwise at least in every second financial year.

In case of Cooperatives with a balance sheet total of more than EUR 1,000,000 and turnover of more than EUR 2,000,000, the inspection must include, but is not limited to, inspection of the annual financial statements, which have to be drawn up by the executive board.

Amendments of the **Cooperative's articles** and any change of the **Cooperative's executive board** require registration with the competent cooperative register.

Governing a Cooperative

A Cooperative is required to have an **executive board**, and in case of Cooperatives with more than 20 members, a **supervisory board** is also needed. Both the executive board and, if applicable, the supervisory board are elected by the general meeting.

Governance

Generally, there **are no mandatory provisions in the form's governing document / constitution**, other than those which would be found in a standard for-profit company's governing document.

However, in order to recognise an NGO's charitable status for tax purposes, the Cooperative's articles need to show that its activities exclusively and directly serve tax-preferred purposes, such as public-benefit, charitable or religious purposes conducted in a selfless way.

Furthermore, the articles should expressly state that the Cooperative's funds and proceeds may only be used for achieving the tax-privileged purposes and may not be distributed to its members. In order to meet such requirements, German tax law provides a model article of association which is generally recognised by the German tax authorities but is not mandatory to be used.

The formation of a Cooperative requires registration in the cooperative register, which in turn requires confirmation by an inspection association that the interests of the Cooperative members or creditors are not endangered. **It cannot be ruled out that lack of physical presence of an executive board member in Germany may be challenged by the inspection association.** Lack of physical presence in the country of jurisdiction may also be considered to conflict with the principle of self-administration of members of a Cooperative.

This form offers **limited liability** as liability is limited to the assets of the

Operations

Cooperative.

There are **no statutory requirements regarding the level of physical presence** required in the jurisdiction. Board members must however be members of the Cooperative.

A foreign residency of the director of a charitable NGO does not have tax impacts for the NGO in Germany. However, the foreign state of residence may impose taxes in case it qualifies the NGO as being tax resident in the foreign state due to any provisions in the respective double treaty.

This form gives the NGO the legal capacity to do things in its own name for example employ staff, deliver services, enter into commercial contracts and leases in its own name.

The articles of a Cooperative may foresee that general meetings may be held virtually and that supervisory board members may in certain defined cases take part in a physical general meeting by way of picture and sound transmission.

Resolutions of the executive board may be taken by email or by telephone. Resolutions of the supervisory board may be taken by video or telephone conference.

Whether it is possible for an overseas entity (such as the UK as a non-EU member state) to have control of the legal form depends on different factors:

1. The first question would be whether a UK entity without activities in Germany could be member of a German Cooperative. Given that the purpose of a Cooperative needs to be the promotion of the income or economic businesses of its members or their social or cultural interests based on the principles of mutual self-help and self-administration of the members, this does not appear self-evident.
2. Assuming membership was possible the next question would be whether it could confer control. In the general meeting which elects the executive board each member has one vote and the statutory minimum number of members is three. Control could only be conferred on a single member if the articles provide for multiple voting rights for that member, which is possible under certain circumstances.

External activities of a Cooperative(Genossenschaft)

Are there restrictions on the Cooperative's ability to trade?	No However, when such economic activity (i) does not support the charitable purpose of the corporation which can only be achieved by such economic activity, or (ii) could potentially compete with non-tax-exempted businesses other than to an extent which may be considered unavoidable for achieving the NGOs purposes, such economic activity of the Cooperative forms a taxable economic business (wirtschaftlicher Geschäftsbetrieb) and is therefore generally not tax-exempted. This will in particular become relevant in case of social entrepreneurship.
Are there restrictions on the Cooperative's ability to campaign?	No
Would the Cooperative be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes
Would there be any restrictions on the Cooperative sharing resources with a non-EU entity (i.e. the UK)?	No

Tax

If its charitable status is recognised by tax authorities, the Cooperative has access to a range of tax reliefs and other benefits. The key reliefs and benefits are as follows:

1. exemption from **corporate income tax** and **trade tax**;
2. exemption from **land tax**; however, no exemption for real estate transfer tax;
3. certain exemptions from **VAT**.

If the charitable status of the Cooperative is recognised by tax authorities, membership fees, donations, grants and estates can be received tax free, irrespective of the citizenship of the member / donor.

Furthermore, donations to NGOs benefit from tax deduction regulations and therefore encourage taxpayers to donate parts of their income to charities.

NGOs in Ireland

Overview of legal forms available to NGOs

NGOs in the Republic of Ireland usually take one of three forms: a trust, an unincorporated association or a company. The most popular legal form is the use of a **limited liability company**.

Irish Law and the regulation of NGOs

Companies Registration Office and Companies Act 2014

Organisations that structure themselves as a company will be required to adhere to the legal requirements within the Companies Act 2014. Duties under the Companies Act 2014 include keeping adequate accounting records, preparing annual financial statements, having an annual audit undertaken (subject to certain exceptions), holding general meetings (subject to certain exceptions) and maintaining registers and other documents.

Companies will also be required to meet annual reporting obligations such as the requirement to submit an annual report and annual accounts to the Companies Registration Office (**CRO**) as well as documents which are mandatory in the event of certain occurrences, such as a change of director, or change of registered office.

Irish Revenue Commissioners (IRC)

Any organisation that holds or wishes to apply for a charitable tax exemption from the Irish Revenue Commissioners (**IRC**) must meet the regulatory obligations. A new applicant must provide detailed information to the IRC about the activities to be undertaken, funds to be raised, particulars and people involved, and other information. The IRC requires that there be a minimum of three directors / trustees for the organisation, the majority of whom must be resident in Ireland.

The obligations that must be met include the following:

- The income and property of the charity must be applied solely towards the promotion of its main charitable objective;
- If the annual income of an organisation is in excess of EUR 100,000, the accounts must be audited;
- The organisation may be periodically reviewed by the IRC;
- Proper controls must be put in place where funds are raised by public subscription;
- If funds or property remain upon the organisation's winding up they must be transferred to some charitable body having similar main objectives, or failing that, to some other charitable body;
- If the organisation is intended to accumulate funds for a period of over 2 years, permission must be obtained from the IRC;
- No director / trustee / officer may receive remuneration;

- Certain clauses concerning winding up, distribution of property to members and availability of annual accounts must be included in the organisation's governing instrument.

Charities Act 2009 and CRA

Any "charitable organisation", as defined within the Charities Act 2009, must adhere to its provisions concerning charities and is obliged to register and make annual returns to the Charities Regulatory Authority (**CRA**), the regulator of charities in Ireland. Both steps are carried out online and require, among other things, the following information to be submitted:

1. **Registration:** This form requires that charities insert key details in relation to their charitable purposes and objects, correspondence address and trustees / directors.
2. **Annual Reporting:** For this second phase, the charity will be required to provide further details in relation to the activities of the charity, along with providing financial information such as gross income and expenditure. The CRA website also provides for the possibility to upload financial statements and any other supporting documents, where required.

On applying to the CRA as a new applicant, the charity must provide a significant amount of information, as set out in the Charities Act 2009, which is considered relevant to the CRA.

Not registering with the CRA or carrying out activities in the name of an unregistered charity is an offence. Any person / trustee / charity office who:

- a) advertises on behalf of, or causes another person to advertise on behalf of a charity that is not registered;
- b) invites, or causes another person to invite, members of the public to give money or property to a charity that is not registered; or
- c) accepts, or causes another person to accept, a gift of money or other property on behalf of a charity that is not registered, will be guilty of an offence.

Therefore, we recommend carefully considering whether or not an organisation falls within the definition of a charitable organisation and, if so, to register with the CRA.

Irish law and the regulation of NGOs

The Charities Act 2009 is relatively new and several sections of it have only recently been commenced or are awaiting commencement. Therefore, the legal obligations of charities under the Charities Act 2009 are being regularly updated. The CRA, which is a new entity, is gradually assuming a greater role in relation to the regulation, supervision and investigation of charities.

Under the Charities Act 2009, the CRA is permitted to make regulations relating to the manner and conduct of fundraising by, or on behalf of, charitable organisations, including non-cash collections. These are likely to be published in the near future.

Supporting NGOs

The greatest incentives for NGOs are given to charities in the form of a charitable tax exemption (**CHY number**). The benefit of receiving a CHY number is the receipt of an exemption from income tax, corporation tax, capital gains tax and deposit interest

retention tax (**DIRT**). An exemption from stamp duty can be obtained by making a separate application to the IRC. A CHY number may also enhance **public trust and confidence** in a body that is dealing with funds donated for charitable purposes.

After holding a CHY number for 2 years, an entity may apply for “section 848a donations relief” which allows the entity to claim tax relief on certain donations from individuals over EUR 250 per annum. If a company donates a sum greater than EUR 250 in any year to a charity holding donations relief, it may claim a deduction for the donations as if it were an expense.

To apply for a CHY number, a charitable organisation that is established in Ireland must submit an application form known as a **Form CHY1** and ancillary documents / information referred to in the form (including a draft memorandum and articles of association) to the IRC. If a charity does not wish to establish an entity in Ireland, there is an alternative option. If it has already been established in another European Economic Area (**EEA**) / European Free Trade Association (**EFTA**) state, it may apply for relief from the payment of certain taxes in the Republic of Ireland. Technically, what is obtained in such circumstances is a “determination”, rather than an “exemption”. Charities that are resident and operating in an EEA / EFTA State may apply to the IRC for a **DCHY number**.

A DCHY number is a determination of the IRC that if that charity was to have an income in the Republic of Ireland similar to that of an Irish charity that has a CHY number; it would qualify for similar tax exemptions. It should be noted that the IRC can impose Irish Revenue-specific conditions on the non-Irish entity, which can be troublesome. For charities that are in existence in the UK and are considering the DCHY process, the potential implications of Brexit on the availability of this process should be analysed.

Recommendations

A **company limited by guarantee** is usually the most appropriate legal form for a not-for-profit organisation. Please note, however, that a company must have at **least one director who is resident in a member state of the EEA**. If the company is to be a charity that intends to apply for a charitable tax exemption, it must have a **minimum of three directors**, the majority of whom must be resident in the Republic of Ireland.

The relative advantages of a company limited by guarantee, compared to a trust or an unincorporated association, are set out below:

(i) A company provides for a more suitable corporate structure and more modern methods of governance because:

1. a company has perpetual succession;
2. a company automatically brings about transparency in reporting;
3. a company is the preferred structure for providers of finance; and
4. the internal controls of a company can be stated more explicitly.

(ii) A company structure relieves the trustees of automatic unlimited personal liability.

(iii) A limited company does not impose unlimited personal liability on members.

(iv) A company structure facilitates a more straightforward implementation of the requirements of the Charities Act 2009, if the new body is a charity, given the overlap in reporting and other requirements.

It should be noted that no legal form offers more flexibility than others for allowing non-EU staff hires.

Company Limited by Guarantee

Features

- A company has a **legal personality** which is separate and distinct from that of its members.
- Most forms of company come with the important feature of **limited liability**. In the event of such a company failing, shareholders / members normally only stand to lose their investment.
- If a not-for-profit entity wishes to obtain a charitable tax exemption or carry out charitable activities in Ireland, and decides to take the form of a company, the most common and recommended company form to adopt is a company limited by guarantee.

There are two types of company limited by guarantee:

- (i) a Company Limited by Guarantee; and
- (i) a Designated Activity Company (limited by guarantee, with a share capital).

A **Company Limited by Guarantee** does not have shares or share capital like typical limited companies. As there is no share capital, its “shareholders” are referred to as its “members”. Members receive their interest in the company in return for guaranteeing to pay a fixed amount of money to the company in the event of it being wound up (usually a nominal sum such as **EUR 1**).

The fact that this amount is fixed means that there is no value in a member’s interest in the company and no possibility of profit in the event of a member selling their interest. There is no limit on the number of its members (unless its constitution provides otherwise).

This elimination of the element of profit and the ability for there to be an unlimited number of members has attracted charitable bodies to this form of entity.

There is a second type of guarantee company, a **Designated Activity Company (limited by guarantee)** that has a share capital, but it is a rarity.

Members are obliged to take shares, as well as to give a guarantee. There is a **limit of 149 on the number of members**. Although this is a second form of company limited by guarantee, in practice, any company carrying out charitable activity or applying for a charitable tax exemption will be required to be a Company Limited by Guarantee.

It is also possible, if not operating as a charity, for a social enterprise to operate as a limited liability share company, which is the standard commercial company form, which permits payments to members and provides the same protections of limited liability as set out in the note above.

Setting up a

A **Form A1** (available at www.cro.ie) should be filled out, signed by the prospective members and directors of the company, and submitted to the CRO.

Company Limited by Guarantee

The company's **constitution** or **memorandum & articles of association** ("M&A") must also be submitted.

A fee of **EUR 100** will be charged for submission to the CRO. Additional legal / professional fees will apply.

There are some provisions which are mandatory in the form's governing document / constitution, other than those which would be found in a standard for-profit company's governing documents as if the company intends to be a charity, its M&A must state its charitable objects.

Furthermore, if it intends to seek a charitable tax exemption from the IRC, its governing document must contain standard provisions concerning the following:

- Prohibition on distribution of income and property to members and directors, apart from certain, specified exceptions as follows;
- reasonable and proper remuneration to any member, officer or servant of the company (not being a director) in return for any services rendered to the Company;
- interest at a rate not exceeding 1% above the Euro Interbank Offered Rate (**Euribor**) per annum on money lent by any director or any member to the company;
- reasonable and proper rent for premises demised or let by any director or any member to the company;
- reasonable and proper out-of-pocket expenses incurred by any director in connection with his attendance to any matter affecting the company; or
- fees, remuneration or other benefit in money's worth to any company of which a director may be a member holding not more than one hundredth part of the issued capital of such company; or
- sums to any director or to any person with whom a director has a personal connection in return for services actually rendered to the company, pursuant to an agreement entered into in compliance with the Charities Act 2009.
- Provision requiring certain additions, alterations or amendments of the governing document to be submitted in advance to the CRA;
- Provisions concerning the transfer of remaining property upon winding up; and
- Provision entitling the IRC to annual accounts, upon request.

Ongoing filing and reporting

There is an annual requirement to file **audited accounts** and an **annual report**

with the CRO.

An annual return is filed using a Form B1 and should include the following details:

- Registered office address;
- Names, addresses, DOBs and other directorships of directors; and
- Name, address and DOB of company secretary.

The company, if a charity, will also be required to adhere to the annual reporting requirements of the CRA.

Governing a Company Limited by Guarantee

There must be a **minimum of three directors**, the majority of whom **must be resident in the Republic of Ireland**, if the company intends to apply for a charitable tax exemption. The business of the company is delegated by the members, to the directors, who are responsible for the management of the company. The rules and regulations of the company are set out in a constitution known as a “memorandum and articles of association” (**M&A**).

Governance

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of the legal form, subject to the makeup of that control, given the fact that there are no shares.

This form offers limited liability. In a company limited by guarantee, members receive their interest in the company in return for guaranteeing to pay a fixed amount of money to the company in the event of it being wound up (usually a nominal sum such as EUR 1). Therefore, the members’ liability is typically an undertaking to pay EUR 1, or some other nominal sum.

If the company applies for a charitable tax exemption, the IRC requires that the majority of the directors must be resident in Ireland. There must be a **minimum of three directors of the company** if applying for a charitable tax exemption. Therefore, in practice, if it is intended to incorporate a company with the minimum of three directors, at least **two directors must be resident in the Republic of Ireland**.

Operations

Meetings of this entity can be held virtually. This is a mandatory provision of the Companies Act 2014 and is also often specified in the memorandum and articles of association for the purposes of clarity.

This form gives the NGO the legal capacity to do things in its own name, for example employ staff, deliver services, enter into commercial contracts and leases in its own name. The company will be permitted to do whatever powers identified in the memorandum and articles of association are. These should be broadly drafted.

External Activities of a Company Limited by Guarantee

Are there restrictions on the company's ability to trade?

No

However, a separate application should be made to the IRC for the tax exemption available for charitable trading activities under section 208 of the Taxes Consolidation Act 1997. Also, VAT registration may be required if a charity is seen to be trading (i.e. engaged in a commercial activity or acquiring goods / services from abroad). Advice should be taken in this regard. Some charities establish a separate non-charity as a trading entity.

Are there restrictions on the company's ability to campaign?

No

However, a company that wants to be a charity will be prohibited if it promotes a political cause, unless that cause is directly related to the advancement of its charitable purposes.

Would the company be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes

Would there be any restrictions on the company sharing resources with a non-EU entity (i.e. the UK)?

No

Tax

The company may apply for a charitable tax exemption from the IRC. This will grant an exemption from the payment of corporation tax and certain other taxes, mentioned previously.

This form does not offer any benefits in terms of maximizing fundraising from taxpayers in the jurisdiction. However, the company may apply for section 848a donations relief, which is relief available to successful applicants regardless of their corporate / legal form.

Trust

Features

- A trust is an arrangement, often governed by a deed of trust, under which a person or persons (trustees) hold property or funds on behalf of other persons or objects. The underlying reason for a trust's existence is to **protect and use the property for the benefit of some other person or object** so that the real benefit accrues to that other person or object.
- Trusts have historically been the legal form adopted by bodies established for charitable / not-for-profit purposes. The **replacement of individual trustees must occur periodically** and if this has not been mentioned in the trust documentation, it falls to the courts to determine replacements, which can cause delays.
- While a trust is relatively easy to set up and maintain, not-for-profit bodies are starting to move away from the trust structure in order to achieve limited liability, perpetual succession and more certainty in the future.
- In the past trusts were seen as an easier and more cost efficient structure to govern because of the lack of regulation for trusts – there was no regulatory body (such as the CRO for companies) where details of the trust, financial records and other documents had to be filed and were available for the public to see.
- However, since the establishment of the CRA, **every organisation carrying out a charitable activity in Ireland must provide details and documentation that are available for public inspection**. In addition, everybody with a charitable tax exemption from the IRC must prepare and file audited accounts with the IRC if the annual turnover of the body exceeds EUR 100,000.
- Therefore, a trust that is a registered charity can no longer avail of the “perceived benefits” of greater privacy and less red tape. We refer to “perceived benefits” in parenthesis, because, in an era of increased transparency and openness, one has to consider if in fact it is a benefit not to have to disclose details of a not-for-profit body where the body operates by virtue of donations of time and funds from the public.

Setting up a Trust

A trust may be established by the drafting of a **trust deed**, provided that the three certainties are present: **certainty of intention, certainty of subject-matter and certainty of objects**.

If the entity intends to be a charity, its trust deed must state its charitable objects. Furthermore, if it intends to seek a charitable tax exemption from the IRC, its trust deed must contain standard provisions concerning the following:

1. Prohibition on distribution of income and property to trustees, apart from certain, specified exceptions as follows:



- reasonable and proper remuneration to any member, officer or servant of the trust (not being a trustee) in return for any services rendered to the trust;
 - interest at a rate not exceeding 1% above the Euribor per annum on money lent by any trustee to the trust;
 - reasonable and proper rent for premises demised or let by any trustee to the trust;
 - reasonable and proper out-of-pocket expenses incurred by any trustee in connection with her / his attendance to any matter affecting the trust; or
 - fees, remuneration or other benefit in money's worth to any company of which a trustee may be a member holding not more than one hundredth part of the issued capital of such company; or
 - sums to any trustee or to any person with whom a trustee has a personal connection in return for services actually rendered to the trust, pursuant to an agreement entered into in compliance with the Charities Act 2009.
2. Provision requiring certain additions, alterations or amendments of the trust deed to be submitted in advance to the CRA;
 3. Provisions concerning the transfer of remaining property upon winding up; and
 4. Provision entitling the IRC to annual accounts, upon request.

Governing a Trust

The **trustees** govern the trust. Their duties and powers are as set out in the trust deed.

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of this legal form.

The trustees of this form have **unlimited liability**.

Governance

Meetings of this entity can be held virtually, if provided for by the trust deed, or if the practice of the trustees is to hold virtual meetings.

If the trust applies for a charitable tax exemption, the IRC requires that the majority of the trustees are resident in Ireland. There must be a minimum of three trustees of the trust if applying for a charitable tax exemption. Therefore, in practice, **at least two trustees must reside in the Republic of Ireland**.

Operations

Actions such as employing staff, delivering services and entering into commercial contracts and leases are completed by the trustees of the trust as the trust does not have any separate legal personality from the trustees. The trust deed should however specify the powers of the trustees.

External Activities of a Trust

Are there restrictions on the Trust's ability to trade?

No

However, the trustees must adhere to the provisions of the trust deed. A separate application should be made to the IRC for the tax exemption available for charitable trading activities under section 208 of the Taxes Consolidation Act 1997. Also, VAT registration may be required if a charity is seen to be trading (i.e. engaged in a commercial activity or acquiring goods / services from abroad). Advice should be taken in this regard. Some charities establish a separate non-charity as a trading entity.

Are there restrictions on the Trust's ability to campaign?

No

However, if the trust is a charity, it will be prohibited from registering as a charity if it promotes a political cause, unless that cause is directly related to the advancement of its charitable purposes.

Would the Trust be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes.

Would there be any restrictions on the Trust sharing resources with a non-EU entity (i.e. the UK)?

No.

Tax

A Trust may apply for a **charitable tax** exemption from the IRC. This will grant an exemption from the payment of the taxes outlined previously.

A Trust does not offer any benefits in terms of maximizing fundraising from taxpayers in the jurisdiction. However, if the trust is a charity, it may apply for section 848a donations relief, as described in greater detail above, which is available to successful applicants regardless of their corporate / legal form.

An Unincorporated Association

Features

- An Unincorporated Association is simply a collection of individuals, often bound by a set of rules and having identifiable members. An Unincorporated Association has no existence in law separate from its members.
- Not-for-profit bodies often start out life as an Unincorporated Association and those that grow in organisational complexity tend to incorporate as companies limited by guarantee.
- The main advantage of an Unincorporated Association over a company is that it allows for **additional discretion in the manner of its operation and administration**. Furthermore, it is often perceived as relatively inexpensive to establish and operate, in comparison to a company, although this is not always the case.
- Previously there was no body that regulated Unincorporated Associations. Now, if the Unincorporated Association is carrying out a charitable activity in Ireland, it will be **regulated by the CRA**. If it has a charitable tax exemption, it must also meet the requirements of the IRC.

Setting up an Unincorporated Association

An Unincorporated Association can be easily set up by the creation of a **governing instrument** or a **set of rules**.

If the association is a charity, it will be required to adhere to the **annual reporting requirements of the CRA**.

If the association intends to be a charity, its rules must state its charitable objects. Furthermore, if it intends to seek a charitable tax exemption from the IRC, its rules must contain standard provisions concerning the following:

1. Prohibition on distribution of income and property to trustees, apart from certain, specified exceptions which are:
 - reasonable and proper remuneration to any member, officer or servant of the association (not being a trustee) in return for any services rendered to the association;
 - interest at a rate not exceeding 1% above the Euribor per annum on money lent by any trustee or any member to the association;
 - reasonable and proper rent for premises demised or let by any trustee or any member to the association;
 - reasonable and proper out-of-pocket expenses incurred by any trustee in connection with his attendance to any matter affecting the association; or

- fees, remuneration or other benefit in money's worth to any company of which a trustee may be a member holding not more than one hundredth part of the issued capital of such company; or
 - sums to any trustee or to any person with whom a trustee has a personal connection in return for services actually rendered to the association, pursuant to an agreement entered into in compliance with the Charities Act 2009.
2. Provision requiring certain additions, alterations or amendments of the rules to be submitted in advance to the CRA;
 3. Provisions concerning the transfer of remaining property upon winding up;
 4. Provision entitling the IRC to annual accounts, upon request.

Governing an Unincorporated Association

The **members of the association** govern the association. Their duties and powers are as set out in the rules of the association.

Governance

This form itself does not offer limited liability. The main disadvantage of an Unincorporated Association is that its members have **unlimited liability**. Therefore, if a claim is brought against the not-for-profit body, the members will be personally liable for meeting it.

It is possible for an overseas entity (such as the UK as a non-EU member state) to have control of this legal form.

Meetings of this entity can be held virtually if provided for by the rules of the association, or if the practice of the members of the association is to hold virtual meetings.

If the association applies for a charitable tax exemption, the IRC requires that the majority of the members of the association must be resident in Ireland. There must be a **minimum of three association members** if applying for a charitable tax exemption. Therefore, in practice, at **least two members of the association must be resident in the Republic of Ireland**.

Operations

This form gives the NGO the legal capacity to do things in its own name, for example- employ staff, deliver services enter into contracts and leases in its own name. However, an unincorporated association does not have any separate legal personality from its members. Therefore, they have unlimited liability if a claim is brought against the unincorporated association. The rules of the association should specify the powers of the members of the association.

External Activities of an Unincorporated Association

Are there restrictions on the Unincorporated Association's ability to trade?

No

However, the members of the association must adhere to the provisions of the association rules. A separate application should be made to the IRC for the tax exemption available for charitable trading activities under section 208 of the Taxes Consolidation Act 1997. Also, VAT registration may be required if a charity is seen to be trading (i.e. engaged in a commercial activity or acquiring goods / services from abroad). Advice should be taken in this regard. Some charities establish a separate non-charity as a trading entity.

Are there restrictions on the Unincorporated Association's ability to campaign?

No

However, if the association is a charity, it will be prohibited from registering as a charity if it promotes a political cause, unless that cause is directly related to the advancement of its charitable purposes.

Would the Unincorporated Association be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?

Yes.

Would there be any restrictions on the Unincorporated Association sharing resources with a non-EU entity (i.e. the UK)?

No.

Tax

The association may apply for a **charitable tax** exemption from the IRC. This will grant an exemption from the payment of the taxes outlined previously.

This form does not offer any benefits in terms of maximising fundraising from taxpayers in the jurisdiction. However, if the association is a charity, it may apply for section 848a donations relief, as described in greater detail above, which is available to successful applicants regardless of their corporate / legal form.

NGOs in the Netherlands

Overview of legal forms available to NGOs

In the Netherlands, there are no regulatory oversights other than a tax review, if an NGO is seeking to be recognised as a charitable organisation ('a public interest pursuing organisation' for tax purposes). This is based on the historical notion that foundations and associations are part of the 'private domain' rather than the public domain.

In general, there is no specific or general barrier in setting up an NGO in the Netherlands. However, some banking institutions may scrutinise unknown international NGOs and require extensive information of the founders / contributors in light of their obligations to identify the Ultimate Beneficial Owner (UBO) of any organisation.

In the Netherlands, NGOs can use the legal form of a **Foundation** or **Association**.

1. **Foundations** are the most commonly used form for NGOs and are covered in detail below.
2. Unlike the foundation, the **association** has an assembly of members, which is typically the most important body of the association. Where an international NGO uses an association, normally its national organisation constitutes the assembly of members, and the board of the association must ultimately report to the members' meeting.
3. An association may exist informally, without being incorporated by a notarial deed, but will have restricted powers. In the case of an association, the board members are **personally liable** for any obligations incurred. The main restriction of an association is **that its purpose may not be to distribute any profits to members or board members**.
4. In the Netherlands, **no specific legal form exists for Social Enterprises** which are normally structured in the legal form of a cooperative or in hybrid structures of both foundations/associations and corporations.

Dutch Law and the regulation of NGOs

Over the years, the requirements for recognition as a public interest pursuing organisation ("Charity") for tax purposes have increased but are still reasonable in comparison to other jurisdictions. The Netherlands have an extremely liberal approach to privileging international flows of charitable money. This allows foreign charities to qualify as charities for Dutch tax purposes relatively easily and equally allows Dutch based charities to expand their funds internationally without onerous restrictions.

There have been discussions on a regulatory oversight regime but recently it has been decided that this will be left to "voluntary regulation" within the sector and that no link will be made with the charity requirements of any NGO for privileged tax purposes.

Supporting NGOs

Traditionally, the government has been the main sponsor of large Dutch based NGOs. During the last couple of years, **the government has reduced direct sponsoring budgets to NGOs**.

The tax exemptions and incentives for philanthropic flows of money are substantial as well as the government refraining from imposing policy requirements and prohibitions. The result is a liberal civil society sector that enjoys the benefit of tax exemptions.

Recommendations

The most common recommendation for establishing an NGO in the Netherlands is to create a **Foundation**, eventually in combination with a corporate entity as a subsidiary where (international) commercial activities are involved. When an international NGO wishes to have an overarching global entity made up of national organisations, an association would be the preferred choice. It should be noted that no form in particular offers more flexibility than another in regards to allowing non-EU hires.

Foundation

Features

- A Foundation is a **legal entity** created by a legal act which has no members and the purpose of which is to **realise a specified objective** by means of applying its assets.
- Foundations must be established by **notarial deed** and may not exist informally. Unlike companies, which can be considered to be owned by shareholders, and unlike associations, which are owned by their members, foundations by definition do not have shareholders or members.
- The applicable rules relating to the foundation are set out in **Book 2 of the Netherlands Civil Code, articles 285-304**. The prohibition of ownership or private inurement is stipulated in art. 285:
"[T]he purpose of a Foundation may not be to make payments to its founders or its officials, unless the distributions have a charitable or social character. Having no members or shareholders, a Foundation is considered a 'purpose fund'. It is managed by a board and may be supervised by a supervisory board of trustees with an oversight or advisory function. In international affiliate structures, a foreign parent organisation may have substantial oversight functions through the use of a board of trustees, while the domestic board of directors is responsible for the day-to-day operations of the foundation."
- The identity of the persons on the Board of Directors and of the members of any eventual Supervisory Board must be disclosed in the Chamber of Commerce.

Setting up a Foundation

Setting up a Foundation is relatively simple and requires a **notarial deed**. This should be a deed of incorporation including the **articles of association, purpose and governance**. The fee is contingent on the complexity, starting at **EUR 500** for

a simple form.

Ongoing filing and reporting

The foundation has **no obligation to publish annual accounts** unless it carries out an enterprise. If it qualifies as a charity for tax purposes, it should – depending on its character – publish some information on a website for ‘the public’ such as a **balance sheet and accounts, the board members, and the compensation policy of the organisation.**

It is important to mention that charities that are not publicly supported but are endowed foundations do not have to publish full financial information or a balance sheet. A **summary of proceeds and expenditures** is sufficient.

Apart from the disclosure of certain information on the internet, there is **no requirement to report annually to the tax authorities.**

Governing a Foundation

A Foundation is governed by a **Board** (which must consist of at least 1 member but usually has at least 3), but not seldom in concert with other organs such as a **Supervisory Board** or **Board of Trustees** with controlling powers. The Dutch Court has default power in case of mismanagement or a lack of board members.

Governance

A Foundation offers **limited liability** as it is a legal entity with a full legal personality. There are some limited circumstances in which the board members of a Foundation can be held personally liable, such as fraudulent or wrongful trading when the company faces insolvency.

An overseas entity may have the power to appoint or dismiss board members of the Foundation by forming a **Supervisory Board** or **Board of Trustees**.

A standard for-profit company does not exist in the Netherlands and in order to meet the requirements of a charity for tax purposes, the provision of the compensation of board members, modifying the charitable purpose and the liquidation of the Foundation should contain specified language.

Operations

There are **no residency or nationality requirements for directors**. Charities that are effectively governed abroad or are governed by an international board may equally qualify as a charity, as long as they demonstrate to the Dutch tax authorities that they are complying with Dutch charity requirements.

The meetings of the entity can be held virtually.

A Foundation is a legal entity with full legal personality, meaning the NGO has the

legal capacity to do things in its own name. For example, it can employ staff, deliver services, enter into commercial contracts and leases in its own name.

External Activities of a Foundation

Are there restrictions on the Foundation's ability to trade?

No

In order to meet the requirements of a charity (Algemeen Nut Beogende Instelling ANBI) under Dutch rules, trading activities have to meet certain requirements. **Trading activities with the aim of financing the charitable purpose of the ANBI are unrestricted.** Related trading activities, i.e. with the aim to achieve the charitable purpose of the ANBI should not be exclusively realised at commercial rates.

In other words, there should be something 'for the public benefit' in the activities of a charitable foundation. If the only activities of a Foundation are trading activities, not all of these activities should be at commercial rates in order to remain a charitable foundation.

Dutch charitable foundations are characterised by a very liberal regime that is based on qualitative criteria. This is foremost a cultural matter. Dutch legislation is based on '*open qualitative norms*' and leaves ample room for interpretation and new developments. Rather than imposing a qualitative norm on expenditures, the Dutch legislator requires a 'reasonable' balance between expenditures and accumulation of funds. It is up to the organisation to specify why its policy is reasonable.

Only in marginal situations, the tax authorities will deny the charitable status because of 'unreasonable' accumulation of properties; the margins however are not fixed but are developing.

Therefore, Dutch law does **not** have, for example:

- excess business holding rules; a charitable foundation may own all shares in a private company wherever located.
- a certain minimum compulsory distribution for charitable foundations. If a grant contains specific guidance on the maintenance of (part or basis of) the funds for the recipient charitable organisation, the maintenance of the funds in accordance with this guidance is deemed to be 'reasonable'.
- taxable expenditure rules; in the Netherlands, no specific controlling measures on international philanthropy are found, no expenditure responsibility is required for grants, donations or investments overseas.

	<ul style="list-style-type: none"> investment restrictions; Dutch charitable foundations may invest in whatever they like, there is no regulatory oversight on the decisions of the foundation.
Are there restrictions on the Registered Association's ability to campaign?	No, as long as the campaign is not in contradiction to Dutch public policies and is in conformity with the public interest purpose of the NGO.
Would the Registered Association's be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	No
Would there be any restrictions on the Registered Association's sharing resources with a non-EU entity (i.e. the UK)?	No, presuming the requirements of the charity (ANBI) are still met.

Tax

Corporate income tax

Foundations and associations are **exempt** from corporate income tax, except where commercial profits are realised. Profits from entrepreneurial activities are subject to corporate income tax based on the notion of non-competition with other (for profit) entities. Accordingly, it does not matter whether business income is derived from activities that are 'related to the public interest purpose'. In addition to this, **specific deductions exist** e.g. where profits are made with the use of volunteers; the use of these deductions may result in a full exemption of business profits.

Gifts

Charities are **exempt** of gift and **inheritance tax** if the gifts and inheritance received are not subjected to conditions that deprive them from being in the public interest. To be eligible for the benefits of the charity (ANBI) status in the Netherlands, the NGO should have the legal form of a foundation or association and should meet the requirements. The charity (ANBI) status provides for an exemption of gift tax on all gifts that are distributed by the NGO.

Individuals benefit from a deduction for gifts to charities. Typically, the size of the deduction depends on the form of the gift. Periodic gifts are fully deductible without a limit or threshold, whereas non-recurring gifts are deductible only within certain limits of taxable income of the donor.

1. **Periodic gifts** are gifts made in the form of an annuity, formalised by notarial deed, with annual fixed and equal payments lasting at least five years. During those five years, the annuity may be contingent on events other than the death of the donor, over which the donor has no control: e.g. unemployment, bankruptcy of the recipient organisation. These are examples that may be stipulated as conditions of the periodic gift.
2. A **non-recurring (one-time) gift** to a charitable organisation is tax deductible to the extent the amount(s) per annum exceeds the minimum threshold (1% of taxable gross income) and as long as they do not exceed a limit of 10% of the taxable gross income (before personal deductions). However, if the gift is made as a periodical gift, neither threshold nor limits apply. As a result, it is possible for a Dutch resident donor to donate his or her entire taxable income to public interest organisations.
3. **Corporations** benefit from a deduction for gifts benefited to charities up to 50% of their taxable income with a maximum of EUR 100.000.
4. The **Income Tax Act** does not distinguish between cash gifts or gifts in kind.

NGOs in Spain

Overview of legal forms available to NGOs

1. **Foundations** (Fundación)
2. **Associations** (Asociación)
3. **Non-Governmental Organisations or NGOs** (Organizaciones no gubernamentales de desarrollo)
4. **Cooperative enterprises** (Cooperativa)
5. **Companies** (Sociedad)
 - A corporate structure may be used when the non-profit entity carries out mainly an economic activity. In this case, a limited liability company (either a sociedad anónima or a sociedad de responsabilidad limitada) would be the most appropriate structure.
 - The advantages and disadvantages of a company will not be analysed, as the other forms mentioned are more non-profit specific.

Spanish Law and the regulation of NGOs

The charity sector in Spain is subject to **strict regulation**. As explained further on in the chapter, each legal form has to fulfil many requirements. This strict regulation has improved the sector's reputation as well as the confidence Spanish society has in the sector.

The main challenge that NGOs now face is how to finance these charitable entities. Many organisations have seen their funds decrease during the financial crisis. However, there has been a parallel increase in partners, affiliates and volunteers.

Barriers to entry

There are no barriers for an NGO to be established in Spain, but each of the suggested forms should strictly comply with its specific regulation:

- **Foundations:** Law 50/2002 on Spanish foundations, from 26 December 2002 and Royal Decree 1337/2005 on state competence foundations, from 11 November 2005.
- **Associations:** Law 1/2002 on the right to associate, from 22 March 2002 and Royal Decree 1740/2003 on Spanish associations with a public interest purpose, from 19 December 2003.

- **NGOs:** Law 23/1998 on Spanish international development cooperation, from 7 July 1998 and Royal Decree 193/2015 of the NGOs registry, from 23 March 2015.
- **Co-operatives:** Law 27/1999 on co-operatives, from 16 July 1999 and Law 20/1990 on the co-operatives tax regime, from 19 December 1990.

Additionally, when a non-profit entity carries out its activities solely in one of Spain's autonomous regions (*Comunidades Autónomas*), specific local regulations shall apply.

Supporting NGOs

Alongside tax incentives, the national, regional and local administrations grant subsidies to encourage the incorporation and functioning of non-profits.

Additionally, a recent law on social enterprises established a general framework of support measures to be undertaken by the government. However, they currently have not been developed into specific provisions.

Recommendations

Being a non-profit organisation from outside the European Union does not pose a problem when selecting one form or another. Therefore, a non-EU non-profit organisation should analyse what its main activities and structures are in order to determine which form serves its purpose best.

It should be noted that no legal form offers more flexibility than another in regards to allowing non-EU staff hires. In every case, hiring staff would require a double registration:

- (i) as an enterprise with the Social Security, and
- (ii) as a labour centre.

The hired staff would in turn need to be registered with Social Security.

When deciding amongst the different legal forms, the non-profit should also determine where its activities will take place. If they are to be carried out in more than one EU state, specific European regulated entities should be taken into account: The European foundation, the European co-operative enterprise, and the European company. The main advantage of opting for one of these forms is that there is a general regulation at the EU level, so local laws are not as important.

Foundation (Fundación)

Features

- Foundations are organisations that **manage an estate in order to carry out a goal of public interest**. There are no partners, just a patrimony linked to the foundational activity managed by a board of trustees.
- If the project intends to achieve a goal of public interest and its beneficiaries are not involved in the project's management, a foundation

Setting up a Foundation

can be an appropriate legal form.

- It must pursue a goal of general interest and its beneficiaries must be a generic group of people. The workers of a company and their relatives qualify as a generic group of people for these purposes.
- 70% of the net profit shall be invested in the foundation's goal.

In case of winding up, the remaining assets shall be assigned to another foundation or non-profit entity.

Foundations are incorporated by means of an **incorporation deed** granted by the founder or founders (who can be a natural person or legal entity). The founder is not considered a member of the foundation; s/he just adopts the decision of incorporating the foundation, and may contribute the initial foundation capital. The intention to incorporate a foundation may be expressed inter vivos or mortis causa, in which case the founder's last will shall be the document fulfilling the requirements of the incorporation deed.

The incorporation deed shall include the following documents:

1. A **name certificate** issued by the Spanish Foundations Registry within the previous three months, confirming that no other entity is using the same name. The name of a foundation shall fulfill certain requirements.
2. The **foundation's by-laws** (the rules governing the entity) with the mandatory contents established in the law.
3. If the founder is a legal entity, the corresponding **resolution approving the incorporation of the foundation and the donation to the foundation**.
4. Documents proving the initial foundation capital: its **reality and valuation**. The initial foundation capital must be enough to allow the foundation to pursue its general interest goals- the law presumes **EUR 30,000** to be enough.
5. Spanish **tax id number**.
6. **Liquidation of taxes** (although foundations are exempt from payment, forms need to be filed with the tax authorities).
7. **Report** by the protectorate confirming that the **foundation's goals are suitable and that the initial foundation capital is enough**.

The incorporation deed needs to be filed with the Foundations Registry.

The estimated time to incorporate a foundation is **2-3 months** (the Foundations Registry has six months to decide whether the foundation may be filed or not). Costs will normally be under **EUR 1,000**, the only material cost being the

notarisation of the deed.

In the interest of time, we would recommend scheduling a prior appointment with a notary and with the Foundations Registry to discuss and agree the required steps.

Ongoing filing and reporting

The filing and reporting that a Foundation requires is quite extensive. Foundations shall have and keep updated the following books, which need to be legalised by the Foundations Registry prior to using them:

- (i) **a daily ledger (libro diario);**
- (ii) **a registry book of inventory and annual accounts** (libro de inventarios y cuentas anuales). The annual accounts shall include: a balance sheet, a profit and loss statement, and a report. Under certain requirements they may be formulated in abbreviated form.
- (iii) **a minute's registry book**, where all drawn up and approved minutes of the board of trustees' meetings are recorded.

Annual accounts must be audited when any two of the following conditions are met by the end of the accounting year:

- (i) the total assets exceed EUR 2,400,000;
- (ii) the annual net income turnover exceeds EUR 2,400,000; and
- (iii) the average number of the employees exceeds 50.

Foundations are required to elaborate yearly:

1. An **action plan** (plan de actuación) illustrating the purposes and activities that the Foundation will carry out the next year. It shall be prepared during the last three months of each accounting year, sent to the protectorate, and filed with the Foundations Registry. There is an action plan registry book also legalized by the Foundations Registry.
2. A **report** explaining the level of compliance of the Foundation with the code of conduct regarding temporary financial investments published by the Spanish Securities Commission (**CNMV**). It shall be sent to the protectorate together with the annual accounts.

Throughout the Foundation's life the following events need to be filed with the Foundations Registry:

- **Any change in the board of trustees:** for this purpose, the trustees shall accept the position by means of a public deed or a private document legitimated by a notary; or by their appearance before the Foundations Registry.
- **Any change in the by-laws:** it needs to be formalised in a public deed before a notary public.
- The **merger** with another Foundation, as well as the termination and

winding up of the Foundation.

Finally, changes in the Foundation's **endowment** generally need to be authorised by the protectorate, and need to be filed with the appropriate registry (e.g. the Land Registry for real estate, etc).

Governing a Foundation

Board of trustees (patronato)

The board of trustees is the representative and governing body of a foundation. It should have **at least three members** – individuals or legal entities, as long as they are fully able to act, and they are not incompatible.

It promotes the foundation's activity, strategic planning and management control, and represents the foundation during relations. As a collegiate body, agreements are adopted by majority. It must have a president and a secretary.

The main activities, duties and voting system of the board of trustees shall be regulated in the by-laws of the foundation or in special rules and regulations.

As a general rule, trustees are not remunerated **and are liable for damages caused in the exercise of their duties**. They may receive remuneration for the services provided out of the scope of their duties as trustees.

Protectorate (protectorado)

The protectorate is the foundation's control body. It is a public organism that depends on the Education, Culture and Sports Ministry of Spain. It is responsible for ensuring that assets are effectively allocated to the fulfilment of the foundation's general interest purposes, and supervises the application of the law.

The board of trustees is accountable to the protectorate, who are entitled to claim the trustees' responsibility and, if necessary, urge their removal.

Governance

Foundations may establish any other governing body as long as it does not interfere with the legal obligations of the board of trustees.

Once the Foundation acquires legal capacity upon filing the incorporation deed to the Foundation's Register, it can act and do everything in its own name for example employ staff, deliver services, enter into commercial contracts and leases.

There are no partners in this entity. The members of the board of trustees **are liable for the obligations contracted prior to registration**, if six months have elapsed since the granting of the incorporation deed without having requested it.

Operations

The foundation will require **a registered office with a physical address in Spain**. Although, there are **no residency or nationality requirements for directors**.

Meetings of the entity can be held virtually as long as the by-laws express that this is allowed.

Communication between the trustees should be held in real-time to ensure deliberation.

As there are no shareholders, **there is no control over a foundation.**

In the case of an overseas Foundation, an option would be to operate in Spain through a delegation. The founder must:

- (i) establish and maintain a permanent delegation in Spain;
- (ii) grant a public deed;
- (iii) receive a favourable report from the protectorate stating that the purpose of the Spanish delegation satisfies general interest requirements; and
- (iv) file the deed at the Foundations Registry.

The activities of foreign foundations in Spain cannot consist exclusively on the receipt of funds.

External Activities of a Foundation

Are there restrictions on the Foundation's ability to trade?	Foundations may take part in economic activities that are related, complementary or ancillary to the foundation's objectives. In particular, they may hold stakes in corporate companies, as long as that does not make them personally liable for the company's debts.
Are there restrictions on the Foundation's ability to campaign?	No.
Would the Foundation be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes.
Would there be any restrictions on the Foundation sharing resources with a non-EU entity (i.e. the UK)?	No.

Tax

Foundations are subject to a special tax regime, regarding the following taxes:

- **Corporate income tax (impuesto de sociedades)**

Certain revenues are exempt from corporate income tax (e.g. donations, partners' contributions, public subsidies with certain restrictions); certain economic activities are wholly tax exempted (e.g. protection of children, refugees, medicines delivery); and those activities that are not exempt, as well as those activities that do not have a non-profit goal, are taxable at a reduced rate of 10%.

N.B. even when Foundations may be completely exempt from corporate income tax, they shall account and declare all revenues before tax authorities through the relevant tax declaration.

- **Tax on asset transfers and on legal documents (ITPyAJD)**

Foundations are usually exempt from this tax.

- **Real estate tax (IBI) and trade tax (Impuesto sobre actividades económicas)**

Foundations are usually exempt from this tax, except for those assets linked to activities that are not exempt from corporate income tax. N.B. local regulations may establish additional rules.

Individuals or entities that collaborate with Foundations may benefit from certain tax benefits, provided that the Foundation is subject to the special tax regime:

- Donations (both in cash and in-kind) give rise to a deduction on the full amount of the income or corporate income tax of the donor. The deduction varies between 35% and 75% depending on the quantity of the donation and the donor's income.
- Cooperation agreements between Foundations and companies or individuals result in tax advantages: (i) participants may deduct from their income or corporate income tax the costs incurred, and (ii) broadcasting the participation does not constitute a provision of services subject to VAT.

Association (Asociacion)

Features

- Associations are organisations of **three or more people** who agree to share knowledge, resources and activities in order to **pursue a licit and common objective of public or particular interest**.
- If the project intends to carry out an activity of public interest, or to promote the interests of a specific group of people, with the involvement of the beneficiaries, associations are a suitable organisation.

Setting up an

The agreement to incorporate an association shall be formalised in an **incorporation charter** with mandatory contents, which may be signed privately or

Association

before a public notary.

The incorporation charter shall be filed at the **Associations Registry**, together with the following documents:

- **Application;**
- The association's **by-laws** (the rules governing the entity) with the mandatory contents established in the law;
- If the promoter is a legal entity, the corresponding **resolution approving the incorporation of the association;**
- If the promoter is a minor, the **authorisation** of her/his guardian;
- **Certification of payment** of the corresponding public fee.

It should be noted that:

- There is **no minimum capital** required by law. Associations will be financed by the periodical contributions of their affiliates.
- A name certificate is not required. The promoters may verify whether the name chosen for the association is already in use through the online system provided on the website of the Home Affairs Ministry. There are certain requirements that the name needs to comply with.

Associations may be declared to be in the public interest (asociación de utilidad pública) –which entails the applicability of the special tax and legal regime of non-profit entities– when:

- (i) the by-laws promote a general interest;
- (ii) the activity does not exclusively benefit the affiliates, but the community as well;
- (iii) when the members of the governing council are remunerated and such remuneration is not paid with public funds or subsidies;
- (iv) they have the necessary means and organisational structure to guarantee the fulfilment of the association's general interest goal; and
- (v) they must have had an ongoing activity for at least two consecutive years

To this end, associations must obtain a favourable report from the Finance Ministry and file an application with the Home Affairs Ministry.

The estimated time to incorporate an association is a **few hours**, as the only requirement is drawing up the by-laws (for which there are standard templates available at the Home Affairs Ministry). Registration may take longer, up to **2-3 months**. The cost of setting up an association is a simple public fee.

Governing an Association

General assembly (asamblea general)

The general assembly is the supreme governing body, which approves the resolutions on a majority basis.

It is constituted of all the affiliates of the association and should meet at least once per year.

Governing council (consejo rector)

The governing council is the managerial body of the association. It should represent the interests of the association and should follow the rules established by the general assembly.

The members of the governing council must be affiliates, of legal age, with full capacity and ability to exercise their rights, and must not be incompatible.

If the members of the governing body are remunerated for their service as such, it should be established in the by-laws and reported in the annual accounts.

Intervention (intervención)

The intervention is the association's control body.

Governance

It is possible for an overseas entity (such as the UK as non-EU member state) to have control of the legal form.

Foreign associations operating in Spain may be incorporated as a foreign delegation and filed as such at the Associations Registry, subject to three main requirements:

- (i) certification that they have been correctly incorporated pursuant to the local laws of their jurisdiction;
- (ii) possession of a permanent establishment in Spain or a physical representative; and
- (iii) grant of a Spanish Tax Identification number.

Associations declared of public interest shall comply with the following mandatory rules:

1. 70% of the net profit shall be re-invested in the association's goal.
2. In case of winding up, the assets shall be assigned to another association or non-profit entity.

Ongoing filing and reporting

The governing council must draw up and approve minutes of its meetings, which shall be kept in a minutes' registry book.

Associations shall draft and approve their **annual accounts** during the six months after the closing of the accounting year, and shall file them with the Registrar. The annual accounts shall include a **balance sheet, a profit and loss statement, and a report**. Under certain requirements they may be formulated in abbreviated form.

Non-profit entities must audit their accounts when any two of the following conditions are met by the end of the accounting year:



- (i) The total assets exceed EUR 2,400,000;
- (ii) The annual net income turnover exceeds EUR 2,400,000; and
- (iii) The average number of the employees exceeds 50.

Throughout the association's life the following events need to be filed with the Associations Registry:

- **Any change in the governing council.**
- **Any change in the by-laws** or in the **association**
- The **merger** with another association, as well as the termination and winding up of the association.
- The **incorporation of a federation**, confederation or union of associations: the documentation is similar to that needed for the incorporation of an association.

Operations

This form gives the NGO the legal capacity to do things in its own name, for example employ staff, deliver services, enter into commercial contracts and leases in its own name.

Associations acquire legal capacity upon the incorporation agreement, which shall include the by-laws. The incorporation agreement may be formalised in public but it is not mandatory. Additionally, associations have to be filed with the Associations Registry to publicise the fact that they have been incorporated.

Meetings of the entity can be held virtually as long as the by-laws express that this is allowed. Communication between the trustees should be held in real-time to ensure deliberation.

The association will require **a registered office with a physical address in Spain**. Although, there are **no residency or nationality requirements for directors**.

This form offers **conditional limited liability**. In the case of non-registered associations, the promoters respond personally and jointly to obligations contracted towards third parties, provided that they have stated they were acting on behalf of the association.

In case of registered associations, **the affiliates are not personally liable** for the association's debts.

- In any case, managers, directors and any other person acting on behalf of the association shall be responsible (towards the association, its partners, and any third party) for damages and debts caused by intentional, guilty and negligent acts.

Affiliates may not transfer their quota, save in case of death or if the transfer is for

free. They may however leave the association at any time they want. The by-laws shall establish the applicable procedure.

External Activities of an Association

Are there restrictions on an Association's ability to trade?	Yes. Associations are incorporated to pursue a specific goal, and can therefore take part in all the activities needed to obtain such goal.
Are there restrictions on an Association's ability to campaign?	No.
Would the Association be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes.
Would there be any restrictions on the Association sharing resources with a non-EU entity (i.e. the UK)?	No.

Tax

Associations declared to be in the public interest are subject to a special tax regime, regarding the following taxes:

- **Corporate income tax (impuesto de sociedades)**

Certain revenues are **exempt** from corporate income tax (e.g. donations, partners' contributions, public subsidies with certain restrictions); certain economic activities are wholly tax exempted (e.g. protection of children, refugees, medicines delivery); and those activities that are not exempt, as well as those activities that do not have a non-profit goal, are taxable at a reduced rate of 10%.

N.B. even when associations may be completely exempt from corporate income tax, they shall account and declare all revenues before tax authorities through the relevant tax declaration.

- **Tax on asset transfers and on legal documents (ITPyAJD).**

Associations are usually **exempt** from this tax.

- **Real estate tax (IBI) and trade tax (Impuesto sobre actividades económicas)**

Associations are usually **exempt** from this tax, except for those assets linked to activities that are not exempt from corporate income tax. N.B. local regulations may establish additional rules.

Individuals or entities that collaborate with associations may benefit from certain tax benefits, provided that such associations are subject to the special tax regime:

1. Donations (both in cash and in-kind) and membership fees give rise to a deduction on the full amount of the income or corporate income tax of the donor or member. The deduction varies between 35% and 75% depending on the quantity of the donation and the donor's income.
2. Cooperation agreements between non-profit entities and companies result in tax advantages:
 - (i) participants may deduct the costs incurred from their income or corporate income tax, and
 - (ii) broadcasting the participation does not constitute a provision of services subject to VAT.

Non-Governmental Organisations (*Organizaciones no gubernamentales de desarrollo*)

Features

- NGOs are private non-profit entities that have been legally incorporated as associations or as foundations and whose purpose includes the **performance of activities related to international cooperation for development** (*cooperación internacional para el desarrollo*).
- NGOs have to promote a sector among a certain number of **priority sectors and certain regions**: (i) Latin America; (ii) Middle East; (iii) Arabic-speaking countries of North Africa; and (iv) other developing countries with which Spain has had historical relations.
- **NGOs must first register as a foundation or as an association.** Afterwards, they must be registered in the NGOs Registry (Registro de ONGs) to obtain subsidies from the Spanish Government.

Setting up an NGO

The following documents shall be provided to the NGOs registry in order to register in Spain:

- a **national identity card of the representative** of the non-profit entity and all documentation stating that such person can represent the non-profit entity;
- the **incorporation documents** of the non-profit entity;

- a **copy of the Spanish tax identification card** of the non-profit entity;
- a **certificate** from the relevant registry certifying that the association or foundation has been duly registered;
- a responsible **statement from the legal representative** with a brief description of its main activities, including how the non-profit entity fulfils Spanish law requirements in relation to the international cooperation for development, and stating that the non-for-profit entity is up-to-date with its tax and social security obligations;
- a **certificate** of the non-profit entity stating that it has **sufficient resources** to carry out its activities;
- a **certificate** of the non-profit entity clarifying the **origin of all funds received** from its affiliates and funds obtained by third party entities; and to the extent applicable, the annual report.

NGOs are not required to obtain a name certificate. They may, however, verify if the name chosen for the NGO already exists through the online system provided on the website of the Foreign Affairs and Cooperation Ministry.

Once filed with the Registry as an NGO, the general regime for foundations/ associations as explained previously will apply (**see above**).

Cooperative Enterprises (*Cooperativa*)

Features

- Cooperative enterprises are **mutual companies, incorporated to meet the economic, social and cultural needs and aspirations of their partners**. They function democratically (attributing a vote to each partner) and adopt the principles and values set forth by the **International Cooperative Alliance**.
- If the project intends to help those who are to be partners and are involved in its management, this may be a suitable way for its development.

Setting up a Cooperative

Incorporating a cooperative requires an agreement between at least three partners, which shall be formalized in an incorporation deed.

The **incorporation deed** shall include the following documents:

- A **name certificate** issued by the Cooperatives Registry within the previous six months, confirming that no other entity is using the same name;

- A **certificate** on the **by-laws**;
- The **co-operative's by-laws** (the rules governing the entity) with the mandatory contents established in the law;
- **Documents proving the initial co-operative capital**: its reality and valuation. Some special-purpose cooperatives require an initial minimum capital;
- **Spanish tax identification** number;
- **Liquidation of taxes** (although protected co-operatives are exempt from payment, forms need to be filed with the tax authorities).

The incorporation deed needs to be filed with the **Cooperatives Registry**.

The estimated time to incorporate a co-operative is **1-2 months** (the Cooperatives Registry has three months to decide whether the foundation may be filed or not).

Costs will depend on the initial foundation capital.

In the interest of time, we would recommend scheduling a prior appointment with a notary and with the Cooperatives Registry to discuss and agree the required steps.

Ongoing filing and reporting

Cooperatives shall have and keep updated the following books, which need to be legalized by the Cooperatives Registry prior to using them:

- (i) a **daily ledger** (*libro diario*);
- (ii) a **registry book of inventory and annual accounts** (*libro de inventarios y cuentas anuales*). The annual accounts shall include: a balance sheet, a profit and loss statement, and a report, and under certain requirements they may be formulated in abbreviated form;
- (iii) **minute's registry books**, to record all the drawn up and approved minutes of the meetings of the general assembly and the governing council;
- (iv) **partner's registry book**; and
- (v) **registry book for the contributions** to the cooperative's capital.

Annual accounts must be **audited** when any two of the following conditions are met by the end of the accounting year:

- (i) the total assets exceed EUR 2,400,000;

- (ii) the annual net income turnover exceeds EUR 2,400,000; and
- (iii) the average number of the employees exceeds 50.

Throughout the cooperative's life the following events need to be filed with the Cooperatives Registry:

- **Any change in the board of directors.**
- **Any change in the by-laws.**
- The **merger, transformation, termination and winding up** of the co-operative.

Governing a Cooperative

General assembly (asamblea general)

The general assembly is the meeting of all the partners. As a rule, and by virtue of democratic management, each member has one vote, although statutory amendments to this rule may be made.

Governing council (consejo rector)

The governing council is the collegiate body of government in charge of management, supervising executives and representing the cooperative.

The majority of the governing council members must be partners, who shall accept the position.

When the cooperative has **less than ten members, a sole director may be appointed** instead.

Intervention (intervención)

The intervention is the control organ of the cooperative.

Governance

There are some mandatory provisions that are in this form's governing document / constitution.

The law requires **two mandatory funds**, of a collective character, which are not to be distributed amongst the cooperative's partners (not even in case of winding-up). They are:

1. The **mandatory reserve fund** (fondo de reserva obligatorio) – For the consolidation, development, and guarantee of the cooperative. It is similar to a legal reserve. 20% of the net profits and 50% of the non-cooperative results have to be destined to this fund.
2. The **education fund** (fondo de educación y promoción) – For the

realisation of the cooperative principles of cultural, professional, and assistance promotion, 5% of the net profits have to be destined to this fund.

Cooperatives may appoint general managers and managers to perform the tasks of ordinary management. They can also establish other governing bodies as long as they do not interfere with the legal structure of those stated above.

This form gives the NGO the legal capacity to do things in its own name, for example employ staff, deliver services, enter into commercial contracts and leases in its own name. Cooperatives have legal capacity as of the date of filing the public deed of incorporation with the Cooperatives Registry.

It is possible for an overseas entity (such as the UK as a non- EU member state) to have control of the legal form. Partners of a Spanish cooperative may be overseas entities.

Operations

The co-operative will require a **registered office** with a **physical address in Spain**. There are **no residency or nationality requirements for directors**.

The meetings of the entity can be held virtually as long as the by-laws express that this is allowed. Communication among the trustees must be in real-time so there is an actual deliberation.

This form offers limited liability. **The partners' liability is limited to their contribution to the cooperative capital**, even if it has not been fully paid up.

However, a special regime needs to be taken into account: The people who have entered into acts prior to filing with the Registry will be personally liable for such acts unless the cooperative assumes them upon filing.

External Activities of a Cooperative

Are there restrictions on the Cooperative's ability to trade?

There are no other restrictions than those derived from its nature:

- A cooperative's aim is to provide its partners with either a service at the lowest cost, or a return for their services at the highest pay out. The cooperative trades only in order to benefit its partners.
- If the by-laws authorise it, and as long as the law does not expressly prohibit it (as it is the case for agrarian cooperatives for example) cooperatives may also engage in economic activities with third parties.

Are there restrictions on the Cooperatives's ability to campaign?	No
Would the Cooperative be able to enter into arrangements with a non-EU (i.e. UK) entity for licence of its intellectual property (i.e. its logo/brand)?	Yes
Would there be any restrictions on the Cooperative sharing resources with a non-EU entity (i.e. the UK)?	No

Tax

Tax benefits are available to cooperatives registered with the appropriate Cooperatives Registry. A distinction is made between **protected cooperatives**, and **specially protected cooperatives**:

- **Protected cooperatives**

Protected cooperatives are cooperatives that have been formally established and do not incur any cause for exclusion.

Corporate income tax

There are two applicable rates:

- (i) 20% for the “cooperative results” –such as operations of the cooperative with its partners, periodic payments by the partners to the cooperative, subsidies received, etc,
- (ii) general rate of 25% for the “extra-cooperative” results.

Additional tax benefits include:

- (i) Freedom of tax depreciation in respect of fixed assets acquired within three years from the date of registration with the Cooperatives Registry.
- (ii) Exemption in tax on asset transfers (ITP) in case of constitution and cancellation of loans and acquisitions of assets and rights integrated into the education and promotion fund for the fulfilment of its purposes.
- (iii) 95% bonus on trade tax (IAE) and real estate tax (IBI).

- **Specially protected cooperatives**

Specially protected cooperatives are those operating in specific sectors whose members possess little financial strength for example, agricultural cooperatives.

In addition to the tax benefits provided for the protected cooperatives, it also benefits from:

- 50% bonus on the full corporate income tax rate.
- Exemption from the tax on capital transfers in the acquisition of assets and rights destined to the fulfilment of its social and statutory purposes.

This form does not offer any benefits in terms of maximising fundraising from taxpayers in the jurisdiction. The cooperative's funds are contributions by its partners, who do not receive additional tax incentives for such contribution.

However, the law authorises the by-laws to establish remuneration for cash contributions.

Additionally, the cooperative partners are entitled to the "cooperative return", which is the participation in the year's profits. This right may be modified by the general assembly's decision.



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