

Spanish Legal Structures of Private Sponsorship and Participation in the Protection and Maintenance of Monuments

We understand that this Seminar is devoted to "private" participation in the protection of cultural heritage. Therefore, we will not mention public administration's policies, budgetary resources and direct investments.

Concerning private contribution, it may be made by natural or legal persons, either directly or through the State, other public entities, foundations or associations, and is currently governed by legal texts regulating foundations.

Before beginning to analyze legal provisions regulating private sponsorship and participation, we should make a brief reference to the Law of Associations, of 1964, which has been partially modified recently: associations are legal persons with legal capacity to act through natural persons appointed to their governing body. Legal capacity is acquired from the moment their statutes are approved by administrative authorities and registered at the relevant Registry. We should also mention that there are different legal provisions related to several kinds of LTD companies, etc.

All these entities contribute to and participate in the protection of cultural heritage, but since the aim of this work is to present the Spanish legal framework of private financial contribution for the conservation and restoration of monuments and historical heritage, we shall concentrate on these aspects. The above-mentioned private contribution is foreseen in three current legal provisions:

1. Law of the Spanish Historical Heritage 16/1985 of June 25th (Official State Gazette of June 29th, 1985) and, more specifically, in Section VIII regarding "Steps for Development".
2. Royal Decree 111/1986 of January 10th and partial development of the said Law, modified in part by Royal Decree 64/1994 of January 21st (Official State Gazette of March 2nd).
3. Law 30/1994 of November 24th of Foundations and Tax Incentives to Private Contributions in Activities of General Interest (Official State Gazette of November 25th).

The last two provisions develop and update the "Steps for Development" foreseen in the above Law of the Spanish Historical Heritage. On the other hand, income tax and corporation tax, if later in time, may have an effect on the tax benefits fixed by the above provisions by determining some percentages in tax deductions foreseen by the former (e.g. Income Tax Law 18/1991 of June 6th which in Art. 78.4 (c) and (d) reduced deductions on investments made in the acquisition, conservation, etc. of assets declared to be of cultural interest by five percentage points). Likewise, the General Budgetary Law of the State for each year may:

- Establish a list of prevailing patronage activities or programmes, for which there may be a five percentage increase in deduction percentages and in the percentage amount of the maximum levels of deduction.
- Regarding corporation tax, this may alter the levy rate on the tax base (fixed at 10 % by the Law of Foundations and

Tax Incentives), as well as altering the amount foreseen in order to reduce the liquid quota if a foundation or association of public utility were to exclusively carry out free services (Art. 55 and Fourth Final Provision of the said Law).

Legislative measures

The following are the most important legislative measures related to private contributions in the protection and conservation of historical heritage in real estate:

1. Preferential access to official credit for funding public works, conservation, upkeep and rehabilitation, as well as archaeological reports and excavations carried out in areas declared to be of cultural interest. In order to do this, the public administration may establish, by means of agreements with public and private entities, the conditions of using credit benefits.
2. As regards public works built and developed by private persons by virtue of State dispensation without financial contribution from the State, one per cent of the overall budget shall be applied to funding conservation or enrichment works for the Spanish historical heritage, preference being given to the works themselves or their immediate surroundings. An exception is made in the case of public works with an overall budget under 100 million pesetas, which affect State security and the security of public services. The Ministry of Education and Culture drafts a yearly Plan for Conservation and Enrichment debited to the said funds. In order to execute these projects and programmes one must request cooperation from the administration.
3. Debt payment in different taxes: succession and gift tax, capital gains tax, income tax and corporation tax may be paid by handing over assets belonging to the Spanish historical heritage which are registered at the General Registry for Assets of Cultural Interest or included in the general inventory. In such a case, the said assets shall be appraised, for this purpose, by the Board for Classification, Appraisal and Export of Assets belonging to the Spanish Historical Heritage.
4. Exemptions and other benefits: Assets belonging to the Spanish historical heritage registered in the above Registry and Inventory are exempt from income tax. These assets may be reappraised for tax purposes up to their market value, being exempted from increased capital tax, unless they are part of the holder's floating assets. Likewise, the following are exempt from local real estate tax:
 - Monuments and gardens declared to be assets belonging to the Spanish historical heritage.
 - Those classified as "specially protected" by the urban development plan for archaeological areas.

- When included in classified historical sites, those at least 50 years old which receive complete urban protection. There is an exemption from other local taxes on property or its use and conveyancing when owners or holders of real property rights have undertaken conservation, improvement or rehabilitation work on real estate declared to be of cultural interest.

This exemption shall be applied in the terms established by respective municipal regulations.

5. Tax deductions for natural persons concern the amount of income tax: 20 % of investments carried out in the acquisition of assets registered at the General Registry for Assets of Cultural Interest, if the asset remains available to the purchaser for at least three years and notice of the conveyance is given to the said Registry. In any case this deduction shall not exceed 30 % of the tax base.

6. Tax deductions for legal persons concern the deduction in the liquid quota of the corporation tax:

- 15 % of amounts assigned to the acquisition of assets registered at the General Registry of Assets of Cultural Interest, with the requirements established for natural persons.

- 15 % of amounts used for conserving, repairing, restoring, promoting and exhibiting assets registered at the above Registry with the same requirements as for natural persons.

7. Tax incentives for private contributions in activities of general interest.

The Spanish legal system regulates private financial contributions for the conservation and restoration of monuments through the State, other public entities, establishments, institutions, foundations or associations, including temporary de facto associations for the administration of funds classified as or declared to be charitable or of public utility by the relevant administrative authorities. Contributions of this kind may be made directly by natural or legal persons which in most cases do not bear the importance of foundations, both in quantitative and qualitative terms, and are currently governed by the same legal text regulating foundation as a legal figure.

Furthermore, large financial companies, to name an example, do not assign assets directly for these purposes but instead, in the case of an activity which is beneficial, both in social and tax terms, with a more or less continuous nature, set up cultural foundations to adequately invest the said capital, e.g. BBV, Banesto and Argentaria Foundations, as well as Savings Bank Foundations. As may be seen, in nearly every case, behind a large bank there exists a foundation with the same name.

Without giving any more comparative preambles, in order to apply the current situation to Spanish law one must first explore the Basic National Law regulating foundations, pointing out beforehand that the Spanish Constitution of 1978 in Art. 34 acknowledges the right to set up a foundation under law for the general interest (Art. 34.1), subsequently stating two rules regarding applicable legislation:

- Foundations which pursue ends or employ methods constituting a crime shall be illegal.
- Foundations may only be dissolved or their activity suspended by a court decision (Art. 34.2, by reference to Art. 22.2 and 4).

Law 30/1994 of November 24th, of Foundations and Tax Incentives for Private Contributions in Activities of General Interest (Official Gazette of the Spanish State, Nr. 282 of November 25th, 1994)

Our current Law of Foundations and Tax Incentives for Private Contributions in Activities of General Interest (hereafter LF) is divided into two sections. Each one covers part of the title, foundations on the one hand and tax incentives on the other. Consequently, a proposal was made to name the said Law at the parliamentary stage the Law of Foundations and Patronage, but this was replaced by the current title for technical reasons. We shall follow the order set in Law 30/1994:

Foundations

Meaning and purposes

Foundations are defined as non-profit organizations, the capital of which is assigned by its founders on long-term basis to fulfilling purposes of general interest (Art. 1.1). They therefore have the following characteristics:

- They are legal persons, with legal capacity to act through natural persons appointed in their governing body. Legal capacity is acquired from the moment the public deed of constitution is registered at the relevant Foundation Registry.
- They are non-profit.
- Their capital is assigned to long-lasting purposes by their founders, regardless of whether, due to other external reasons, long duration is impossible.
- Their purpose is to apply their capital in the general interest, interpreted by the Law as pertaining to social and public works, education, culture, science, sport, health, cooperation for development, environmental protection, promotion of the economy or research, encouragement of volunteer work, or others of a similar nature.

The foundation must benefit generic groups of people and its services cannot be aimed at the founder's spouse or relatives up to the fourth degree of kinship, inclusive. An exception is made in the case of foundations of which the exclusive or principal aim is the conservation and restoration of assets belonging to the Spanish historical heritage and which fulfil the obligations set out in the Law of the Spanish Historical Heritage of 1985.

Incorporation

Regarding the incorporation of foundations, the following two main issues should be taken into account:

Capacity: Natural and legal persons, whether public or private, have the capacity to incorporate foundations, as long as they fulfill the following requirement. Natural persons must have a general capacity to act and a special capacity to freely dispose of the assets and rights forming the gift, either "inter vivos" or "mortis causa". Private legal persons of an associative nature must have the express agreement of their board or shareholders meeting. Those of an institutional nature must have the agreement of their governing body. Persons of a legal and public nature always have the capacity, unless this is prohibited by their governing regulations (Art. 6.6 of the Spanish Constitution).

Form: A foundation may be incorporated by an act, either "inter vivos" oder "mortis causa". The incorporation of a foundation by an "inter vivos" act shall be carried out by the execution of a public deed, containing at least the following:

- Name, surname, age and marital status of the founders, if they are natural persons, and denomination or corporate name if they are legal persons. In either case both nationality and address should be stated.
- The will to incorporate a foundation.
- The gift, its appraisal, form and actual contribution.
- The statutes of the foundation, which must contain: the denomination of the entity with the word "foundation", without confusing another already in existence, the purposes of the foundation, the area of control of the foundation and the territorial scope in which it shall mainly operate, the basic rules for applying the resources to the fulfillment of the foundation's needs and to determine the beneficiaries, the governing and representative body, its composition, rules for the appointment and replacement of its members, reasons for termination, its capacity and method for discussing and entering agreements and any other legal provisions or conditions which the founders see fit.
- The identification of the persons making up the governing body, as well as their acceptance if carried out at the moment of incorporation.

If the incorporation is carried out by a "mortis causa" act it shall be executed by will, fulfilling the above requirements, i.e. the content must be the same – the difference lies in the fact that one is executed by public deed and the other by will.

Applicable legislation

Foundations are governed by the founder's decisions, by their statutes and by Law 30/1994, as well as by additional regulations. Once registered and incorporated following all the above requirements, a foundation attains legal personality. However, decisions with legal effect are made through the governing and representative body, known as the board of trustees, which is an essential requirement for the foundation's existence.

The board of trustees must fulfil the foundation's purposes and manage the assets and rights forming its capital, completely assuring their effectiveness and utility. It must be incorporated by at least three members, the trustees, who shall choose a president from amongst themselves, unless otherwise provided. A secretary may also exist, if such a post is appointed. Trustees may be:

- Natural persons with full legal capacity not disqualified from occupying public office.
- Legal persons, which will appoint a natural person to represent them.

Whether of one kind or another, they must have expressly accepted the post, carried out gratuitously with the diligence of a loyal representative. They will be liable to the foundation for damages due to acts contrary to law or the statutes, or negligent acts. The board of trustees itself (under a previous reasoned agreement not involving the affected trustee) and the protectorate are empowered to file the said action for liability before the ordinary courts.

Foundation Capital

Like every organization, a foundation has capital assigned

for a purpose, consisting of every kind of right and asset of economic worth. Management and conveyancing shall be left to the board of trustees, subject to the law and its statutes. The foundation is the holder of the said capital, which shall feature in its inventory and in the Foundation Registry and other registries, if necessary.

Activity

Foundations are governed by the following principles: They are obligated to assign their capital and income to the foundation's purposes, give sufficient information on their purposes and activities and act according to principles of impartiality and non-discrimination when determining their beneficiaries.

As regards their activities, foundations may not have any shareholding whatsoever in companies where they may be personally liable for company debts. Furthermore, they are under strict accounting control (Art. 23, Law of Finance), being obligated to carry out audits when their capital is over 400 million pesetas, if the net amount of their annual income is over 400 million pesetas or if they have more than 50 employees. At least 70 % of their revenue and income shall be assigned to the foundation's purposes, the remainder being used to increase the foundation's gift (except contributions made as gift capital).

Termination

A foundation shall terminate when its period of duration has expired, when the foundation's objective has been completely fulfilled or fulfillment was impossible, as a result of a merger or due to any other cause foreseen by the statutes or by law at the moment of incorporation.

Protectorate

This is a public institution, aimed at ensuring a correct use of the right to establish foundations and guaranteeing the legality of their incorporation and functioning. The right shall be exercised by the General Government Administration as regards foundations under State control, and by the Administration of the Autonomous Communities as regards foundations under autonomous control. Its basic functions are to counsel foundations on matters regarding their legal and economic system, to ensure the effective fulfillment of the foundation's needs following the founder's decisions, taking into account the attainment of the general interest, to verify that the foundation's financial resources have been applied to its purposes, to advertise the foundation's existence and activities, to temporarily carry out the functions of the foundation's governing body if, for any reason, all its members are unavailable, plus any other functions as established by law.

Higher Foundations Board

This consultative body is created by Law 30/1994 and is made up of representatives of the General Government Administration, of the Autonomous Communities Administration and of foundations. Amongst their functions the following may be stated:

- To counsel on, give information about and make a decision on, whenever requested, any legal or regulatory provision directly concerning foundations.

- To plan and propose the necessary steps for promoting and encouraging the establishment of foundations.
- Any others established by current provisions.

Tax incentives for private contributions in activities of general interest

The tax system for foundations registered at the Foundations Registry and associations declared to be of public utility has two important aspects:

Corporation Tax: The above entities shall be exempted regarding the results obtained in activities which represent their company purpose or specific aim, as well as capital increases derived both from acquisitions including those from non-gratuitous transfer, as long as either are obtained or carried out when fulfilling their purpose or specific aim. They are also exempt from tax on issues such as membership fees, grants, subsidies and cooperation agreements.

Furthermore, Art. 50 points out how the tax base is adjusted according to certain items stated therein, since they may carry out other economical activities not related with their specific aim.

Local Taxes: These entities are exempted from real estate tax regarding the estate they hold. They are also exempt from tax on commercial and professional activities regarding the activities representing their company purpose or specific aim.

Concerning the tax system for contributions made to non-profit entities, we have to distinguish between natural and legal persons. If the contribution is made by *natural persons*, a deduction in the amount of income tax corresponds to the following:

- 20 % in pure and simple gifts of assets belonging to the Spanish historical heritage (registered at the General Registry of Assets of Cultural Interest, or included in the General Inventory) or gifts of works of art with quality guaranteed in favour of entities with the aim, amongst other ends, of developing and promoting artistic heritage and which apply the said works to public exhibitions. The amount of 20 % shall be applied to the value of the assets bestowed according to official appraisal carried out by the Board for Classification, Appraisal and Export.
- 20 % in pure and simple gifts of assets which must be part of the bestowing entity's material assets and which contribute to fulfilling activities according to their purposes. An increase or decrease in capital which may arise in the event of gifts of assets belonging to the Spanish historical heritage and works of art and shall not be taxable.
- 20 % in amounts bestowed for fulfilling activities or for conserving, repairing and restoring assets belonging to the Spanish historical heritage which are registered at the Registry of Assets of Cultural Interest or are included in the General Inventory. Membership dues are included under

this heading as long as they do not involve services offered to members.

In all cases, the above deductions shall not exceed 30 % of the tax base.

If contributions to non-profit entities are made by *legal persons*, deductions in the tax base of Companies Tax are the following:

- Up to 30 % of the taxes, or 3 per 1,000 of the annual volume of sales in the case of gifts of assets belonging to the Spanish historical heritage and works of art, with the same conditions and requirements as for natural persons.
- Up to 10 % of the tax base, or 1 per 1,000 of the annual volume of sales in gifts to material assets of the bestowing entity, the fulfillment of activities according to its purposes, or for conserving, repairing and restoring assets belonging to the Spanish historical heritage with the same requirements as for natural persons.

The treatment given to increases or decreases in capital ensuing from a gift of assets belonging to the Spanish historical heritage, works of art and assets of material capital for the bestowing entity is similar to that stated above regarding natural persons. In some cases, the deduction may be increased by 5 % (both regarding deduction percentages and the deductible limit on the tax base) if the gift is made for any of the prevailing patronage activities or programmes pointed out by the General Budgetary Law of the State for that year.

Tax system for other business cooperation activities

Acquisitions of works of art to be bestowed on the State and other public entities, as well as foundations and associations of public utility, may give rise to deductions, both on corporation and income tax (the latter in the case of entrepreneurs and professionals subject to direct tax evaluation) as long as a series of requirements are fulfilled, such as: an undertaking to convey the asset in five years; once the offer is accepted it becomes irrevocable; the offer must be made the following month after purchasing the asset; until it is conveyed it may be publicly exhibited and investigated; the Administration shall decide on the value of appraisal which shall prevail over the value of acquisition if the latter is higher; the deduction shall be carried out yearly by equal amounts during the period between the undertaking of the offer and the actual conveyance, with a maximum limit per operation. In the case of entrepreneurs and professionals, the said limit shall refer to the share of the tax base regarding net income derived from the relevant business or professional activity.

Federations and associations of entities

Federations and associations of entities are covered by the Law of Foundations and Tax Incentives. These may enjoy

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the tax system foreseen therein as long as both the respective federations and associations, as well as the entities therein, fulfil the legal requirements.

Foreign foundations

These may benefit from the legal system established by the Law of Foundations exclusively regarding the local branch's activity in Spain.

Foundations of religious entities

The provisions of the Law of Foundations apply notwithstanding whatever may be established by agreements with the Catholic Church, cooperation agreements and conventions entered into by the State with churches, confessions and religious communities, as well as regulations to be applied to foundations created or developed by the same. In addition to the Law on Foundations analyzed here, there are other provisions in Spain which complement and develop it in other spheres.

State Sphere

- Royal Decree 765/1995, of 5th May, which regulates certain matters relating to the system of tax incentives for private participation in activities of general interest in accordance with the Final Provision 5th LF.
- Royal Decree 316/1996, of 23rd February, which regulates the State Sphere Foundation Regulations.

Autonomous Region Sphere

Although all the autonomous regions have this faculty transferred to them, there are only three laws:

- Law regarding private Catalan foundations of 3rd March 1982 (modified by Law of 8th November 1985)
- Foral Law 7/1983, of 22nd June, regarding the system of foundations relating to Galician interests (revised by Law 11/1991 of 8th November).
- Law 1/1990, of 29th January, on Canary Island foundations.

Ecclesiastical Foundations

- Royal Decree 589/1984, of 8th February, regarding religious foundations of the Catholic Church.



An overwhelming proportion of Swedish cultural monuments – i.e. monuments taken in a broad meaning, comprising buildings, ancient remains and sites protected in some sense by law – are legally in private hands. (One group of monuments should be excepted from this broad statement: ecclesiastical monuments, which are if not always – in a strict legal sense – owned, so at least managed and controlled by the Church of Sweden, an established church with a certain constitutional standing.)

Indeed, it is a prerequisite that protection of cultural monuments must work under private management. Whatever tendencies there might have been in the past for the state or municipalities to acquire monuments have long since been abandoned. The general principles for protection of privately held monuments are laid down in the 1988 Act on Cultural Monuments etc. (SFS 1988:950). This act discerns between archaeological monuments and sites, listed historical buildings, ecclesiastical heritage, and movables (export/restitution).

Archaeological monuments and sites are protected directly by law. No administrative order is issued to single out even what is an archaeological monument. Property holders have to find that out for themselves by recourse to a list in the act of protected categories of archaeological remains, a register kept by the authorities, and official maps where most monuments have been entered. They could and should, of course, consult the responsible authorities as to the extent and importance of protected remains. All physical interference with protected remains needs official permission, and if permission is given, it is generally on condition that the applicant pay for archaeological investigations and documentation.

Historic buildings (the concept includes structures other than buildings, and parks and gardens) are protected by individual listing. Administrative orders will specify permitted and non-permitted measures to such buildings with regard to demolition, alteration and upkeep. Non-consenting property holders may claim compensation, but there is a threshold of economic damage that must be passed before owners become eligible for indemnification. Protection may be effected either by state or by local governments; in the latter case under the 1987 Planning and Building Act (SFS 1987:10).

No more of the protective rules for cultural monuments in Sweden will be described here. Nor will the fact that there is a grant system to cover owners' extra costs for care and protection of monuments be subject to much attention here. Owners' efforts in maintaining monuments on their land can be seen as a part of their given interest in good management and a certain income of properties. I take the meaning of this seminar to be not a general discussion on how protection of privately held cultural property should and could be enacted and administered in our respective countries. The focus