

### Must tax exempt foundations in Germany benefit the German public?

#### Outline

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The German government has recently suggested a rather non-international approach to bringing German foundation law in line with the EC Treaty. The current law proposal introduces tax incentives for foreign-based public benefit organisations as long as they fulfil German tax law requirements for tax exemption. This proposal intends to remove the discrimination of foreign based and local public benefit foundations as decided by the European Court of Justice in the so called “Stauffer” decision (for more information, see the EFC briefing on the matter:

<http://www.efc.be/content/alert.asp?ContentID=1147>). While this approach of equal treatment of local and foreign based public benefit foundations is surely to be welcomed, the German government has at the same time suggested to define the criteria that leads to tax relief in a very restrictive way. According to German law<sup>1</sup>, public benefit organisations with a tax exempt status must support the “public at large” (*Allgemeinheit*). The proposal for amendment of the law now defines the “public at large” as all individuals with residence in Germany, however with the possibility that activities which benefit Germany’s reputation abroad would also be deemed to benefit the “public at large”.<sup>2</sup> As a consequence, German and foreign based foundations will have to prove that their international activities benefit Germany’s reputation and: German and foreign-based foundations with no activities in Germany (and no positive impact on the image of Germany) will not receive tax exemption for their taxable income in Germany.

Whether such a requirement of benefiting the image of Germany would be in line with the EC-Treaty is now questioned by several German legal experts<sup>3</sup>. According to the opinion of Advocate General Stix-Hackl in the “Stauffer” case<sup>4</sup>, “equal treatment – under national legislation – of domestic and foreign foundations in respect of recognition of charitable status cannot be regarded as a requirement of Community law. It is for national law to determine the interests that it considers should be recognised as charitable”. Member States may therefore decide on the requirements for tax exempt status as long as they do not conflict with the EC-Treaty. Some German legal experts claim that such a requirement could also be in conflict with the German constitution<sup>5</sup>. It will surely be challenging for the German financial authorities to determine whether an activity abroad also benefits the image of Germany. Or one could interpret the new law in a broad way by saying that every activity outside Germany in a way also has a “positive impact on Germany” and therefore supports the “public at large”. However such an interpretation would weaken and therefore question the introduction of this new requirement.

The Bundesverband Deutscher Stiftungen<sup>6</sup> as well as the Stifterverband für die Deutsche Wissenschaft clearly oppose the envisaged law revision as it sends counterproductive signals. The suggested restrictive interpretation of general interest gives the impression that public benefit activities would be pure instruments to improve the image of Germany. This would oppose to the overall increased responsibility of Germany in an international context and runs against the overall support of the German government of citizenship in Germany.

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<sup>1</sup> Article 52.1 of the *Abgabenordnung*

<sup>2</sup> Proposal for German tax law revision 2009

[http://rsw.beck.de/rsw/upload/Beck\\_Aktuell/Regierungsentwurf\\_JStG.pdf](http://rsw.beck.de/rsw/upload/Beck_Aktuell/Regierungsentwurf_JStG.pdf)

<sup>3</sup> Hüttemann, DB 2008, 1061 f.; Weitemeyer in BLS NON Profit Law News Nr.3/2008

<sup>4</sup> Opinion of Christine Stix-Hackl 15.12.2005, C-386/01 Number 94

<sup>5</sup> Weitemeyer in BLS NON Profit Law News Nr.3/2008 page 8 and 9

<sup>6</sup> Comments on an older version of the law proposal can be downloaded @

[http://www.stiftungen.org/files/original/galerie\\_vom\\_05.12.2005\\_19.02.41/Stellungnahme\\_Referentenentwurf\\_JahresStG\\_2009.pdf](http://www.stiftungen.org/files/original/galerie_vom_05.12.2005_19.02.41/Stellungnahme_Referentenentwurf_JahresStG_2009.pdf)

The EFC fully supports the Bundesverband's and Stifterverband's critical point of view. It has always stressed that foundations' and funders' public benefit work does not stop at borders. More and more global challenges await international and European solutions. The restrictive interpretation of German tax law runs contrary to the whole European idea and all recent efforts of many Member States to provide for a better climate for foundations' and funders' cross-border work. Many German foundations are currently active across national borders and such an amended law could severely limit their activities. Europe needs an enabling legislation and must not go backwards by defining public benefit through a very national perspective. Such restrictive definitions of the public benefit concept that lead to tax exemptions are fortunately rarely found throughout Europe and we hope that the German legislator will review the matter and find a more appropriate definition of public benefit, which enables and strengthens international philanthropy.

In addition, some clarification is needed with regard to additional implications of the law proposal. It is unclear whether it will also imply tax exemption of cross-border donations to qualifying foreign based organisations. As currently worded, one could argue that cross-border donations would be tax deductible for the German tax payer as long as the foreign based public benefit organisation would fulfill the requirements of German tax code (*Abgabenordnung*). This would be in line with other recent law revisions for example in the Netherlands, Poland, Slovenia, Denmark and Finland.

The German Ministry of Finance had already in 2005 distributed a restrictive letter which stated that "public at large" in the meaning of German tax code would be the German population or at least parts of the German population (letter dated September 20<sup>th</sup> 2005 – IV C 4 0181 –9/05 published BStBl. I 2005, 902). This letter did however oppose the German Higher Court of Finance, which stated several times that tax exempt foundations are not required by German tax law to benefit the German population. German public benefit foundations with a tax exempt status were considered to be allowed to pursue their activities in a foreign country outside Germany without putting their tax-exempt status at risk<sup>7</sup> (see also EFC briefing on this case "European Court of Justice reviews taxation of foreign foundations in Germany" <http://www.efc.be/content/alert.asp?ContentID=719>.) The 2005 letter of the German Ministry of Finance did according to the knowledge of the Bundesverband not lead to a change in the practice of the financial authorities, which continued to accept international activities of German based tax exempt foundations. One will have to see if the envisaged law revision would have a different effect – the wording of the law would however allow for a more restrictive practice for German based organisations. The message for foreign based foundations with no activities in Germany (and no positive impact on the image of Germany) is however very clear: they would not receive tax exemption for their taxable income in Germany.

## Action Point

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The EFC will keep monitoring national and European-level developments affecting the tax treatment of public-benefit foundations and report them to its members. If you would like to receive any further information on cross-border giving, please contact [legal@efc.be](mailto:legal@efc.be).

For any questions related to the German situation, please contact:

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<sup>7</sup> See for example the Primary Ruling request of the German Higher Court of Finance dated July 14<sup>th</sup> 2004, DB 2004, 2135