

EFC COUNTRY PROFILE JANUARY 2011: AUSTRIA

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I. Legal framework for foundations

- **Does the jurisdiction have a basic legal definition of a foundation (Description where applicable)? What different legal types of foundation exist (autonomous, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations)?**

In Austria two main categories of foundations exist:

Public benefit foundations under the Federal Foundations and Funds Act (BSFG)/*Bundes-Stiftungs und Fondsgesetz vom 27. November 1974* as well as those governed by provincial legislation (provincial legislation is not described in this profile). Foundations that are active in more than one province fall under the Federal Act. According to Art. 2.1 BSFG, foundations are legal entities established upon the irrevocable transfer of assets that are used for public benefit or benevolent purposes. Funds use not only their revenues but can also use their endowment to pursue public benefit purposes¹.

Private foundations are regulated by the Private Foundations Act 1993 (PSG)/*Bundesgesetz vom 14. Oktober 1993 über Privatstiftungen und Änderungen des Firmenbuchgesetzes, des Rechtspflegergesetzes, des Gerichtsgebührengesetzes, des Einkommensteuergesetzes, des Körperschaftsteuergesetzes, des Erbschafts- und Schenkungsteuergesetzes und Bundesabgabenordnung (Privatstiftungsgesetz)*. They can pursue public benefit purposes as well as private purposes. However, only a few private foundations have been set up exclusively for public benefit purposes. A legal definition is found in Art. 1.1 PSG. A private foundation is a legal entity that has received assets dedicated to the pursuit of purposes specified by the founder. A private foundation may also spend its endowment.

- **What purposes can foundations pursue?**

A public benefit foundation has to pursue public benefit or benevolent purposes. According to Art. 2.2 BSFG, the purpose is of public benefit/*gemeinnützig* if the spiritual, cultural, moral, or sporting development of the general public or a specific circle of beneficiaries is supported. According to Art. 2.3 BSFG, a benevolent purpose is support for people in need.

¹ Kalss in Doralt/Nowotny/Kalss, *Privatstiftungsgesetz* introduction No.52.

For private foundations, the founder provides the foundation with assets to pursue a purpose of his/her choice, be it for public benefit or private. All legal purposes are possible except the purpose of having for-profit commercial activities.

➤ **What are the requirements for the setting up of a foundation (procedure, registration, approval)? What application documents are required? Are there any other specific criteria for registration?**

A public benefit foundation, according to the BSFG, receives legal personality when it is approved by the appropriate administration (either provincial administration or the relevant federal ministry). The state has no discretionary power. As soon as the legal requirements are fulfilled, the foundation authority must approve the foundation. The written deed or will of the founder/*Stiftungserklärung* is the constituent element of the foundation. It has to set out the founder's wish to set up a foundation by dedicating certain assets for the pursuance of a public benefit or beneficial purpose according to Arts. 4 and 5 BSFG. If the foundation is set up during the lifetime of the founder, the deed to set up the foundation needs to be witnessed by a court or a notary and must be irrevocable. The competent foundation authorities appoint a curator/*Stiftungskurator* to draft the statutes of the foundation within six months and to administer the foundation until the first governing structure (usually a board) has started its term of office following its appointment by the foundation authority. The statutes must contain the foundation's name and domicile, assets, purpose, beneficiaries, organs and rules on annual accounting. The Ministry of Internal Affairs keeps a register of all foundations and funds under the BSFG.

Private foundations under the PSG need to be established by notarial deed or through a will. No state approval is required but the private foundation must register with the company register at the Commercial Court. The assets are reviewed before registration. According to Art. 2 PSG, the name of the foundation must contain the wording "*Privatstiftung*".

➤ **Is State approval required? (approval by a State Supervisory Authority with/without discretion? Registration with a state authority or court? Notarisation by a Notary public?)**

Yes, public benefit foundations under BSFG require provincial administration or federal ministry approval (but approval has to be given once legal requirements are met – there is no discretion).

However, private foundations under PSG do not require state approval. Registering at the company register is sufficient for private foundations.

➤ **Do foundations have to register? If yes, in what register?**

A register of all foundations under the BSFG (public benefit foundations) is maintained by the Ministry of Internal Affairs.

Private foundations have to register in the company register.

If foundations are registered, what information is kept in the register?

Public benefit foundations: According to Art. 40.2 BSFG, the national register maintained by the Ministry of Internal Affairs has to include for each public benefit foundation the following information: Name, domicile, address, purpose, beneficiaries, name and address of the members of the representative board, statutes and amendments to statutes and change of corporate form or dissolution (if applicable).

Private foundations: According to Art. 13 PSG, the following information is included in the company register: Information required by Art. 3 Company Register Act ("*Firmenbuchgesetz*" - FBG), purpose, date of statutes, statutes/amendment of statutes, and if foreseen the name and date of birth of the members of the supervisory board.

If foundations are registered, is the register publicly available?

Public benefit foundations: According to Art. 40.1 BSFG, the register maintained by the Ministry of Internal Affairs is open to the public. Upon demand, everyone is permitted to get information about the items mentioned above (see Art. 40.2 BSFG) and also to get copies of the registrations.

Private foundations: According to Art. 9 Commercial Code ("*Unternehmensgesetzbuch*"), the company register is publicly available. Everyone is permitted to get information about the items mentioned above (see Art. 13 PSG) and also to get copies of the registrations.

➤ **Is a minimum capital required?**

No minimum capital is required for public benefit foundations under BSFG, but their assets have to be sufficient to pursue their proposed public benefit purpose.

However, private foundations under PSG must have €70,000.

➤ **What governance requirements are set out in the law?**

Is it mandatory to have a supervisory board?

Public benefit foundations under BSFG must have a governing structure, usually in the form of a governing board.

Private foundations under PSG are governed by a board.

A private foundation must have an accountant/*Stiftungsprüfer* and also a supervisory board of trustees/*Aufsichtsrat* (Art. 14 PSG), if it has more than 300 employees or governs a company of this size (Art. 22 PSG). The accountant is appointed by the court or the supervisory board of trustees. The person must be a certified accountant and tax expert and cannot be a beneficiary of the foundation, member of a foundation organ or employee of the foundation. The PSG contains detailed provisions about the composition and appointment of the advisory board. Beneficiaries can inquire into the affairs of the foundation according to Art. 30 PSG.

What are the requirements concerning board members? Is a minimum/maximum number of board members specified? What are the rules concerning appointment of board members? And their resignation/removal?

The curator of the foundation under BSFG (who is proposed in the founding act and appointed by the foundation authority) shall propose to the foundation authority the composition of the first governing structure in line with the written founding deed of the foundation. The authority will appoint the first governing board (Art. 11.2 BSFG) and the mandate of the curator ends once the first board is appointed. Later appointments or resignations from the board have to be reported to the foundation authority within two weeks (Art. 15.4 BSFG). If management duties are not fulfilled properly, the foundation authority may intervene and ask for improvement. Should no improvement be evident, the board can be dismissed and a commissioner appointed (Art. 16 BSFG).

The governing board of a private foundation is normally appointed by the founder (Art 15.4 PSG) or the curator. The board must have at least three members, two of which must be resident in the EU or European FreeTrade Association. Beneficiaries and their close relatives cannot be members of the board, nor can legal entities.

What are the duties and what are the rights of board members, as specified by national legislation?

The governing organ (usually the board) of a foundation under BSFG represents the foundation towards third parties and has the duty to properly administer the foundation (Art. 11.3 BSFG). The governing organs have to act according to the foundation statutes and the law (see Art. 15.1 BSFG). Reasonable remuneration of members of the governing organ is possible if foreseen in the statutes (see Art. 15.2 BSFG). The foundation authority has to approve the remuneration according to Art. 15.3 BSFG.

The governing board of a private foundation administers the foundation, ensures the furtherance of the purpose, and represents it towards third parties (Art. 17 PSG). If the founding act does not say otherwise, all board members must act jointly to legally bind the foundation. If the private foundation has no supervisory council, all binding acts involving a board member need to be approved by all other board members and the competent court. The board is responsible for bookkeeping and accounts (see Art. 18 PSG). Reasonable remuneration of board members is foreseen according to Art. 19.1 PSG unless the founder has decided differently. The amount shall be determined by the court (unless the founder has decided differently).

What are the rights of founders? Can fundamental decisions, such as change of purpose, be made at the discretion of the founder? What are the legal requirements in such circumstances?

The founder of a foundation under BSFG can nominate a curator in the founding deed and can also draft the foundation statutes which will then be proposed by the curator and approved by the authority. The founder has the right to participate in the approval procedure of the statutes. The founder can be a member of the board. He can also be the only board member.

The founders of private foundations have important rights. They can appoint and dismiss members of the organs, and change or withdraw the founding act (if these rights are foreseen in the founding act), among other things. The founder can be a lifetime board member. The

founder cannot be the only board member because the board must consist of at least three members.

What are the rights of beneficiaries (e.g. right of information)?

What rules are in place to ensure against conflict of interest? What is the legal definition of a conflict of interest under your legislation? How is self-dealing prohibited?

Can staff (director and/or officers) participate in decision making? How and to what extent?

➤ **Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation?**

According to Art. 17.1, PSG board members have to represent private foundations towards third parties.

According to Art. 10 BSFG, the statutes of public benefit foundations have to include representation rules. The law does not specify who can represent public benefit foundations.

Do the director and officers have powers of representation?

➤ **Liability of the foundation and its organs**

Foundation board members can be held civilly and criminally liable.

What is the general standard of diligence for board members? Does your country differentiate between voluntary (unpaid) and paid board members?

Public benefit foundations: According to Art. 15.1 BSFG, board members have to fulfill their obligations in compliance with the law and statutes in an orderly and diligent manner. No legal differentiation between unpaid and paid board members is made.

Private foundations: According to Art. 17.2 PSG, each board member has to fulfill his obligations (stipulated in the law and statutes) economically and with the diligence of a conscientious manager. No legal differentiation between unpaid and paid board members is made.

Is there a “business judgment rule”, giving a board member a “safe harbour”, if she/he (1) acts on an informed basis; (2) acts in good faith, (3) acts in the best interests of the corporation, (4) does not act out of self-interest (duty of loyalty concept plays a role here), and (5) is not wasteful?

There is no business judgment rule concerning foundations in a special regulation. The basis reasoning of a business judgement rule developed in the field of companies has to be applied for the board members of a foundation.²

What is the liability the directors and officers?

² Kalss/Müller in Gruber/Kalss/Müller/Schauer, *Handbuch des Erbrechts und der Vermögensnachfolge* (2010) § 25.

Can the founder modify the standard of diligence for board members in the foundation's statutes?

The standard of diligence for board members can be raised, but not reduced.

Can board members be held **civilly** and/or **criminally** liable in the following cases?

	Yes	Probably yes	Unclear	Probably no	No
The foundation distributes money for a purpose which is a public benefit purpose but not accepted in the foundation's statutes.	X				
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).	X				
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.					X
The foundation sells immovable property to the spouse of a board member. The board member was unaware that the price was too low.	X				
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.	X				

➤ **Are economic activities allowed (related/unrelated)?**

Public benefit foundations under the BSFG can conduct commercial activities as long as they fall within the objectives of the foundation.

Private foundations under the PSG must not engage in primarily commercial activities. They can have ancillary economic activities such as museum shops or restaurants. They must not run a separate business or be a personally liable partner in a company.

➤ **Are there any rules/limitations regarding foundations' asset management?**

The assets of a foundation under BSFG must be administered in "secure/conservative investments" (like so-called *Mündelgeld*), unless the founders have decided otherwise (Art. 14.1). Changes in the type of asset administration have to be reported to the foundation authority. The selling of real estate assets needs approval of the foundation authority (Art. 14.2).

A private foundation must not run a separate business or be a personally liable partner in a company. A private foundation may manage a holding company or group of companies through major shareholding, although due to the prohibition of engagement in primarily commercial activities (as mentioned above), the management must not be exercised in an extensive way.

- **Are foundations legally allowed to allocate grant funds towards furthering their public benefit purpose/programmes which (can) also generate income? (recoverable grants; low interest loans; equities)**

As far as the allocation of grant funds is concerned, Austrian foundation law does not contain explicit provisions. For basic restrictions and regulations, see previous question.

- **What are the requirements for an amendment of statutes/amendment of foundations purpose?**

The statutes of a public benefit foundation under the BSFG can be amended by a decision of the organs of the foundation as long as this is in line with the will of the founder (Arts. 17 and 18 BSFG). Every amendment has to be approved by the foundation supervision authority. The foundation authority can also ask for amendment and make the changes itself if the organs do not react. The purpose of the foundation may only be changed if the assets have become insufficient to fulfil the purpose. The changes need to be published in the *Amtsblatt zur Wiener Zeitung* if the name, the domicile or the purpose of the foundation has been changed (Art. 17.5 BSFG). A foundation with too few assets to operate further as a foundation can also be transformed into a fund, if the possibility is there to pursue the purpose for at least 20 years (Art. 19.1 BSFG).

The founder of a private foundation can change the founding act of the foundation. However this needs to be mentioned in the statutes according to Art. 33.2 PSG. The board can also decide to amend the articles. This needs to be approved by the court and the changes have to be registered in the register of companies/*Firmenbuch*. The changes only come into force after having been inserted into the *Firmenbuch* (Art. 33.3 PSG).

- **What are requirements with regard to reporting, accountability, auditing?**

According to Art. 14.3 BSFG, the organs of the public benefit foundation must send yearly accounts to the foundation authority by June of the following year.

The board of private foundations is responsible for the yearly accounts (Art. 18 PSG). An accountant/*Stiftungsprüfer* appointed by the court or the supervisory board reviews the yearly financial report (Art. 20 PSG).

Reporting requirements: Do annual reports and/or accounts of foundations need to be made publicly available?

Annual reports/accounts of foundations (public benefit foundations or private foundations) do not need to be made publicly available.

What type(s) of report must be submitted (annual report including details of finances and activities, public benefit report, tax report/tax return, other reports e.g. on 1% schemes)?

No special report must be submitted by private foundations; only the annual report must be submitted to the tax authority. If there is no donation this information must be submitted.

Who checks (supervisory/tax authorities)?

Tax authorities check private foundations and public foundations. Public foundations are also supervised by the foundation authority.

Where is the required information publicised?

There is no disclosure.

What are the legal requirements concerning external audit? Is external audit required by law for all foundations?

There are no special legal requirements.

By whom should audits be undertaken? Do requirements/guidelines exist regarding international and national auditing agencies and standards?

n/a

➤ **Supervision (which authority – what measures / sanctions?)**

Does the supervisory authority comprise of a public administrative body, a public independent body, a combination of a governmental body and a court, or a public body and an independent body?

What is the extent of the supervision? Does the body review reports and make inquiries? Are public benefit organisations subject to inspection?

According to Art. 13, public benefit foundations under BSFG come under the supervision of the relevant foundation authority. The foundation authority can at any moment inspect the administration of the assets (Art. 14.4 BSFG). Appointments or resignations of the board have to be reported to the foundation authority within two weeks (Art. 15.4 BSFG). If management duties are not fulfilled properly, the foundation authority may intervene and ask for improvement. Should no improvement be evident, the board might be dismissed and a commissioner appointed (Art. 16 BSFG). The supervision authority decides about reimbursement of costs (or remuneration) for the organs of the foundation (Art. 15.3 BSFG).

Private foundations are audited by accountants/*Stiftungsprüfer* who examine the annual report of the board. Only professional accountants/auditors can be appointed as *Stiftungsprüfer*. The competent court or the supervisory board appoints them according to Art. 20 PSG.

Is approval from the authority required for certain decisions of the Board of Directors?

The acquisition and disposal of undertakings, real estate is rendered subject to an approval of the state authority under the BSFG. Under the PSG, no approval from the authorities is required.

Is it mandatory to have a state supervisory official on the board?

No, it is not mandatory to have an official on the board.

What enforcement measures are in place (including compliance measures and sanctions for non-compliance) concerning registrations, governance, reporting, and public benefit status?

The foundation must be registered and therefore supervised. The authority is entitled to dissolve the foundation if the purpose does not comply with the law or the articles of the foundation.

➤ **When and how does a foundation dissolve?**

A public benefit foundation under the BSFG is dissolved if no assets are left, the assets are insufficient, or the purpose cannot be fulfilled (Art. 20 BSFG). The remaining assets are distributed to the beneficiaries listed in the statutes or given to another foundation with similar aims.

The founder of a private foundation can terminate the foundation, if such a provision was foreseen in the statutes (Art. 34 PSG). In addition, according to Art. 35 PSG, dissolution takes place in the event of insolvency, limited duration of the foundation, or if the board decides to dissolve the foundation or the court takes this decision. The board must decide upon dissolution in the special cases foreseen in Art 35.2 PSG, e.g. if circumstances enumerated in the statutes have taken place, the purpose has been reached, or it can no longer be reached.

Regarding the dissolution of private foundations, after liquidation the remaining assets have to be distributed to the beneficiaries listed in the statutes (Art. 36 PSG).

➤ **Under what conditions does the civil law in your country recognise a foreign foundation?**

Foreign foundations conducting activities in Austria will be recognised as legal entities provided that such foundations have their principal place of business in the country where they are registered. Within the scope of the freedom of establishment pursuant to Art. 48 EC Treaty, foreign foundations will also be recognised if they have their principal place of business in Austria.

➤ **Does the civil law in your country allow a foundation to conduct (some or all) activities (grant-making, operating, asset administration, fundraising) abroad? Is there any limitation?**

Civil law allows foundations to conduct activities abroad. Within the scope of freedom of establishment pursuant to Art 48 EC Treaty, it is possible for foundations to have their principal place of business in another EU/European Economic Area member state.

II. Tax treatment of the foundation

➤ **What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?)**

Three types of foundations receive tax incentives: Those that pursue directly and exclusively:

- Public benefit
- Benevolent purposes
- Religious purposes

According to Arts. 34 - 47 Federal Tax Act/*Bundesabgabenordnung*, “public benefit purposes” are defined as those that support the community at large. A large number of persons must therefore benefit from the foundation. The second qualifying purpose is termed “benevolent”. According to the Federal Tax Act, benevolent purposes are those that support persons requiring assistance, even a small group of people. The third group consists of foundations that pursue “religious” purposes.

- **What are reporting/proof requirements to claim tax exemptions?**
- **Is specific reporting required for the use of state funds?**
- **Is there an obligation to report on donors and beneficiaries?**
- **Are there specific accounting rules for foundations?**
- **Is there a statutory definition in the civil law (foundation law, trust law) of your country what a public benefit purpose (charitable purpose) is? If yes, please give us the definition.**

The civil law definition of public benefit purpose can be found at Art. 2.2 BSFG (see first page of the profile).

- **Is there a statutory definition in the tax law of your country of what a public benefit purpose is? If yes, please give us the definition.**

According to Art. 35 Federal Tax Act (“*Bundesabgabenordnung*”), the purpose is of public benefit if the spiritual, cultural, moral or sporting development of the general public is supported.

Please note: The tax law definition is not identical to the civil law definition (Art. 2.2 BSFG). According to Art. 36 Federal Tax Act, the purpose is not of public benefit if the development of only a specific circle of beneficiaries is supported.

- **Support of “the public at large”**

Do the activities of a tax-exempt foundation generally have to benefit “the public at large”?

According to Art. 36 Federal Tax Act, to receive tax exemption the activities of a foundation (public benefit foundation or private foundation under the Private Foundations Act (“*Privatstiftungsgesetz*” - PSG) have to benefit the public at large.

If yes, can a tax-exempt foundation support a small number of disadvantaged/underprivileged individuals?

The effective support of a small number is only possible if the purpose of the foundation is in general open to a large number.

Examples: Do the following purposes promote the public at large?

	Yes	Probably yes	Unclear	Probably no	No
For benefit of the inhabitants of a city with 1,000,000 inhabitants	X				
For benefit of the inhabitants of a village with 10,000 inhabitants	X				
For benefit of the employees of a company					X
For benefit of the members of a family					X
For benefit of the students of a university	X				
Award for the best student of a university	X				

➤ **Non-Distribution Constraint**

Does a **tax-exempt** foundation generally have to follow a “non-distribution constraint” which forbids any financial support of the foundation board, staff, etc?

No

What happens with the foundation’s assets in case of dissolution?

According to Art. 39 Federal Tax Act, in case of dissolution the assets of tax-exempt foundations (whether public benefit foundations or private foundations) – except the assets deposited by founders – must be applied to public benefit, benevolent or religious purposes.

➤ **“Altruistic” Element**

Is remuneration of board members allowed in **civil law** and in **tax law**? If remuneration is allowed, are there any limits in **civil law** and/or in **tax law**?

Tax law: According to Art. 39 Federal Tax Act, unreasonably high remuneration of board members of public benefit foundations or private foundations is forbidden. Reasonable remuneration of board members is allowed. A defined statutory maximum amount does not exist.

Civil law:

- Public benefit foundations: According to Art. 15.2 BStFG, reasonable remuneration of board members of public benefit foundations is possible if foreseen in the statutes. Unreasonably high remuneration of board members is forbidden. The foundation authority (responsible for supervising public benefit foundations) has to approve remuneration according to Art. 15.3 BStFG. A statutory maximum amount does not exist. If remuneration is not foreseen in the statutes, board members have to work on an honorary basis.

- Private foundations: According to Art. 19 PSG, board members of private foundations are generally entitled to earn remuneration. A limit does not exist. Unreasonably high remuneration will exclude private foundations from tax exemption.

Does **tax law** allow a donor/funder to receive some type of benefit in return for a donation? (e.g. postcards, free tickets for a concert)

According to Art. 39 Federal Tax Act, to receive/preserve tax exemption it is forbidden for anybody to get non-purpose-related benefits from the foundation. Therefore a donor/funder is not allowed to receive any type of benefit.

Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**? If yes, how are “administration costs” defined?

Special statutory regulations concerning “administration costs” exist neither in civil nor in tax law. Unreasonably high administration costs will certainly exclude private or public benefit foundations from tax exemption.

➤ **Hybrid Structures (elements of private benefit in public benefit foundations)**

Does the **civil law** of your country accept the following provisions/activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
The founder retains a beneficial reversionary interest in the capital of a property or other asset for his own continuing use.	X				
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.	X				
A foundation distributes a (small) part of its income to the founder or his family.					X

Does the **tax law** of your country accept the following provisions/activities of a tax-exempt foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for its own	X				

continuing use.					
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.	X				
A foundation distributes a (small) part of its income to the founder or his family.					X

Are there any other examples from your country (in **civil law** and/or **tax law**) regarding such “hybrid structures” (e.g. law provisions, court decisions, etc.)?

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

Private foundations are allowed, where as public benefit foundations are not allowed to spend down their capital.

Are they allowed to be set up for a limited period of time only?

Private foundations are allowed to be set up for a limited period of time. Public benefit foundations generally must be set up for an unlimited period of time.

Does the **civil law** and/or the **tax law** of your country require a foundation to spend its income (or a certain amount of the income) within a certain period of time, e.g. within the next financial year?

Neither civil nor tax law have such a requirement.

Does the **civil law** and/or the **tax law** of your country require a foundation to spend a percentage of its overall assets in the form of a “payout rule”?

Neither civil nor tax law have such a requirement.

Example: Does the **civil law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.	X				

Example: Does the **tax law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5	X				

years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.					
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Are there any examples or cases from your country (in **civil law** and/or **tax law**) regarding the question of “timely disbursement” (e.g. law provisions, court decisions, etc.)?

➤ **Does activity abroad put the tax-exempt status at risk?**

Foundations operating mainly abroad can lose their special tax status.

➤ **Income tax treatment**

Foundations (under BSFG and PSG) that pursue directly and exclusively public benefit, benevolent or religious purposes according to Arts. 34 - 47 Federal Tax Act/*Bundesabgabenordnung* are tax-exempt according to Art. 5.6 Corporate Income Tax Act/*Körperschaftsteuergesetz*. They are only subject to corporate income tax on their purpose-related commercial income.

Private foundations, which do not qualify under exemptions provided by Art 5.6 or 5.7 Corporate Income Tax Code, are taxed according to Art. 13 of the same law. Private foundations pay corporate income tax of 25% on land and forest income, rental and lease income, and commercial income (*Gewerbebetrieb*). If the foundation invests its assets in resident company shares or participation, the dividends are not taxed (Art. 10.1. Corporate Income Tax Act). According to Art. 13.2 Corporate Income Tax Act, private foundations can, under certain conditions be tax-exempt on their foreign-sourced investment income. Other profit income (e.g. returns from investment funds or income from the sale of shares in a resident company) is taxed but at a flat rate of 12.5% income tax (see Art. 31 Income Tax Act). Once the private foundation gives grants to the beneficiaries, a capital gains tax of 25% will be levied.

Grants and donations

Investment income (asset administration)

Economic activities related/unrelated)

Major shareholding - considered as an economic activity and taxed accordingly?

Income deriving from grant expenditure towards public benefit purpose/programme activities (such as loans, guarantees, equities)?

➤ **Capital gains tax, where separate from income tax**

Foundations under BSFG receive various tax incentives as mentioned in the previous chapters. Yields are taxed according to the provisions of Art 21.2 and 21.3 Corporate Income Tax Act.

Private foundations: As long as the yield remains in the foundation, it is taxed at a rate of 12.5% (Art 13.3 Corporate Income Tax Act). But as soon as the yield is distributed, it is taxed at a rate of 25% (at the level of the beneficiary).

➤ **Withholding tax on foreign investment income?**

According to Art. 13.2 Corporate Income Tax Act, private foundations can under certain conditions be tax-exempt on their foreign-sourced investment income.

➤ **Gift- and inheritance tax**

The Gift and Inheritance Tax Act (*Erbschafts- und Vermögenssteuergesetz* BGBl 141/155) was abolished by the Constitutional Court in 2007 because of an infringement of the Constitutional principle of equal treatment. As of August 2008 life time and posthumous donations are subject to the donations reporting Act (*Schenkungsmitteilungsgesetz* BGBl 85/2008). Generally speaking no special tax on donations now exists, donations will be included in the general regulation of income tax; therefore the recipients are obliged under the new law to report donations to the fiscal authority.

Foundations now are subject to the Foundation Receipt Tax Act. The Act provides that donations to national foundations are generally taxed at a flat rate of 2.5%. If real property is the subject of the donation there exists an additional flat rate of 3.5%. Donations to foreign foundations are generally taxed at a flat rate of 5% if (i) the foreign foundations are comparable to national foundations, (ii) all documents concerning the foundations' organisation and assets/asset administration are disclosed to the tax revenue department, and (iii) between Austria and the states of registration of the foreign foundations there exists full administrative and enforcement assistance. Otherwise donations to foreign foundations are taxed at a flat rate of 25%.

➤ **Value added tax (VAT)**

There is no special regulation for foundations as regards VAT.

➤ **Capital taxes on value of assets, where applicable?**

➤ **Taxes on the transfer of assets?**

See question on capital gains tax.

➤ **Other taxes, where applicable (Real property tax)**

According to Art 2.3.b Real Property Tax Act/*Grundsteuergesetz*, foundations (under BSFG and PSG) that pursue directly and exclusively public benefit or benevolent purposes are exempt from real property tax under the condition that the property is actually used for benevolent purposes.

Otherwise, the real property tax is 3.5%.

- **Can a foreign foundation get the same tax benefits as a national foundation according to the wording of the tax law in your country? If yes, under what conditions?**

Corporate Income Tax: According to Art. 1.3 and Art. 5.6 Corporate Income Tax Act, foreign foundations (private foundations/public benefit foundations with residence or directorate in EU/EEA member states, according to Art. 27 Federal Tax Act) get the same tax benefits concerning their income under the Corporate Income Tax Act as national foundations. Foreign foundations are tax-exempt if they pursue directly and exclusively public benefit, benevolent or religious purposes, according to Art 34-37 Federal Tax Act.

As of August 2008, due to the invalidation of the Gift and Inheritance Tax by the constitutional court, donations (lifetime as well as posthumous donations) to (national/foreign) foundations (private foundations/public benefit foundations) will be subject to the Foundation Receipt Tax Act ("*Stiftungseingangssteuergesetz*"). Donations to foreign foundations with a public benefit, benevolent or religious purpose are generally taxed at a flat rate of 2.5%, (i) if they are registered in EU/EEA member states and (ii) if they can prove their public benefit, benevolent or religious purpose through annual activity reports and annual accounts (otherwise at a flat rate of 5%). Under these conditions, foreign foundations get the same tax benefits as national foundations.

- **What is the tax treatment (inheritance and gift tax) of legacies to non-resident public benefit foundations?**

Inheritance and gift tax – there is no general exemption. The status depends on tax-treaty agreements.

Real Estate Tax: Foreign foundations are not exempt from Real Estate Tax, and they do not get the same tax benefits as national foundations, which are tax-exempt, if they pursue directly and exclusively public benefit or benevolent purposes (Art. 2.3.b Real Estate Tax Act).

- **Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations are protected by the fundamental freedoms of the EC Treaty? Especially: Are the consequences of the Stauffer decision of the European Court of Justice and/or the current infringement procedures of the European Commission discussed by legal scholars or by practitioners? (e.g. publications in law journals) / Have there been any resulting changes to your country's legislation, or are changes being discussed?**

No changes have yet been made, although a broad discussion on the topic is now beginning.

III. Tax treatment of donors

Only limited tax benefits are given to individual and corporate donors making gifts to foundations.

- **System of tax credit or tax deduction?**

Tax deduction.

➤ **Tax treatment of individual donors**

According to Art. 4.4.5 of the Income Tax Code/*Einkommensteuergesetz*, individual donors can deduct donations in the fields of science, education in science and research or arts, made to special scientific institutions up to 10% of taxable income. Other legal entities (including foundations) mainly engaged in science and research (if a territorial authority is involved or if the entity is regarded as non-profit, benevolent or religious according to Arts. 34 f. of the tax code/*Abgabenordnung*) must ask for recognition by the tax revenue department and are then registered in a special list published annually in the Federal Gazette of the fiscal authorities. Some organisations are explicitly mentioned in Art. 4.4.6 Income Tax Code as qualifying organisations, such as the Austrian National Library, the Diplomatic Academy, and others. Donations in these cases are also deductible only up to 10% of taxable income.

According to a 2009 amendment of the income tax law (*Steuerreformgesetz 2009*) donations/legacies for special, so called favoured purposes (namely for (i) benevolent purposes, (ii) for the purpose of development cooperation, or (iii) for national/international emergency aid) provided to foundations (and other entities), will be recognised as deductible special expenses or business expenses for the corporate and individual donor. The donations/legacies will reduce the tax base by up to a maximum of 10% of the taxable income. This new incentive will also be valid for cross border donations/legacies to “comparable” organisations based in another EU country or EEA country. The resident or foreign based foundation (EU and EEA) receiving such tax effective donations/legacies has to be included in a list/register kept by the fiscal authorities in Vienna. The organisation that wishes to be included in the list has to fulfil the following requirements, which need to be confirmed by an auditor (in case of fundraising organisations additional requirements will have to be met):

- The entity has to serve solely one of the three favoured purposes listed above
- For a period of at least three years;
- Only ancillary economic activities may be undertaken;
- The administration costs do not extend 10% of the donated sum.

Individual donors (tax payers in Austria) will in cases of deduction of the donation as special expenses have to provide the receiving organisation with his/her Austrian security number or in the case of a foreign donor his/her European Health security card number (article 18.1 income tax code).

Deductions can be made as special expenses (Art. 18.1.7 Income Tax Code) or business expenses (Art. 4.4.5 and Art. 4.4.6 Income Tax Code).

Cash donations and other movable donations in connection with natural disasters are deductible according to Art. 4.4.9 Income Tax Code if used for advertisement purposes.

Donations to private foundations linked to a business corporation are deductible as business expenses (Art. 4.4.11 Income Tax Code) if the foundation solely and directly serves the purpose of the founding corporation or the foundation serves to support employees of the corporation. Furthermore, donations are deductible if the foundation solely and directly serves the transfer of affiliated dividend income.

➤ **Tax treatment of corporate donors**

Same as for individual donors (see above).

➤ **Tax treatment of donations to non-resident public-benefit foundations**

Until August 2008 posthumous donations to foreign, non-resident public benefit foundations were taxed at a regular tax rate according to the Gift and Inheritance Tax Act.

The Foundation Receipt Tax Act (see Art. 2.1) provides that donations to foreign public benefit foundations, which are registered in EU/EEA member states, are generally taxed at a flat rate of 2.5%, if the foreign public benefit foundations can prove their public benefit purpose by annual activity reports and annual accounts (otherwise at a flat rate of 5%).

Tax deduction for cross border giving has been reduced in some cases. The 2009 version of the law does now extend existing tax incentives for donations in the area of scientific research to cross border cases.

With regards to donations/legacies to “comparable” organisations based in another EU country or EEA country; the resident or foreign based foundation (EU and EEA) receiving such tax effective donations/legacies has to be included in a list/register kept by the fiscal authorities in Vienna. The organisation that wishes to be included in the list has to fulfil the following requirements, which need to be confirmed by an auditor (in case of fundraising organisations additional requirements will have to be met):

- The entity has to serve solely one of the three favoured purposes listed above
- For a period of at least three years;
- Only ancillary economic activities may be undertaken;
- The administration costs do not extend 10% of the donated sum.

➤ **Other frameworks such as percentage law systems**

None

➤ **What are reporting/proof requirements to claim tax benefits?**

The annual activity report and the annual accounts have to be submitted to the fiscal authorities at Vienna.

IV. Tax treatment of the beneficiary (receiving a grant or other benefit from a foundation)

When a private foundation under PSG gives grants, a capital gains tax of 25% is levied on the beneficiaries, on both individuals and legal entities.

V. Trends and developments

➤ **Recent trends or developments affecting the legal and fiscal environment for public benefit foundations**

➤ **Impact of anti-terrorist debate**

Is there a specific national/regional anti-terrorism act (legislation) in your country, (which one and date of entry into force or adoption)?

A specific national/regional anti-terrorism act does not exist. However, applying Community law (Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing), Art. 40 and the Austrian Banking Act ("*Bankwesengesetz*") generally require – to ensure that money laundering and terrorist financing are prevented – credit and financial institutions to identify the customer (natural persons and legal entities, e.g. foundations) and verify the customer's identity on the basis of documents, data or information obtained from a reliable and independent source in certain cases: (a) When establishing a business relationship; (b) when carrying out occasional transactions amounting to 15,000 euros or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked; (c) when there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold; or (d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.

Additionally, according to tax law regulations the foundations must submit to the tax authority the names of beneficiaries and the donations; if no donation has been made during the last year the foundation has to submit this information to the authority ("*Körperschaftsteuergesetz*"). The law will come into force on 1 January 2011.

If so, has this law introduced new legal and regulatory requirements for foundations (please describe)?

These regulations did not introduce specific legal and regulatory requirements for foundations. According to Art. 40 and the Austrian Banking Act, foundations – like all other customers – have to fulfil the statutory obligation concerning identification.

At the moment a bill (corporate tax law) is pending introducing additional reporting duties for foundations to the fiscal authority to secure that every flow of means (money and other goods) will be revealed to the authorities who are entitled to the information to transmit the responsible authority.

Has the foundation supervisory authority introduced new regulatory/oversight requirements to comply with counter terrorism measures/law?

No

Has the foundation supervisory / regulatory authority(ies) introduced guidance tools to assist foundations to comply with counterterrorism measures/law?

No, it is not the foundation supervisory authority but the fiscal authority because it is this authority that manages the relevant data.

If so, did the foundation supervisory authority engage in a consultation with the foundation sector on counter terrorism measures/ does it plan such a consultation?

The fiscal authority has started an informal consultation procedure.

➤ **Public fundraising**

Are there any specific laws that regulate fundraising and do they affect foundations?

From 1 January 2009 it is possible that funds donated to foundations with public benefit can be deducted from the tax of individuals.

Useful contacts

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Selected law texts

All law texts can be downloaded at: <http://www.ris.bka.gv.at/bundesrecht/>