

EFC COUNTRY PROFILE JANUARY 2011: GERMANY

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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)?**

There is no legal definition but the basic principles of civil law foundations are regulated in Articles 80-88 of the Civil Code (*Bürgerliches Gesetzbuch* - BGB), modified in 2002 (Law on Modernisation of the Foundation Law dated 15 July 2002 - *Gesetz zur Modernisierung des Stiftungsrechts*). Further details are regulated in the 16 foundation laws of the *Bundesländer*, which now have been widely adapted to the changes of the BGB. Although the different foundation laws in the *Bundesländer* are quite similar, they can differ with regard to the requirements for establishment, supervision, and on the issue of foundations that pursue private benefit purposes like family foundations. Foundations in the sense of Articles 80-88 BGB (*Stiftungen bürgerlichen Rechts*) are legal entities with assets that shall be used to pursue a specific legal purpose laid down by the founder. Furthermore, foundations with a legal personality can also be subject to public law as well as church law, if the foundation fulfils the respective special requirements, as for the example of public foundations being a part of a public administrative body.

Furthermore a large number of non-autonomous foundations without legal personality exist in Germany. They too can be foundations according to civil law as well as public or church law.

- **What purposes can foundations pursue?**

Albeit tax privileges are granted only to public benefit foundations, a foundation can be created to pursue every legal purpose – be it private or public benefit.

- **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?**

Individuals and legal entities can establish a foundation. The deed of the foundation (*Stiftungsgeschäft*) can be *inter vivos* or *causa mortis*.

In order to receive legal personality every foundation in the sense of the BGB has to be recognised by the competent authority in the *Bundesland* in which the foundation wants to be headquartered. The authority has to recognise a foundation when the legal requirements are met and the foundation can ensure that its purpose can be pursued permanently and the purpose does not contravene the general interest. The foundation has to have a statute covering the following points: The name, the headquarters, the purpose, the assets and the formation of the board. The authority ensures that the will of the founder, the statutes, and the purpose comply with the law. The administration also determines whether or not the assets

are sufficient to pursue the stated purpose of the foundation. There is no minimum capital for the establishment of a foundation specified in the law, but authorities in most *Bundesländer* normally ask for at least €50,000.

➤ **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, state approval by a state supervisory authority is necessary. If legal requirements are met, the founder has a legal claim to approval (without discretion). Notarisation is not necessary to get an approval.

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

It depends on the federal state law (*Landesrecht*).

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

It depends. There are different regulations in different federal state laws.

If foundations are registered, is the register publicly available?

Yes

➤ **Is a minimum capital required?**

No, not by law, but the authorities determine whether or not the assets are sufficient for the stated purpose of the foundation. Normally they ask for at least €50,000.

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

Article 81 (1) No. 5 BGB (Civil Code) says that the statutes have to provide regulations concerning the establishment of the governing board. According to Articles 86, 26, 27 BGB, the foundation has to have a board which represents the foundation. There are no further regulations about this issue in the Civil Code. However, the federal foundation laws (*Landesstiftungsgesetze*) may provide regulations concerning the administration of a foundation by the board members. The *Landesstiftungsgesetze* of Bremen, Mecklenburg-Western Pomerania, Saxony and Thuringia require that the statutes of a foundation must provide regulations about the number of board members, their appointment, dismissal and term of office and about the decision-making procedures.

A supervisory or audit committee is stipulated neither in Civil Law nor in the *Landesstiftungsgesetze*. There are no special restrictions on the rights of the founder; he can also become a board member.

Is it mandatory to have a supervisory board?

No, but many larger foundations voluntarily choose to install a supervisory board.

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?

None

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

Board members have the right to legally represent the foundation. They have the duty to promote the foundations' mission according to its written statutes. Further rights and duties can be regulated in the statutes.

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?

As soon as a legally independent foundation is legally created, the founder loses his or her influence over decision-making. Nevertheless, a founder can reserve the right to serve as a board-member with the respective rights and duties.

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

No legal rights.

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?

According to § 181 of the German civil code, self-dealing is prohibited; but in many cases this is being amended by a statutory regulation.

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

Yes, staff can participate in the preparation of a decision, but board-members cannot delegate decision-making to others.

➤ **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 Articles 86, 26, 27 BGB the foundation is represented by its board of governors. It is up to the statutes of the foundation to define the board-members.

Do the director and officers have powers of representation?

As a rule, a foundation is represented by its board-members; they can grant the right to represent the foundation to directors and officers who are not members of the board.

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

The foundation is liable for any damage caused by actions of its organs towards third parties. The foundation can then take recourse from board members. The liability of the organs towards the foundation can be restricted to damages caused by intention or severe negligence.

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

In most cases there are statutory restrictions on liability. In cases where no explicit statutory provisions exist, unpaid board members (meaning that they receive a maximum of €500 *per annum*) are – according to a new legislation (“*Haftungsbegrenzungsgesetz*”) that came into force as of 3 October 2009 – only liable for intent and gross negligence (§§ 86, 31a BGB).

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?

Not as such, but the above mentioned criteria are being taken into account when a board member's conduct is being qualified as intent vs. gross negligence.

What is the liability of directors and officers?

See above.

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

Yes. See above.

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)?**

Related economic activity is allowed.

Unrelated economic activity is also allowed. If the annual income from this activity does not exceed €35,000, it is not taxed (Art 64 (3) *Abgabenordnung*).

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

Nearly all *Landesstiftungsgesetze* stipulate that the assets of a foundation cannot be allowed to decrease. Exceptions are possible.

Shareholding and major shareholding is allowed, although the latter might be regarded as economic activity, if shares grant voting-rights.

Alternative investments such as hedge funds and private equities are possible to a certain extent as long as there is no risk for the public interest and the possible loss of capital is limited and there is no opposing regulation in the statutes.

- **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)**

There are no known cases.

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

The requirements for amendments or changes to the statutes can be specified in the statutes. All changes to the statutes have to be approved by the supervisory authority. Regulations concerning this procedure are provided in the *Landesstiftungsgesetze* and tend to be very restrictive.

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

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

No

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)?

Foundations must present annual reports to the relevant state authorities according to the laws of the *Bundesländer* or, if they wish to receive tax privileges, to the relevant financial authorities. Tax-exempt status is reviewed every three years. Foundations are not legally requested to make the information publicly available.

Who checks (supervisory/tax authorities)?

Both supervisory and the authorities.

Where is the required information publicised?

The information is not publicised.

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

No. However, a growing number of supervisory authorities demand an external audit in individual cases, mainly from larger foundations.

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

Audits can be undertaken by certified financial auditors; audits are subject to binding professional standards set by the German institute of financial auditors (IDW).

➤ **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?

Public administrative body.

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

Civil law foundations are subject to state control according to the respective laws of the *Bundesländer*. Each state has its own supervisory system. The supervision authority has to ensure that the statute and activities of the foundation do not contravene the law and that the will of the founder is observed. The state authority has the right to be informed.

According to the different laws of the *Bundesländer*, foundations must file annual reports with the supervisory authority. The authority is allowed to object to activities or decisions of the organs of the foundations which are illegal or do not conform to the founder's will. In this case, the authority can also order the foundation's board to take specific action.

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

Yes. See above.

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

No

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

If the board fails to comply with measures taken by the supervisory authority, the authority can step in and take action itself. According to the laws of the *Bundesländer*, the authority can also dismiss board members in case of severe breach of duty. Some legal transactions of foundations need to be approved. If the fulfilment of the aim of the foundation has become impossible or the purpose contravenes the general public interest, the authority has, according to Art. 87 BGB, the competence to change the purpose while respecting the will of the founder. As *ultima ratio*, the authority can even dissolve the foundation.

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

The dissolution of a foundation is the *ultima ratio* measure of the supervisory authority. The board of the foundation can also decide to dissolve the foundation, for example, if the aim of the foundation is achieved or the foundation has lost its assets. In any case this decision has to be approved by the supervisory authority. The remaining assets must be used for similar purposes. The merger of foundations is also possible.

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

There has to be a process of foundation establishment according to German civil law. German civil law is not restricted to Germans.

- **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?**

There are no limitations in civil law.

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?)**

Foundations like other non-governmental organisations (NGOs) are in principle subject to corporate income tax, but foundations can be exempt from it if they pursue qualified philanthropic purposes enumerated in Arts. 52-54 of the *Abgabenordnung* (AO). The catalogue of public benefit purposes is codified in Article 52 (2) AO as a part of the German tax law. It was updated by the *Gesetz zur weiteren Stärkung des bürgerchaftlichen Engagements* (Law for the further strengthening of civil engagement) in October 2007. 25 public benefit purposes have been codified within this law. These purposes are public benefit purposes (*gemeinnützige Zwecke*), benevolent purposes (*mildtätige Zwecke*), and the support of churches. The foundation has to carry out its tax-privileged purpose unselfishly, exclusively and directly. The income of the assets of the organisation must be used exclusively to pursue the tax-exempt purposes. But the foundation is allowed to build reserves up to one-third of the annual income from capital investment. New foundations can build up their endowments during their first three years (Art. 58 No. 12 AO). Without losing the tax privileges, one-third of the income can be spent on the living expenses of the founder or his/her close relatives or on the care of their graves (Art. 58 No. 5 AO). The income of a foundation must be used directly, which means before the end of the following year.

- **What are reporting/proof requirements to claim tax exemptions?**

Tax authorities demand that foundations file a tax statement, including an annual report. If the foundation does not pursue any economic activity, reporting is required only every third year.

- **Is specific reporting required for the use of state funds?**

No

- **Is there an obligation to report on donors and beneficiaries?**

Not except for the regular proofs of expenditure.

- **Are there specific accounting rules for foundations?**

Articles 86, 27 (3), 666, 259, 260 of the German civil code (BGB) contain minimum accounting requirements; more detailed regulations can be applicable according to the respective foundation law of the *Bundesland*. Every state (*Bundesland*) requires foundations to issue an annual report ("*Jahresabrechnung*") containing a statement of assets and liabilities. In addition to that some *Bundesländer* demand that foundations comply with the Generally Accepted German Accounting Principles ("GoB") and or issue an annual activity report ("*Tätigkeitsbericht*").

- **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.**

No, the question of public vs. private purpose is subject only to tax law, not civil law.

- **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.**

Yes, there is a definition in § 52 AO (*Abgabenordnung*):

§ 52 Public benefit purposes

A legal entity is following public benefit purposes if its activities are aimed at giving unselfish support to the public at large, referring to material, spiritual or moral issues.

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

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

Yes

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

No

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?

Yes, but paying a salary to them is allowed.

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

There is a special regulation in the statute of the foundation which specifies to whom the assets belong in case of dissolution.

➤ **“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**?

Remuneration is allowed. It shall be “appropriate”.

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)

No

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?

There is no strict legal rule on the programme and administrative costs ratio, although many local foundation laws demand that administrative cost should be as low as possible. There is no general rule on what this means in percentages. Fiscal authorities will evaluate the programme and administrations cost ratio in each individual case on the basis of the “principle of proportionality”. What is regarded as proportional in the case of a newly established foundation might not be proportional for an older foundation. Also, administrative cost is generally higher in operating foundations than in grant-giving foundations.

➤ **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					X

endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for its 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				

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.)?

No

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

Not as a rule, but there are exceptions if the founder makes provision for spending down capital in the statutes (*Verbrauchsstiftungen*).

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

Normally not. However, a “*Verbrauchsstiftungen*” is regarded to be legitimate if its duration is longer than approximately 10 years.

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?

Yes, it is required by tax law.

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”?

No

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 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.					X

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.)?

Although German foundation law does not know a “minimum payout rule” (see above), German tax law (§ 55 (1) Nr. 5 AO) obliges tax exempt foundations to distribute all of their actual income (e. g. from asset management, lease and rent, economic activity, donations etc.) on its public benefit activity. This must be effected in a timely manner, meaning within the next fiscal year (“rule of timely disbursement”). But there are several exceptions to this rule, which are of great practical importance. Firstly, a so called “earmarked reserve” can be built to save capital for a specified project. It is possible to build an earmarked reserve, if the respective project will be accomplished within the next 3-5 years (§ 58 Nr. 6 AO). If a foundation must rely on income from donations to bear the cost for operating expenditures (wages, rent, cost of administration etc.), it is permitted to accumulate an “earmarked reserve” in the form of an “operating expenditures reserve”. A foundation’s management can prevent financial bottleneck situations due to volatile income (e. g. from donations) by accumulating such reserves for a time period of up to one year. Secondly, a foundation can build a general contingency reserve (§ 58 Nr. 7 AO) not exceeding 1/3 of their annual surplus from asset management (income after deduction of cost of administration for asset management). Beyond that, donations can be used to build a contingency reserve up to an annual limit of 10% of income from donations and profit earned by economic activity. Primarily, the general contingency reserve is an instrument to compensate for a decline in real value of assets caused by inflation. But it can also be released to replenish stock capital in case of depreciation.

Thirdly, a newly established foundation is allowed to build an accrual reserve (§ 58 Nr. 12 AO) by using all profit from asset management and economic activity, provided that it complies with the foundations statutes. The right to build accrual reserves expires three years after the establishment of the foundation.

In addition, reserves for maintenance of economic activity as well as asset management are allowed, if they are necessary to ensure the sustainable existence of this source of income. These reserves must be justified by a concrete reason and must be commercially acceptable.

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

In principle, a foundation or other NGO does not lose its tax-exempt status if it pursues its purposes outside Germany. However, tax exemption requires that pursuing public benefit purposes abroad possibly has a positive impact for Germany and does not lead to disadvantages. The usage of funds has to be proved by a comprehensible statement of accounts (Article 63 (3) *Abgabenordnung*).

➤ **Income tax treatment**

Grants and donations

Foundations pursuing public benefit purposes do not have to pay any income tax on grants and donations.

Investment income (asset administration)

Investment income is tax-exempt.

Economic activities related/unrelated)

Foundations can carry out economic activity as long as it is not their main purpose. If the activity is necessary to pursue the public benefit purpose and does not compete with for-profit organisations, it is not taxed (so-called “*Zweckbetrieb*”). Unrelated commercial activity (so-called “*wirtschaftlicher Geschäftsbetrieb*”) is normally taxed if the income amounts to more than €35,000.

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

Major shareholding is not considered as an economic activity and is consequently tax-exempt, if there are no voting rights.

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

There are no known cases, but if income can be regarded as of related economic activity, the respective rules apply (see above).

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

There is neither capital gains tax nor income tax if the investments are managed in Germany.

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

There are two possibilities: Either the foundation is exempt from withholding tax in a foreign country or the foundation has to pay withholding tax but can apply for reimbursement up to a certain extent. Here changes in legislation are expected following a ruling of the European Court of Justice on the matter.

➤ **Gift- and inheritance tax**

Inheritance tax or gift duty is levied on the transfer of property to a German foundation at a progressive rate. Tax exemption exists concerning donations made to domestic foundations with exclusive qualified purposes. A complete removal of inheritance tax is granted if the inheritance is passed on to a public benefit purpose foundation within two years of the succession.

➤ **Value added tax (VAT)**

Foundations are considered final consumers, meaning that VAT is levied on goods and services received by foundations, and foundations cannot deduct input tax. Donations are not subject to VAT. No refund schemes for VAT paid by foundations exist.

Services provided by foundations can also be subject to VAT, if the foundation delivers goods or services with the intent to generate income, but there are number of supplies by foundations that can be either exempt from VAT or where a reduced tax rate can be applicable, e. g. income from cultural events and institutions (museums, orchestras, archives) or educational institutions, as well as scientific lectures and events.

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

There is no capital tax on the value of assets gained with investments in Germany.

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

There are no taxes on the transfer of assets if assets are managed in Germany.

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

Public benefit foundations are exempt from real property tax.

➤ **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?**

Following the Stauffer ruling¹ German foundation tax law was amended: To be eligible for tax incentives, public-benefit foundations (being resident in Germany or not!) must pursue activities that possibly benefit the German public. The reform was rendered into force as of 1 January 2009.

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

Donations to foreign foundations may be exempt from inheritance and gift tax if the recipient's country has entered into a reciprocity agreement with Germany (e. g. such an agreement exists between Germany and the USA.).

➤ **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?**

There was a broad discussion on this matter, until German tax law had to be reformed in accordance to the Stauffer-ruling.

¹ ECJ case number C-386/04.

III. Tax treatment of donors

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

There is a system of tax deduction.

➤ **Tax treatment of individual donors**

Cash, assets, and any other economic goods except rights of usage and specific performances can be deducted.

In September 2007, the German *Bundesrat* approved the following tax incentives: Tax deduction up to 20% of the yearly taxable income; exceeding amounts can be carried forward to future tax years without any limitation. In addition, individual donors can deduct the maximum amount of €1 million. This amount can be carried forward for a period of up to 10 years.

Donations to resident foundations carrying out projects abroad enjoy the same privileges as donations to foundations operating in Germany.

In these cases the foundation has to prove to the German tax authorities that the donation is spent for the furtherance of purposes for the public benefit.

➤ **Tax treatment of corporate donors**

Cash, assets, and any other economic goods except rights of usage and claims for specific performances can be deducted.

After the 2007 law revision, a tax deduction on the taxable income is possible up to 20% of yearly taxable income (or 0.4% of the sum of the turnover and salaries).

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

Until recently, donations by German residents to non-resident foundations were not deductible for income tax purposes. The tax deduction for the donation was only given if the donation was made to a qualifying resident entity. Following the Persche-ruling (ECJ C-318/07, 27 January 2009), the German parliament has adopted provisions (*Gesetz zur Umsetzung steuerlicher EU-Vorgaben sowie zur Änderung steuerlicher Vorschriften, 8 April 2010*) enabling the deduction of cross border donations. Gifts for charitable, benevolent or religious purposes to foundations residing in the EU shall be tax privileged, if individuals resident or domiciled in Germany benefit from the foundation's activities or if the activities potentially improve the reputation of Germany. Furthermore, the foundation must meet the same requirements for tax-exemption as foundations in Germany, and the country where it is located must give administrative assistance to the German fiscal authorities (EC directive 77/799/EEC as well as 2008/55/EC). Finally, Art. 60 (1) AO (German tax code) states that tax exemption may only be granted to foundations, whose written statutes are in accordance with the official model statute that is regulated in an appendix to the German tax code. The tax payer has the burden of proof that all requirements are met. Given the very strict requirements for the deduction of cross-border-donations, the practical impact of these legal amendments following the Persche ruling it is still unclear.

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

There are no other frameworks.

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

The donor has to file the tax receipt issued by the foundation together with his or her tax return.

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

Individuals

No taxes. However, income tax will be levied if the grant or benefit exceeds what are considered to be the costs of an adequate living.

Legal entities

No taxes.

V. Trends and developments

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

In October 2009 a new regulation on the liability of foundation board-members came into force, granting a limited liability (restricted to gross negligence and intent) to unpaid board members (see above, I. Legal Framework / question 10). Discussions on liability questions in particular, arose during the financial and economic crisis that lead to foundations losing parts of their income and stock capital.

Furthermore, German fiscal law had to be amended following the ECJ Persche-ruling. The new regulation on the tax-deductibility of cross-border-donations is being harshly criticized, because it is as yet unclear if – albeit being formally in accordance with the requirements set up by the Persche-ruling – it has any practical impact. Currently it is being discussed just how strictly the new regulation is to be interpreted and how donors can deal with it.

➤ **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)?

No

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

No

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

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?

Yes

➤ **Public fundraising**

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

Foundations are free to do fundraising in any possible way and without needing any public permission. According to civil law, a donation is regarded as a gift, and every foundation – irrespective of its tax status – is allowed to accept gifts.

Regarding endowments, there is a discussion whether every foundation is allowed to accept endowments irrespective of an explicit permission in its respective statutes. To avoid legal uncertainty, most foundations' statutes include a clause stating that the foundation can accept additional endowments.

While all types of foundations can choose any form of fundraising, only public benefit foundations that have tax exempt status are allowed to issue tax receipts. A tax receipt entitles the donor to apply for tax deduction.

If the donor explicitly states that his or her donation is dedicated to a specific purpose ("earmarked money"), the beneficiary must check if this purpose is in compliance with the foundation's statutes. Since a foundation's scope of action is limited by its statutes, it can only accept earmarked money if the area to which the donation is dedicated is in line with the foundation's statutory purposes.

Useful contacts

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