



# EFC LEGAL AND FISCAL COUNTRY PROFILE

*The operating environment for  
foundations*

## **GERMANY – 2014**

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***The operating environment for foundations***

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## **I. Legal framework for foundations**

**1. 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.

**2. 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.

**3. 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 - €100,000.

**4. 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.

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

It depends on the federal state law (Landesrecht).

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

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

b) If foundations are registered, is the register publicly available?

Yes

**6. Is a minimum founding capital required? Is the foundation required to maintain these assets or any other specified asset level throughout its lifetime?**

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 to €100,000.

**7. 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.

a) Is it mandatory to have a supervisory board?

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

b) 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

c) 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.

d) 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.

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

No legal rights.

f) 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.

g) 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.

**8. 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.

a) 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.

**9. 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.

a) 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 €720 per annum) are – according to a new legislation (“Haftungsbegrenzungs-gesetz”) that came into force as of 3 October 2009 – only liable for intent and gross negligence (§§ 86, 31a BGB).

b) 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.

c) What is the liability of directors and officers?

See above.

d) Can the founder modify the standard of diligence for board members in the foundation’s statutes?

Yes. See above.

e) 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	

**10. Are economic activities<sup>1</sup> allowed (related/unrelated)? If so, is there a ceiling/limit on economic activities (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) or €45,000 for income stemming from sport-events.

**11. Are foundations permitted to be major shareholders?**

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

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<sup>1</sup> For the purposes of this profile economic activity can be understood as “trade or business activity involving the sale of goods and services”. “Related” economic activity is in itself related to and supports

**12. Are there any rules/limitations in civil and/or in tax law regarding foundations' asset management? What, if any, types of investment are prohibited?**

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.

**13. 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.

**14. 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. It is especially difficult to change or extend the purpose of a foundation.

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

a) What type(s) of report must be produced?

- annual financial report
- annual activity report
- public benefit/activity 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.

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the pursuance of the public benefit purpose of the foundation. According to the above, normal asset administration by foundations (including investment in bonds, shares, real estate) would not be considered as economic activity.

b) Must all/any of the reports produced by the foundation be submitted to the supervisory authorities? If so, to which authorities (e.g. foundation authority, tax authority)?

c) Are the reports checked/reviewed? By whom (supervisory/tax authorities)?

Both supervisory and the authorities.

d) Do any or all of the reports and/or accounts of foundations need to be made publicly available? If so, which reports and where (website, upon request)

No. The information is not publicised.

e) 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.

f) 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).

## **16. Supervision (which authority – what measures / sanctions?)**

a) 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.

b) 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.

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

Yes. See above.

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

No

e) 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.

**17. 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.

**18. 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.

**19. 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**

**1. What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?). Is there a special approval process for receiving tax exemption? If so does the process have to be repeated every year?**

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 bürgerschaftlichen 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.

**2. What are reporting/proof requirements to claim tax exemptions? What does the foundation have to submit to the authorities (statutes, financial reports, activity reports, other?)**

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.

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

No

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

Not except for the regular proofs of expenditure.

**5. 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").

**6. 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.

**7. 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.

8. Please indicate whether the following purposes would or would not be accepted for tax privileges in your country:

Public benefit purpose	Accepted in tax law (for tax privileges)			
	Yes	Probably yes	Probably no	No
Arts, culture or historical preservation	X			
Environmental protection	X			
Civil or human rights	X			
Elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination	X			
Social welfare, including prevention or relief of poverty	X			
Humanitarian or disaster relief	X			
Development aid and development cooperation	X			
Assistance to refugees or immigrants	X			
Protection of, and support for, children, youth or elderly	X			
Assistance to, or protection of, people with disabilities	X			
Protection of animals	X			
Science, research and innovation	X			
Education and training	X			
European and international understanding	X			
Health, well-being and medical care	X			
Consumer protection	X			
Assistance to, or protection of vulnerable and disadvantaged persons	X			
Amateur sports	X			
Infrastructure support for public benefit purpose organisations	X			
<i>Other – please list other purposes accepted in tax law for tax privileges in your country</i>				

9. Support of “the public at large”

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

Yes

b) 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				

## 10. Non-Distribution Constraint

a) Does a **tax-exempt** foundation generally have to follow a “non-distribution constraint”<sup>2</sup> which forbids any financial support of the foundation board, staff, etc.?

Yes, but paying a salary to them is allowed.

b) 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.

## 11. “Altruistic” Element

a) 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” and there must be a clause in the statutes allowing remuneration.

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<sup>2</sup> For the purposes of this profile, a non-distribution constraint implies that any transactions/benefits to third parties going beyond reasonable compensation for services rendered are prohibited (such as unreasonable board remuneration or excessive payments to service deliverers) except where transactions/benefits provided are part of the direct promotion of the public benefit purpose.

b) 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)

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

c) Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**?

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.

If yes, how are “administration costs” defined? Please indicate which of the following types of expenditures would/would not be considered as “administration costs”:

- Personnel costs (staff salaries/payroll costs)
- Board remuneration
- Costs of external audit
- Other legal/accounting costs
- General office overheads (rent/mortgage payments, utilities, office materials, computers, telecommunications, postage)
- Insurance
- Publicity and promotion of the foundation (e.g. website, printed promotional materials)
- Asset administration costs
- In the case of an operating foundation – costs related to programmes/institutions run by the foundation
- Costs related to fundraising

## 12. Hybrid Structures (elements of private benefit in public benefit foundations)

a) 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				

b) 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 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				

### 13. Distributions and Timely Disbursement

a) 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). According to § 80 (2) BGB it is now (1.1.2013) allowed to start a “spend-down”-foundation, if the minimum life-span of the foundation is 10 years or more.

b) Are they allowed to be set up for a limited period of time only? If so, is there a minimum length of time for which the foundation must exist?

Normally not. However, a “Verbrauchsstiftungen” can be set up if its duration is longer than 10 years.

c) 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? If so, is there a specific amount/percentage of the income that must be spent within this time? Which resources would be considered as income? E.g. would donations/contributions designated as being for building up the endowment be included in /excluded from the income to be spent? What expenditures would count towards the disbursement of income (e.g. would administration costs be included/excluded?)?

Yes, it is required by tax law. Although German foundation law does not foresee a “minimum payout rule” 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.

**d) 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 "pay-out rule"?**

No (see above).

**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 <sup>th</sup> 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 <sup>th</sup> year are there distributions for the public benefit purpose of the foundation.					X

**14. 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).

**15. Are there any civil and/or tax law rules regulating cross-border grants by a foundation? If yes, please provide a description of the requirements the foundation must fulfil in such cases.**

No explicit rules (see above).

**16. Income tax treatment**

How are the following types of income treated for income tax purposes?

Grants and donations

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

Investment income (asset administration)

- Interest from fixed rate bonds

The interest from fixed-rate bonds is considered as income from mere assets management as well and therefore falls under the general tax privilege for PBOs.

- Equities

- Income from leasing of a property that belongs to the foundation

Besides dedicated activities the mere asset management of PBOs is tax exempt as well. As long as the leasing of property qualifies as asset management under sec. 14 Sentence 3 FC, the income of this activity is not subject to taxation.

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.

- Income from running a hospital/museum/opera

Economic activity which is related to the public benefit purpose is tax exempt, if it is considered as a dedicated activity under sec. 65 FC. This section requires:

1. the overall design of the economic activity to be directed towards achieving the tax-privileged purposes of the corporation as set out in the statutes,
2. such purposes can be achieved only by way of such activities, and

3. the economic activity does not enter into competition with non-privileged activities of the same or similar type to a greater extent than necessary for achieving the tax-privileged purposes.

Further regulations on specific dedicated activity especially regarding welfare, hospitals and sporting events can be found in sec. 66 to 68 FC.

- Income from producing/selling books (e.g. art books sold by a cultural foundation)
- Income from running a bookshop inside a museum/opera run by the foundation
- Income from running a café in the hospital/museum run by the foundation
- Income from selling T-shirts (activity not related to the pursuance of the public benefit purpose)
- Income from intellectual property (e.g. royalties and licence fees)

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).

Is 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.

#### **17. Are capital gains subject to tax? If so, are they taxed as income or liable to a separate tax?**

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

#### **18. Does any kind of value added tax (VAT) refund scheme for the irrecoverable VAT costs of public-benefit foundations exist in your country?**

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.

#### **19. Is capital tax levied on the value of assets, where applicable?**

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

#### **20. Are there taxes on the transfer of assets by foundations?**

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

**21. Are there any other taxes to which public-benefit foundations are subject there (e.g. real property tax)?**

Public benefit foundations are exempt from real property tax.

**22. 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\_– if they have to fulfil exactly the same requirements as local based public benefit foundations, please refer to above but indicate which documents need to be provided and translated:**

- Statutes (translation required?)
- Last annual financial report (translation required?)
- Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes, which may not be required by the organisation's country of seat but are required according to the legislation of the country from which tax benefits are sought?
- Other?

Following the Stauffer ruling<sup>3</sup> 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.

Sec. 5 (2) no. 2 CTA outlines both the basic principle denying corporate tax exemptions for foreign-based organisations as well as an exception of that principle for foreign-based public-benefit organisations. However, foreign-based public-benefit organisations not only have to fulfil the requirements of sec. 5 (2) no. 1 CTA, but also the general requirements for a corporate tax exemption of a public-benefit organisation stated in sec. 5 (1) no. 9 CTA, 52 to 68 FC.

First it should be noted that income derived by a foreign-based is only taxable in Germany under the additional requirements of sec. 49 ITA. That is in particular if the income is derived from an economic activity (e.g. charitable sales) carried out through a permanent establishment in Germany (e.g. an office, branch) or from leasing a property situated in Germany. There may be overriding regulations in one of Germany's double tax agreements though.

Supposed a foreign-based public benefit organisation's income is taxable in Germany, in principle the PBO benefits from the same exemptions as resident public benefit organisations provided that

- the PBO is organised in a legal form recognised by the law of a EU or EEA state
- the PBO is based in the EU or EEA
- there is an agreement of mutual assistance by the competent authorities between Germany and the state(s) the PBO is based in (sec. 5 (2) no. 2 CTA). For PBOs based in the EU this requirement is fulfilled by the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

In general foreign-based PBO would have to fulfil all requirements that resident PBOs have to fulfil (see above 1.3). In particular a foreign-based PBO (as well as a resident PBO) carrying out its charitable activities outside Germany can only benefit from a corporate tax exemption when

- its beneficiaries are individuals having their residence or their habitual abode within Germany or
- the PBO's activities are able to contribute to the Federal Republic of Germany's international reputation (sec. 51 (2) AO).

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<sup>3</sup> ECJ case number C-386/04.

However, there are specific regulations for foreign-based PBOs in some of Germany's double tax agreements overriding the requirements stated above. For example according to Article 28 of the double taxation treaty between the Kingdom of Sweden and the Federal Republic of Germany a Swedish PBO shall be exempt from gift and inheritance tax by the Federal Republic of Germany in respect of items of income if and to the extent that

- a) such company or organisation is exempt from tax in Sweden, and
- b) such company or organisation would be exempt from tax in the Federal Republic of Germany in respect of such items of income if it were a German company or organisation and carried on all its activities in the Federal Republic of Germany.

**23. Does your country apply withholding tax to the income from local investments held by domestic and/or foreign-based foundations? If so, can domestic or foreign-based foundations reclaim all or part of the withholding tax under domestic law?**

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.

**III. Tax treatment of donors of public benefit foundations**

**1. System of tax credit<sup>4</sup> or tax deduction<sup>5</sup>?**

There is a system of tax deduction.

**2. Tax treatment of individual donors**

a) What tax relief is provided for individual donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

b) Which assets qualify for tax deductibility?

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.

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<sup>4</sup> For the purposes of this profile tax credit can be defined as an amount that can be deducted from the actual tax to be paid (reduction in amount of tax paid)

<sup>5</sup> For the purposes of this profile tax deduction can be defined as a reduction in the gross amount on which tax is calculated (reduction in taxable income/tax base)

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.

### **3. Tax treatment of corporate donors**

a) What tax relief is provided for corporate donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

b) Which assets qualify for tax deductibility?

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).

### **4. Tax treatment of donations to non-resident public-benefit foundations – do donors get the same tax incentive?**

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.

Sec. 10b ITA provides that individual donors can deduct donations and contributions given to foreign PBOs as extraordinary expenses from their total amount of income as laid out in sec. 2 (4) ITA. The overall ceiling for the deductibility of all donation given within one year is either 20 % of the total income as laid out in sec. 2 (4) ITA or 4 % of the the total revenue and the wages and salaries spent per year. If the donee is not situated in Germany this is however subject to the condition of Sec. 10b (1) sentence 3 ITA which requires the foreign state to give administrative assistance and support regarding tax/claim collection. According to sec. 10b (1) sentence 4 ITA "administrative assistance" refers to Council Directive 77/799/EEC and the associated implementing rules. "Tax/claim collection" refers to Council Directive 76/308/EEC and the associated implementing rules (sec. 10b (1) sentence 4 ITA). If the tax-privileged purposes of the donee are served abroad only, the tax deductibility is granted only if

- a) its beneficiaries are individuals with residence or habitual abode within Germany or
- b) the PBOs activities are able to contribute to the Federal Republic of Germany's international reputation.

Contributions given to PBOs cannot be deducted if the organisations advance sport, local heritage and traditions, purposes as defined by Sec. 52 no. 23 FC or cultural activities that primarily serve recreational activities.

Only PBOs based in a EU/EEA Member State may qualify for the income tax deductibility.

## **5. Other frameworks such as percentage law systems**

There are no other frameworks.

## **6. What are the requirements that the donor must fulfil/ information they must provide in order to claim tax benefits?**

Donors have to file the contribution receipt issued by the foundation. The receipt must comply with the official printed form provided by tax authorities.

## **7. Are there any different or additional requirements to be fulfilled when a donor is giving to a foreign-based foundation?**

What information do donors to foreign-based organisations have to provide in order receive tax incentives for their donation (e.g. Statutes (translation required)? Annual financial report (translation required)? Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

The donor has to establish that the foreign donee fulfils the requirements of the German non-profit law. Therefore the donor has to hand all relevant and necessary information (including but not limited to the organisations statutes, annual financial reports, activity report, asset statements (particularly regarding reserves), cash statements, flyers, press material, and information concerning the disposition of funds etc) to the local tax authority. The local tax authority is entitled to render any document as relevant and necessary, this decision only being limited by the principle of proportionality.

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

##### **1. 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.

##### **2. Legal entities**

No taxes.

##### **3. Are there any different or additional requirements that must be fulfilled by a beneficiary receiving funding from abroad?**

#### **V. 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.

**1. Does gift and inheritance tax/transfer tax exist in your country and if yes who has to pay the tax in the case of a donation/legacy to a public-benefit organisation (the donor or the recipient organisation)?**

**2. What are the tax rates? Is there a preferential system for PBO's? Which PBO's qualify? Is there a difference according to the region or the legal status of the PBO?**

**3. Is there a threshold (non-taxable amount) from gift and inheritance tax for donations/legacies to public-benefit organisations?**

**4. Is there a legal part of the estate that is reserved for certain protected heirs and which a donor cannot give to third parties?**

**5. 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.).

## **VI. Trends and developments**

**1. Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations and their donors are protected by the fundamental freedoms of the EC Treaty? Have there been any changes to your country's legislation, resulting from the Persche, Stauffer, Missionswerk or other relevant ECJ judgments, 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.

**2. Has the fight against terrorism and financial crime led to the introduction in recent years of new laws / rules affecting the foundation sector (e.g. implementation of EU Anti Money Laundering Directive, or reactions to recommendations of the Financial Action Task Force)?**

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

No

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

No

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

No

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

No

e) 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

**3. Are there any other recent trends or developments affecting the legal and fiscal environment for public benefit foundations in your country?**

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 loosing 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.

On March 1<sup>st</sup> 2013 the German Federal Council passed a new law affecting tax exempt foundations; it enter into force retroactively as of January 1<sup>st</sup> 2013. The “Gesetz zur Stärkung des Ehrenamtes” (law for the advancement of volunteering) was based on a proposal of the federal government dating from November 2012. The act’s name is misleading, because it comprises not only regulations on honorary services, but also on foundation law, charitable tax law and company law.

This latest reform is part of a series of improvements to the legal framework for foundations in Germany during recent years, especially between 2002 and 2007. Many see these reforms as one reason for the rapid growth of Germany’s foundation sector. In 2012, foundations were “born”, which means a growth rate of 3.2 %, and resulting in 19,551 foundations altogether - as well as an uncounted number of non-profit trusts. Germany stays in the leading position in Europe regarding the number of new foundations.

But of course foundations in Germany also suffer from the current situation on the capital markets, especially extremely low interest rates. Foundations depending on income from asset management must adjust their activities and can hardly succeed in building adequate financial reserves.

The latest reform takes this situation into account by making it more attractive to donate to the stock capital of a foundations, by granting more flexibility regarding the building of financial reserves and additional stock capital, and – somewhat conversely – by allowing new foundations to be organised as spend-down-foundations (“Verbrauchsstiftung”).

#### **New: Spend-down foundations**

Until now, foundations were allowed only to spend their earnings and income from donations. It was not clear, under which provisions foundations were allowed to also spend down their stock capital for the furtherance of the statutory purposes. These provisions have been clarified: according to an amendment of the German Civil Code it is now possible to start a foundation in the form of a spend-down foundation if the capital is - in accordance with the respective written statutes – spent down over a time period of at least 10 years. A drawback of spending-down- foundations is that tax privileges applying to the donor are being shortened.

#### **Rule of timely disbursement being mitigated**

The rule of timely disbursement says that charitable organisations must spend their income in a certain period of time. This time-limit has been extended from one to two years beginning from the end of the year of accrual – giving foundations better planning capabilities. Also, foundations are now allowed to fund other charitable organisations in the form of an endowment – meaning that the beneficiary organisation is not obliged to spend these funds but can increase its stock capital with the funds received.

#### **New: Legal certainty regarding tax exempt status**

When starting a new foundation, tax authorities until now did not issue any legally binding administrative act granting tax exemption, but only a preliminary statement. Now, legal certainty is improved by a new procedure, resulting in a binding administrative decision. This new instrument at the same time gives foreign charitable organisations a way of determining whether they comply with German charitable tax law – giving legal certainty to possible German donors with respect to tax deductibility.

#### **Donations into foundations’ stock capital get more attractive for married couples**

Until now, married couples who donated, could only benefit from the full tax deductibility (up to 2 million Euro) if they proved that their respective donations stemmed from each partner’s own assets. Otherwise it was often assumed that assets originated from only one partner – resulting in liability for gift tax. With the reform, full tax deductibility for donations of spouses is granted irrespective of the assets’ origin.

### **Building financial reserves got easier**

Charitable organisations can now build “free reserves” not only during the current year, but they can also make up for omitted free reserves within two years. Up to one third of excess income from asset management can be held back as a free reserve. Also, foundations are now allowed to build up stock capital from their income during the first four years of their existence; until now, this time limit was only three years.

### **4. Public fundraising**

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

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### **Selected law texts online:**

Foundation laws of the Bundesländer: [www.stiftungsgesetze.de](http://www.stiftungsgesetze.de)

### **About the EFC Legal and Fiscal Country profiles**

This profile is part of a series of profiles of the legal and fiscal environments for foundations in 42 different countries across the wider Europe, as well as some countries in other world regions. The aim of these profiles is to paint a picture of the current operating environment for foundations in these countries to better understand the legislative landscape foundations inhabit. The profiles are produced in collaboration with foundations, legal experts, and associations in each country. Each profile is written by the national-level expert. A comparative overview of the country profiles from wider Europe can be downloaded from the EFC website: “Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe.”

[www.efc.be](http://www.efc.be)

### **About the European Foundation Centre**

The European Foundation Centre, founded in 1989, is an international membership association representing public-benefit foundations and corporate funders active in philanthropy in Europe, and beyond. The EFC develops and pursues activities in line with its four key objectives: creating an enabling legal and fiscal environment; documenting the foundation landscape; building the capacity of foundation professionals; and promoting collaboration, both among foundations and between foundations and other actors. Emphasising transparency and best practice, all members sign up to and uphold the EFC Principles of Good Practice.