

Germany

This document summarises information provided by national experts as to the tax treatment by the relevant EU Member State of public-benefit foundations and their donors both domestically and in cross-border scenarios. The information was collected for a joint project of the Transnational Giving Europe network (TGE) and the European Foundation Centre (EFC), “Taxation of cross-border philanthropy in Europe after Persche and Stauffer – from landlock to free movement?”, which resulted in a comparative study to be downloaded in full, [here](#). Following the ground-breaking decisions of the European Court of Justice, “Stauffer” (ECJ C-386/04) and “Persche” (ECJ C-381/07), most Member States have adapted their laws in order to comply with provisions of the Treaty on the Functioning of the European Union. The project mapped relevant laws and procedures across the European Union: Does a donor giving to a public-benefit organisation in another EU Member State obtain the same tax reliefs as they would get if they donated to a local organisation? What do foreign EU based public-benefit foundations need to do to have their public-benefit status recognised by foreign tax authorities? Are the procedures in place adequate and are they clear for users? How close are we to genuine free movement for philanthropy? And what steps must be taken to bring us closer?

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To receive a hard copy of the full study or for further information, please contact: legal@efc.be.

1. Persche: A donor resident in Germany donates to a public-benefit foundation registered in another EU country – does the donor get a tax incentive?

1.1. Legal situation

Are there tax incentives for giving?

The German tax law foresees tax incentives for donations to public benefit foundations. According to sect. 10b German Income Tax Act or sec. 9 Corporate Income Tax Act the donor can deduct the amount of the donation in his/her tax declaration (tax deduction) in the following way:

Tax deduction of cash and in-kind donations as extraordinary expenses from total taxable income

Individual donors can deduct donations up to 20% of the total income

Corporate donors can deduct donations up to 20% of the total income or 4% of the sum of the total revenue and the salaries spent per year

Do the incentives apply in cross-border scenarios?

After a recent reform, German tax law no longer distinguishes according to whether the recipient public benefit foundation is resident in Germany or another EU or EEA based country; donations to other foundations based in other countries are excluded. The foreign EU or EEA based public benefit foundation must fulfil all legal requirements that a resident foundation also has to fulfil. Thus the German law corresponds with the Persche decision of the ECJ by requiring a comparability test.

1.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the donor must state in his/her tax declaration that the EU or EEA based public benefit foundation, which received his/her donation, fulfils German tax law requirements.

The responsible German tax authority (in the region where the donor is registered) performs the comparability test only for this specific case/request for a tax incentive of the donor. This individual decision is not kept in any register/list and may be judged differently for the same foundation by another donor's responsible local tax authority.

The donor has the burden of proof and the authority may require translated documents of evidence such as a receipt of the donation, the statutes of the foundation and the financial report of the recipient organisation.

1.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public benefit foundation fulfils the requirements of German tax law, which are mainly the following:

- The foundation pursues a public benefit purpose according to sec. 52-54 Fiscal Code (*Abgabenordnung*) but not included are sport, local heritage and traditions and recreational cultural activities. This includes that the public at large (and not a small circle of beneficiaries) is promoted.
- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a so-called non-distribution constraint, in case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members and the administration costs must not be excessive.
- There exists a rule of timely disbursement of income under German tax law.
- Additionally the German tax law requires that in case that public benefit purposes are pursued outside Germany, the beneficiaries have to be German residents or the activities should contribute to Germany's international reputation (what will generally be the case)

2. Missionswerk/Gift and inheritance tax: Donor stipulates in the last will that a foreign EU-based public-benefit foundation should inherit a certain amount of money – is the donation subject to gift and inheritance tax?

2.1. Legal situation

Are there tax exemptions for legacies to public-benefit organisations?

A gift/legacy is taxed in Germany as the state where the testator at his/her last residence.

German tax law foresees a gift and inheritance tax.

However, there also exists a tax benefit for public benefit foundations. According to sec. 13(1) no. 16 German Gift and Inheritance Tax Act they are tax-exempt.

Despite of a recent reform German tax law still distinguishes based on whether the recipient public benefit foundation is resident in Germany or in another country. An EU or EEA based public benefit foundation has to meet all requirements of the German tax law (comparability test) and there is a formal declaration of a corresponding provision in the foreign tax law. Only a few such declarations exist (Italy, Netherlands, Denmark and some Swiss Cantons) and the donor cannot demand such a declaration. Gifts to foundations based in other countries are always excluded.

In case of the EU member States the German law consequently does not correspond with the Missionswerk decision of the ECJ by requiring a comparability test without further requirements.

There are good arguments to believe that the tax law provision has nevertheless to be interpreted in the light of the Missionswerk decision by the ECJ in the way, that these additional requirements violate the fundamental freedoms of the EC Treaty and consequently must not be applied. So in practice only a comparability test is eligible.

2.2. Procedures for tax incentives/the comparability test

According to the wording of the law, the donor has to establish that the EU/EEA based foundation fulfils local tax law requirements and that a formal declaration of a corresponding provision in the foreign tax law exists. However in the light of the Persche decision only a comparability test would be eligible.

The responsible German tax authority (in the region where the testator was resident) will perform the comparability test, whether the foreign EU or EEA based public benefit foundation fulfils the requirements of German tax law. It performs the comparability test only for this specific case. This individual decision is not kept in any register/list and may be judged differently for the same foundation by another testator's responsible local tax authority.

The donor has the burden of proof and the authority may require translated documents of evidence such as statutes and a financial report of the recipient organisation.

2.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public benefit foundation fulfils the requirements of German tax law, which are mainly the following:

- The foundation pursues a public benefit purpose according to sec. 52-54 Fiscal Code (*Abgabenordnung*) but not included are sport, local heritage and traditions and recreational

cultural activities. This includes that the public at large (and not a small circle of beneficiaries) is promoted.

- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a so-called non-distribution constraint, in case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members and the administration costs must not be excessive.
- There exists a rule of timely disbursement of income under German tax law.
- Additionally the German tax law requires that in case that public benefit purposes are pursued outside Germany, the beneficiaries have to be German residents or the activities should contribute to Germany's international reputation (what will generally be the case)

3. Stauffer: Foreign EU-based public-benefit foundation generates income in Germany – does the foreign foundation get a tax incentive?

3.1. Legal situation

A foreign based foundation is taxed in Germany as far as it generates income in Germany. Examples are:

- Generated income from purpose-related economic activities (e.g. Museum which promotes the foundation's public benefit purpose (art and culture).
- Generated income from purpose-unrelated economic activities (e.g. noodle factory which just generates income in order to promote the public benefit purpose, but does not directly promote the public benefit purpose).
- generated income from renting, fixed rates bonds, dividends

German tax law foresees (partial) tax incentives for public benefit foundations in the following cases:

Fully exempt is income generated by related economic activity, asset administration (including fixed-rate bonds and leasing a property, if considered asset management).

Partial exemption for unrelated economic activity (up to 35,000 EUR).

The German tax law distinguishes after a recent reform, no longer according to the income generating public benefit foundation being resident in Germany or another EU or EEA based country; excluded are donations to other foundations based in other countries. The foreign EU or EEA based public benefit foundation must fulfil all legal requirements that a resident foundation also has to fulfil. Thus the German law corresponds with the Stauffer decision of the ECJ by requiring a comparability test.

3.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the EU or EEA based public benefit foundation must state in its tax declaration that it fulfils German tax law requirements.

The tax exempt status of public benefit foundations is usually not decided upon ex ante for the future, meaning that the tax exempt status not is granted in a formal procedure beforehand but instead when dealing with the tax declaration of the foundation, the tax authority checks annually if the foundation fulfilled the requirements for tax exemption (ex post).

The responsible German tax authority will perform the comparability test, whether the foreign EU or EEA based public benefit foundation fulfils the requirements of German tax law. It performs the comparability test only for this specific case/request for a tax incentive of the donor. This individual decision is not kept in any register/list and may be judged differently for the same foundation by another donor's responsible local tax authority.

The foundation has the burden of proof and the authority may require translated documents of evidence such as statutes and a financial report of the recipient organisation.

3.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public benefit foundation fulfils the requirements of German tax law, which are mainly the following:

- The foundation pursues a public benefit purpose according to sec. 52-54 Fiscal Code (*Abgabenordnung*) but not included are sport, local heritage and traditions and recreational

cultural activities. This includes that the public at large (and not a small circle of beneficiaries) is promoted.

- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a so-called non-distribution constraint, in case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members and the administration costs must not be excessive.
- There exists a rule of timely disbursement of income under German tax law.
- Additionally the German tax law requires that in case that public benefit purposes are pursued outside Germany, the beneficiaries have to be German residents or the activities should contribute to Germany's international reputation (what will generally be the case)

4. Practical information

4.1. Further resources

Fiscal Code of Germany (in English):

http://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html

Official decree on the Fiscal Code of Germany by the German Ministry of Finance (in German):

http://www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Weitere_Steuerthemen/Abgabeordnung/AO_Anwendungserlass_AEAO/ao_anwendungserlass_aeao.html

General information on nongovernmental organizations (NPOs) in Germany which includes several aspects also applicable to PBOs (in English):

<http://www.usig.org/countryinfo/germany.asp>

4.2. Persche (giving to a foreign beneficiary)

- See sec. 10b ITA
- BMF-Schreiben vom 6. April 2010 – S 2223/07/0005; Schreiben betr. steuerbegünstigte Zwecke (§ 10b EStG); Anwendung des Urteils des Europäischen Gerichtshofs vom 27. Januar 2009 C-318/07 (BStBl. 2010, II S. 440) in der Rechtssache "Persche"
- LfSt Bayern, Verfügung vom 14. September 2012 betr. Verwirklichung steuerbegünstigter Zwecke im Ausland, LfSt Bayern S 2223.1.1-23/5 St32
- For a model of a donation receipt see BMF Schreiben vom 30.8.2012, IV C 4- S 223/07/0018: 005, BStBl. I 2012, 884

4.3. Missionswerk (gift and inheritance tax in cross-border cases)

- See the commentaries on sec. 13 and 29 IGTA.
- Erbschaftsteuerrichtlinien 2011, especially R E 13.9 and H E 13.9

4.4. Useful contacts

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