

Denmark

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 Denmark 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 Danish tax law foresees tax incentives for donations to public benefit foundations.

According to the Act on Tax Assessment (*Ligningsloven*, or “LL”, Consolidated act no. 1017 of October 28th 2011, article 8 A, a donor which is resident in Denmark for tax purposes may deduct from his taxable income donations made to public benefit foundations and other public benefit organisations (tax deduction) in the following way:

Both individual and corporate donors receive limited tax benefits when donating to recognized public benefit foundations etc. Gifts exceeding 500 DKK (approximately €70) up to 14,500 DKK (approximately €1,950) are deductible each year. Cash donations and in-kind donations are deductible. The limit of 14,500 DKK is valid for the fiscal year 2013. The limit is normally adjusted annually. If the donation is given through a covenant or an annuity for a fixed period of at least 10 years (written statement between donor and beneficiary), corporations and individuals cannot deduct more than 15% of their taxable income.

Do the incentives apply in cross-border scenarios?

After a recent reform, Danish tax law no longer distinguishes according to the recipient public benefit foundation being resident in Denmark 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 apply for recognition with the Danish Ministry for Taxation (*Skattecenter Bornholm*), which checks if the legal requirements that a resident foundation also has to fulfil are fulfilled. Thus the Danish 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, is registered in the list of the Skattecenter Bornholm and hence fulfils Danish tax law requirements.

The donor's tax authority hence refers to the list of the Ministry of Taxation/*Skattecenter Bornholm*, in which all eligible beneficiary public benefit organisations are listed. Danish and foreign public benefit foundations have to apply for the status and hand in all relevant documents before October 1st of the previous year. The authority checks if the foundation pursues a public benefit purpose as described in LL section 8 A and the potential beneficiaries are not limited (geographically or otherwise to a group of possible beneficiaries with less than 40,000 persons). The number of donors must be at least 100 on average for three years. The annual gross income or the net assets must exceed 150,000 DKK.

The donor's Danish tax authority (in the region where the donor is registered) does not do its own assessment and only refers to the list of the Ministry of Taxation.

An Application form at the Ministry of Taxation is available at: <http://www.skat.dk/SKAT.aspx?oID=159132>

The rules for application and recognition are laid down in the Ministerial Order no. 837 of June 8th 2008, which can be downloaded here: <https://www.retsinformation.dk/Forms/R0710.aspx?id=120713&newwindow=true>

The foundation etc. must provide the following information to the Danish tax authorities at the time that the application is sent (before October 1st):

- Updated statutes or bylaws
- The latest annual financial report
- Documentation that the foundation etc. is considered public benefit under Danish law
- Documentation that the foundation etc. is recognized as a public benefit entity in the Member State where it is resident.

It is hence a centralised decision about the public benefit status of an organisation and the organisation is filed in a list, which is published every year with the names of all foundations approved as public benefit (this list is found as an annex to “*Ligningsvejledningen*” which is a ministerial decree governing the tax authorities’ administration of tax legislation (see www.skat.dk).

1.3. Criteria for the comparability test:

Apart from the proof that the EU/EEA based foundation is recognised as public benefit in its home country, the tax authority checks during the comparability test, whether the EU or EEA based public benefit foundation fulfils the requirements of Danish tax law, which are mainly the following:

- The foundation must have a public benefit purpose according to LL section 8A. There is no closed list of public benefit purposes. Consequently a concrete assessment must be made in relation to each individual foundation.
- The public at large (and not a small circle of beneficiaries) is promoted. Beneficiaries must be objectively defined as a broad group of the population, which is not geographically or otherwise limited to less than 40.000 persons.
- 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.
- The foundation must have an average of at least 100 donors from the EU /EEA for a period of three years.
- The yearly income of the foundation shall be no less than 150,000 Danish Kroner (DKK).

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 Denmark as the state where the testator had his/her last residence.

Please note that under Danish tax law there does exist a fundamental distinction between gifts (donations) inter vivos and gifts mortis causa (inheritances). Gifts inter vivos (donations) are regarded as income of the foundation and consequently taxed under the Danish income tax act.

Inheritance tax

Danish tax law foresees an inheritance tax up to 36.25 %. The Ministry of Taxation annually publishes a list of foundations that have a charitable or public benefit purpose. The foundations on this list are exempt from inheritance tax; other foundations may apply for exemption from inheritance, if their purpose is considered to be of public benefit. A purpose is considered “public benefit” if an unrestricted range and number of persons can benefit from the public benefit purpose. There is no specific amount that needs to be distributed annually.

Do the exemptions apply in cross-border scenarios?

After a reform, Danish inheritance tax law no longer distinguishes according to the recipient public benefit foundation being resident in Denmark 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 Danish law corresponds with the Missionswerk decision of the ECJ by requiring a comparability test.

No gift tax but income tax

Gifts inter vivos (donations) are under Danish income tax law regarded as income of foundation and consequently taxed under the Danish income tax act.

However there exist tax benefits for public benefit foundations according to article 3, paragraph 6 of the special taxation act for foundations (LBK nr. 1248 of 02/11/2010): If the donor has stipulated that the donation is spent to the endowment the donation is tax-exempt. If the donor has stipulated that the donation should not be spent to the endowment, the donation will be taxed, if it is not spend by the foundation in order to pursue its public benefit purpose. From a functional point of view you can say that the Danish tax law will always grant a tax exemption to a public benefit foundation which receives a donation except it violates the duty of timely disbursement stipulated by the donor.

In the concrete case it is necessary to clarify, whether this tax incentive is also applicable to gifts to foreign EU based public benefit foundations if they are tax liable in Denmark.

According to the wording of the law the exemptions are only applicable to organisations which for tax purposes are considered to be residents of Denmark (Act on corporate taxation, section 2 and section 8 paragraph 1), which would appear in conflict with the ECJ decisions and article 49 and 63 TFEU and a respective interpretation of the law is hence recommended. A comparability test would therefore need to also lead to equal tax exemption.

2.2. Procedures for tax incentives/the comparability test

With regard to exemption from inheritance tax, the recipient organisation must state in its tax declaration that the EU or EEA based public benefit foundation, which received the legacy, is registered in the list of the Skattecenter Bornholm (the same list as referred to above concerning tax incentives for donors) and hence fulfils Danish tax law requirements or is otherwise eligible for tax exemption because it is considered equivalent.

The tax authority hence refers to the list of the Ministry of Taxation/*Skattecenter Bornholm*, in which all eligible beneficiary public benefit organisations are listed. Danish and foreign public benefit foundations have to apply for the status and hand in all relevant documents before October 1st of the previous year. The authority checks if the foundation pursues a public benefit purpose as described in LL section 8 A and the potential beneficiaries are not limited (geographically or otherwise to a group of possible beneficiaries with less than 40,000 persons). The number of donors must be at least 100 on average for three years. The annual gross income or the net assets must exceed 150,000 DKK.

The responsible Danish tax authority (in the region where the donor was last registered) does not do its own assessment and only refers to the list of the Ministry of Taxation.

An Application form at the Ministry of Taxation is available at: <http://www.skat.dk/SKAT.aspx?oID=159132>

The rules for application and recognition are laid down in the Ministerial Order no. 837 of June 8th 2008, which can be downloaded here: <https://www.retsinformation.dk/Forms/R0710.aspx?id=120713&newwindow=true>

The foundation etc. must provide the following information to the Danish tax authorities at the time that the application is sent (before October 1st):

- Updated statutes or bylaws
- The latest annual financial report
- Documentation that the foundation etc. is considered public benefit under Danish law
- Documentation that the foundation etc. is recognized as a public benefit entity in the Member State where it is resident.

It is hence a centralised decision about the public benefit status of an organisation and the organisation is filed in a list, which is published every year with the names of all foundations approved as public benefit (this list is found as an annex to “*Ligningsvejledningen*” which is a ministerial decree governing the tax authorities’ administration of tax legislation (see www.skat.dk).

With regard to gift tax: if the donor has stipulated that the donation is spent to the endowment of a public benefit foundation, the donation is gift-tax-exempt. If the donor has stipulated that the donation should not be spent to the endowment, the donation will be taxed, if it is not spend by the foundation in order to pursue its public benefit purpose. In the latter case, the public benefit foundation can ask for tax deductions.

2.3. Criteria for the comparability test:

With regard to inheritances, apart from the proof that the EU/EEA based foundation is recognised as public benefit in its home country, the tax authority checks during the comparability test and before including the foundation in the Danish list, whether the EU or EEA based public benefit foundation fulfils the requirements of Danish tax law, which are mainly the following:

- The foundation must have a public benefit purpose according to LL section 8A. There is no closed list of public benefit purposes. Consequently a concrete assessment must be made in relation to each individual foundation.
- The public at large (and not a small circle of beneficiaries) is promoted. Beneficiaries must be objectively defined as a broad group of the population, which is not geographically or otherwise limited to less than 40.000 persons.
- 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.
- The foundation must have an average of at least 100 donors from the EU /EEA for a period of three years.
- The yearly income of the foundation shall be no less than 150,000 Danish Kroner (DKK).

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

3.1. Legal situation

According to the applicable double tax treaties a foreign based foundation is taxed in Denmark as far as it generates income in Denmark. 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

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

Foundations are for tax purposes generally treated as joint-stock companies according to Art. 3 of the special Taxation Act for Foundations/*Fondbeskatningsloven Nr. 813 af 26. oktober 1997* (FBL), now consolidated Act (*lovbekendtgørelse*) nr. 1248 af 2. november 2010. They are taxed on the income derived from economic activities. Other income is also taxed at a rate of 25 %, but only if it exceeds 25,000 DKK (approximately 3,400 euros). Gifts and donations received by foundations are treated like other income, according to Art. 3.3 FBL. (Tax deductions for foundations are possible - see below). Gifts and donations given to a foundation in order to build up its endowment are not taxed (Art. 3.3 FBL).

Dividends received from companies in which the foundation holds at least 10 % of the shares are exempt from tax – cf. Art. 10 FBL, which refers to Art 13 of the Corporate Income Tax Law/*Selskabsskatteloven* (SEL). If a foundation holds at least 75 % of the shares of a limited liability company which for tax purposes is considered to be resident in Denmark, the income of that company is for tax purposes considered to be earned by the foundation (Art. 3.4 SEL)

Foundations can receive tax deductions in various ways. Most importantly, they can deduct the amounts they spend on donations made during the fiscal year for the charitable or public benefit purposes specified in their statutes (cf. Art. 4 FBL). According to Art. 4 FBL, a foundation may deduct from its taxable income an amount for consolidation of up to 25% of the amount spent on donations for public benefit purposes during the fiscal year. The foundation may also deduct a reserve for consolidation if the amount is donated for public benefit purposes within the next five years (Art. 4.4 and 4.5 FBL). It can deduct other grants as well if their recipients are taxed. Donations from one foundation to another are also tax-deductible.

In the concrete case it is necessary to clarify, whether this tax incentive is also applicable to income generated by foreign based public benefit foundations.

According to the wording of the law the exemptions are only applicable to organisations which for tax purposes are considered to be residents of Denmark (Act on corporate taxation, section 2 and section 8 paragraph 1). Foreign foundations with a PE located in Denmark are taxed according to the rules on limited liability companies. This would appear in conflict with the ECJ decisions and article 49 and 63 TFEU and a respective interpretation of the law is hence recommended. A comparability test would therefore need to also lead to equal tax exemption.

3.2. Procedures for tax incentives/the comparability test

In order to apply for the tax incentive the EU or EEA based public benefit foundation should state in its tax declaration that it fulfils Danish tax law requirements and would according to the TFEU be eligible to get the same tax treatment as a Danish based public benefit foundation.

3.3. Criteria for the comparability test:

The tax authority would have to check during the comparability test, whether the EU or EEA based public benefit foundation fulfils the requirements of Danish tax law, which are mainly the following:

- The foundation pursues a public benefit purpose according to LL section 8A. 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.

4. Practical information

4.1. Useful contacts

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