

## Austria

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](mailto:legal@efc.be).

### **1. Persche: A donor resident in Austria 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 Austrian tax law foresees only limited tax incentives for donations to public-benefit foundations. According to Art. 4.4.5 Austrian Income Tax Code/*Einkommensteuergesetz*, individual donors can deduct donations in the fields of science, education in science and research, or arts, made to special scientific institutions as well as to organisations specifically mentioned in the law (Art.4.4.6.) up to 10% of taxable income.

Other legal entities (including foundations) mainly engaged in science and research, or entities regarded as non-profit, benevolent or religious according to Arts. 34 f. of the tax code/*Abgabenordnung*), must ask for recognition by the tax revenue department and are then included in a special list published annually on the website of the Ministry of Finance/fiscal authority in Vienna. Donations/legacies for special purposes (namely for (i) benevolent purposes, (ii) for the

purpose of development cooperation, or (iii) for national/international emergency aid) provided to foundations (and other entities), will be recognised as deductible special expenses or business expenses for the corporate and individual donor. The donations/legacies will reduce the tax base by up to a maximum of 10% of the taxable income.

### **Do the incentives apply in cross-border scenarios?**

Following a recent reform Austrian tax law no longer makes a distinction according to whether the recipient public-benefit foundation is resident in Austria or in another EU or EEA country. However, donations to 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 has to fulfil and must be included in the same list kept by fiscal authorities. Thus the Austrian 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 included in the list of the tax authorities and hence fulfils Austrian tax law requirements.

The resident or EU/EEA based foundation/organisation that wishes to be included in the list kept by the fiscal authority in Vienna has to fulfil the following requirements, which need to be confirmed by an auditor (in case of fundraising organisations additional requirements will have to be met):

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

Individual donors (tax payers in Austria) will in cases of deduction of the donation as special expenses have to provide the receiving organisation with his/her Austrian security number or in the case of a foreign donor his/her European Health security card number (article 18.1 income tax code). Deductions can be made as special expenses (Art. 18.1.7 Income Tax Code) or business expenses (Art. 4.4.5 and Art. 4.4.6 Income Tax Code).

The donor's Austrian 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 Finance/Vienna tax authority. The Vienna tax authority will issue a decision for the organisation which is valid throughout Austria, the so called *Spendenbegünstigungsbescheid*.

The list of approved organisations can be accessed here:

[https://service.bmf.gv.at/Service/allg/spenden/show\\_mast.asp](https://service.bmf.gv.at/Service/allg/spenden/show_mast.asp)

#### **1.3. Criteria for the comparability test:**

The Austrian tax authority, which keeps the list checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of Austrian tax law, the core elements of which can be summarised as follows:

- The entity has to serve solely one of the three favoured public-benefit purposes listed above. This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- For a period of at least three years.

- The pursuance of the public-benefit purpose has to be exclusive (there is only one exemption: up to 1/3 for the founder and or his/her family). That means, there exists a 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 (10% of the income). Only ancillary economic activities may be undertaken;

## **2. Missionswerk/Gift and inheritance tax: Donor stipulates in their 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 or legacy is taxed in Austria as the state where the testator at his/her last residence.

The Austrian gift- and inheritance tax was abolished in 2008. Instead the Gift-Notification (*Schenkungsmitteilungsgesetz*) Act was introduced in 2008, which however does not include any obligations for public-benefit foundations (see Art 121a para 2 lit c *Bundesabgabenordnung* together with Art 15 para 1 Z 14 Inheritance tax law).

Foundations now are subject to the Foundation Receipt Tax Act/*Stiftungseingangsteuergesetz*. The Act provides that donations to private foundations are generally taxed at a flat rate of 2.5%. Donations to public-benefit foundations are tax exempt according to Article 1.6. Foundation Receipt Tax.

#### **Do the exemptions apply in cross-border scenarios?**

Following a recent reform Donations to comparable foreign EU/EEA foundations with a public benefit, benevolent or religious purpose are also tax exempt (i) if they are registered in EU/EEA member states and (ii) if they can prove their public benefit, benevolent or religious purpose through annual activity reports and annual accounts, see Article 1.6. Foundations Receipt Act. Otherwise donations to foreign foundations are taxed at a flat rate of 25%.

The foreign EU or EEA based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil. Thus the Austrian law corresponds with the Missionswerk decision of the ECJ by requiring a comparability test.

### **2.2. Procedures for tax incentives/the comparability test**

The responsible Austrian tax authority (in the region where the testator was resident) will perform the comparability test to assess whether the foreign EU or EEA based public-benefit foundation fulfils the requirements of Austrian 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 receiving foundation/organisation has the burden of proof and the authority may require translated documents to prove the status of the recipient organisation, 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 Austrian tax law, the core elements of which can be summarised as follows:

- The entity has to serve solely one of the three favoured public-benefit purposes listed above. This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public-benefit purpose has to be exclusive. That means, there exists a 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 (10% of the income). Only ancillary economic activities may be undertaken.

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

#### **3.1. Legal situation**

A foreign-based foundation is taxed in Austria as far as it generates income in Austria.

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

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

Following a recent reform, Austrian tax law (Article 34 *Bundesabgabenordnung*) no longer makes a distinction according to whether the income generating public-benefit foundation is resident in Austria or another country. The foreign based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil. Thus the Austrian law corresponds with the Stauffer decision of the ECJ by requiring a comparability test.

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

#### **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 Austrian tax law requirements.

The tax exempt status of public-benefit foundations is not decided upon for the future, meaning that the tax exempt status not is granted in a formal procedure beforehand (ex ante 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 Austrian tax authority will perform the comparability test to assess whether the foreign EU or EEA based public-benefit foundation fulfils the requirements of Austrian tax law. It performs the comparability test only for this specific case/request for a tax incentive by the foreign public-benefit foundation. This individual decision is not kept in any register/list and may be judged differently for the same foundation by another responsible local tax authority.

The foundation has the burden of proof and the authority may require translated documents to prove the foundation's status, such as statutes and a financial report of the foundation, see Article 34 *Bundesabgabenordnung*/Federal Tax Code.

#### **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 Austrian tax law, the core elements of which can be summarised as follows.

- The foundation pursues a public-benefit purpose directly and exclusively according to sec. 34 Fiscal Code (*Abgabenordnung*). This includes that the interest of the public at large (and just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public-benefit purpose has to be exclusive, meaning that, 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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