

**2020**

Legal Environment for Philanthropy in Europe

# Germany

COUNTRY PROFILE

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# Contents

- I. Legal framework for foundations ..... 3
- II. Tax treatment of foundations..... 11
- III. Tax treatment of donors of foundations..... 22
- IV. Tax treatment of beneficiaries ..... 24
- V. Gift and inheritance tax ..... 25
- VI. Trends and developments ..... 26
- VII. Further information ..... 28
  - Useful contacts..... 28
  - Selected bibliography ..... 28
  - Selected law texts online ..... 28
- VIII. About ..... 29
  - Philanthropy Advocacy..... 29
  - Donors and Foundations Networks in Europe (Dafne) ..... 29
  - European Foundation Centre (EFC)..... 29

## I. Legal framework for foundations

1. **Does the jurisdiction recognise a basic legal definition of a foundation? (please describe) What different legal types of foundations exist (autonomous organisations with legal personality, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations, party political foundations, family foundations, foundations of banking origin as a specific type, companies limited by liability, trusts)? Does your jurisdiction recognise other types of philanthropic organisations?**

The German jurisdiction does not have a legal definition of a foundation. Though the basic principles of civil law foundations are regulated in Articles 80-88 of the Civil Code (Bürgerliches Gesetzbuch - BGB), modified in 2013 (Law for the strengthening of the volunteer service dated 21 March 2013 - Gesetz zur Stärkung des Ehrenamtes). Further details are regulated in the 16 foundation laws of the states (Bundesländer). Although the different foundation laws in the states 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 such as 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 in 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 legally pursue?<sup>1</sup>**

- Only public-benefit
- Both public- and private-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 Civil Code (BGB) must be recognised by the competent authority in the state in which the foundation wants to be headquartered. The authority must 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 must have statutes 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 states normally ask for at least €50,000 - €100,000.

4. **Is state approval required? (approval by a state supervisory authority with/without discretion)**

- Approval by a state authority with discretion
- Approval by a state authority without discretion
- Approval by a court
- Notarisation by a notary public

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<sup>1</sup> This question focuses only on public-benefit foundations; see the definition in the Glossary developed for this project, which can be found on the Philanthropy Advocacy website.

## 5. Are foundations required to register?

- a) If foundations must register, in what kind of register?
- Company register
  - Foundation register at national level
  - Foundation register at the regional/county level
  - Beneficial ownership register
  - Any other public register (other than a foundation/charity one)

The supervisory authorities in most of the states also keep registers, which are not public registers though.

- b) If foundations are registered, what information is kept in the register?

Beneficial ownership register:

For foundations with legal capacity, the beneficial owners must be entered. These include:

- Any natural person acting as settlor, administrator of trusts (trustee) or protector, if available
- Any natural person who is a member of the foundation's governing board
- Any natural person designated as a beneficiary
- The group of natural persons for whose benefit the assets are managed or distributed should be included, provided that the natural person who is the beneficiary of the assets under management is not yet determined
- Any natural person who otherwise directly or indirectly controls or exerts influence on the asset management or income distribution

The following information on the beneficial owner:

- First name
- Last name
- Date of birth
- Location (not address)
- Nationality
- Nature and extent of the economic interest. In the case of directors of a foundation, this results from their position on the governing body.

The registers of the supervisory authorities keep different and much less information depending on the regulations applying for the respective state.

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

- Yes, all information publicly accessible
- Yes, some information publicly accessible
- Yes, accessible upon request
- No

The answer only applies for the beneficiary ownership register.

## 6. Is a minimum founding capital/endowment required?

- No
- Yes, amount:

At least 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. Is the foundation required to maintain these assets or any other specified asset level throughout its lifetime? Are spend-down foundations allowed?**

A foundation is to be recognised as having legal personality if the endowment transaction satisfies the requirements of section 81 (1) of the Civil Code (BGB), if the long-term and sustained achievement of the object of the foundation appears guaranteed and if the object of the foundation does not endanger the common good. In the case of a foundation which is established for a specific period the assets of which are to be depleted in pursuing its purpose (principal-depleting foundation), the ongoing performance of the object of the foundation is to be deemed secured if the foundation is to exist for a period defined in the endowment transaction which is at least ten years.

**8. What governance requirements are set out in the law? Is it a one-tier or two-tier foundation governance model?**

a) Is it mandatory to have a:

- Supervisory board
- Governing board

Section 81 (1) No. 5 of the Civil Code (BGB) says that the statutes must provide regulations concerning the establishment of the governing board. According to Sections 86, 26, 27 BGB, the foundation must 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. Some Landesstiftungsgesetze for instance 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; they can also become a board member.

b) What are the requirements concerning board members? Is a minimum/maximum number of board members specified? Does the law regulate the appointment of board members and their resignation/removal or can this be addressed in the statutes/bylaws?

There are no legal requirements concerning board members. The appointment of board members and their resignation/removal can be designed in the statutes.

c) What are the duties and what are the rights of board members, as specified by national legislation or case law?

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

d) What are the rights of founders during the lifetime of the foundation? 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 their influence over decision-making. Nevertheless, a founder can reserve the right to serve as a board member with the respective rights and duties.

e) Can the board or the founder amend the statutes including the purpose of the foundation? If yes, please indicate any particularities. What is the relationship between the powers of the founders, the statutes of the foundation and the power of the board members?

The board as an executive body is bound to the will of the founder. The founder cannot grant himself any power of disposal over the foundation. In general, changes to the purpose of the foundation and the foundation statutes are only possible under strict, individual conditions.

The individual state foundation laws contain provisions according to which the approval of amendments to the statutes, which have been decided by the competent foundation bodies, must

be given. The provisions of the state foundation laws differ greatly with regard to the substantive requirements for an amendment to the statutes. In some cases, no specific provisions are provided for, while other state foundation laws contain restrictions, some of which are more precisely defined. The foundation supervisory authority may only refuse to grant approval in the event of violations of the law. With regard to the examination of the approvability of an amendment to the statutes, the founder's will at the time of the establishment of the foundation is decisive, which must be taken into account when amending the statutes. Against this background, the Higher Administrative Court of Saarlouis, for example, has considered the amendment of a foundation's statute to relocate the seat of a foundation to be approvable only if the interpretation of the founder's will, as it results from the foundation's business and the statutes stipulated by the founder, leads to the conclusion that the founder would have agreed to the relocation of the seat.

Apart from the amendment of the statutes initiated by the competent foundation body, some state foundation laws also provide for a sovereign amendment of the statutes. The prerequisite for an amendment is always that it is necessary due to "substantial change in circumstances" and that if the founder is still living, the founder's approval is required.

The state foundation laws also provide for the possibility of a change of purpose by means of an amendment to the statutes. According to the relevant provisions of the state foundation laws, a prerequisite for a change of purpose requiring the approval of the supervisory authority is that this is either provided for in the statutes, that the circumstances have changed significantly since the establishment of the foundation, or that the foundation business or the statutes do not conflict with the measure. These requirements apply partly alternatively and partly cumulatively. Only in these cases is it justified, according to the legal evaluations, to override the founder's will which has become independent with the approval of the foundation.

In addition, Section 87 of the Civil Code (BGB) contains a provision that a change of purpose may be ordered by the supervisory authority if the fulfilment of the foundation's purpose has become impossible or if there is a threat to the common good. In these cases, too, a change of purpose must still be compatible with the founder's will.

f) What are the rights of third parties (e.g. right of information)?

No legal rights.

g) 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 Section 181 of the Civil Code (BGB), self-dealing is prohibited; but in many cases this is has been amended by a statutory regulation.

h) 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. The board may delegate some of its decision-making powers, but remains responsible for the decisions taken within the framework of this delegation.

**9. What is the liability of the foundation and its organs? What is the general standard of diligence for board members? (e. g. duty of obedience, duty of care/prudence, duty of loyalty)? In what type of rule are these criteria established: fiscal, administrative, civil, commercial? Is there a solid case law, if any, regarding the duty of due diligence? Does your country differentiate between voluntary (unpaid) and paid board members? Who is allowed to bring a complaint about breaches of such duties: the other members of the board, the founder/s, the public authorities? If a complaint is brought, which authority has competence in such cases: administrative, tax authority, only the judiciary power (attorney general) or beneficiaries/general public?**

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.

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 only liable for intent and gross negligence (§§ 86, 31a of the Civil Code (BGB)).

**10. Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation? Do the director and officers have powers of representation based on legislation?**

According to Sections 86, 26, 27 of the Civil Code (BGB) the foundation is represented by its board of governors. It is up to the statutes of the foundation to define the board members. As a rule, a foundation is represented by its board members, but the board can grant the right to represent the foundation to directors and officers who are not members of the board.

**11. Are purpose-related/unrelated economic activities allowed? If so, are there other types of limitations 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 (Section 64 (3) Abgabenordnung).

**12. Is there any legal/fiscal framework for grantmakers to be able to fund legal entities that are conducting economic activities in addition to their public utility activities? If any, what are the limitations for funding those kinds of legal entities?**

Grantmaking to support economic activity is foreign to the German fiscal law for PBOs.

**13. Are foundations permitted to be major shareholders in a company? Are there any limitations to voting rights? Is this considered as an economic activity?**

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

**14. Are there any rules/limitations in civil and/or tax law regarding foundations' asset management (only secure investments/bonds/investments with a certain return)? What, if any, types of investment are prohibited? Are there any limitations on mission-related investments?**

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

Shareholding and major shareholding are 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, the possible loss of capital is limited, and there is no opposing regulation in the statutes.

**15. Are foundations legally allowed to allocate grant funds towards furthering their public-benefit purpose/programmes which (can) also generate income – impact investing? (recoverable grants; low interest loans; equities)**

There are no known cases.

**16. Are there any limitations (in civil law/tax law) to political party related or general lobby/advocacy activities?**

Anyone who pursues political aims by influencing political decision-making and shaping public opinion does not fulfil a public-benefit purpose within the meaning of § 52 AO. A public-benefit foundation may only be active in this way if this serves the pursuit of one of the public-benefit purposes expressly mentioned in § 52 (2) AO.

With the promotion of the national education in the sense of § 52 (2) No. 7 AO the influence on the political decision-making and organisation of public opinion has to be limited on education-political questions.

Political education takes place in intellectual openness. It cannot be promoted if it is used to influence political decision-making and public opinion in the sense of one's own views.

A public-benefit foundation may not use its resources to support or promote political parties, either directly or indirectly (§ 55 (1) No. 1 AO).

#### **17. 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 must 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. See also the comments under No. 8 f) of this questionnaire.

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

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

- Annual financial report/financial accounts
- Annual activity report
- Public-benefit/activity report
- Tax report/tax return
- Other reports e.g. on 1% schemes
- Reports on governance changes (e.g. new board members)
- Report on conflict of interest (self-dealing and conflict of interest breach cases)

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

Foundations must present annual reports to the relevant state authorities according to the laws of the states or, if they wish to receive tax privileges, to the relevant financial authorities. Tax-exempt status is reviewed every three years.

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

The reports are checked/reviewed by supervisory and tax 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)?

Foundations are not legally requested to make the information publicly available.

e) 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).

## 19. Supervision: Which authority, what measures?

a) What type of body is the supervisory authority? (multiple answers possible)

- A public administrative body
- A public independent body
- A combination of a governmental body and a court
- A court
- A public administrative body and an independent body
- A tax authority
- Other

b) Does the supervisory body review reports?

- Yes
- No

c) Are foundations subject to inspection?

- Yes
- No

Civil law foundations are subject to state control according to the respective laws of the individual states. Each state has its own supervisory system. The supervision authority must 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 states, foundations must file annual reports with the supervisory authority of their state. 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.

d) Is approval from the authority required for certain decisions of the governing board?

- Yes, formal approval is needed
- Yes, needs just to be informed
- No

If yes, please specify which type of decisions:

See the comment under question No. 19 c).

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

- Yes
- No
- Can a government official be appointed to the governing board by a state authority, if so please mention:

f) 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 states, 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 of the Civil Code (BGB), the competence to change the purpose while respecting the will of the founder. As ultima ratio, the authority can even dissolve the foundation.

**20. 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 must be approved by the supervisory authority. The remaining assets must be used for similar purposes. The merger of foundations is also possible.

**21. Is there a maximum that can be spent on office/administration costs in civil law and/or tax law? If yes, what is the amount?**

There are neither absolute nor percentage ceilings by law for the ratio of administrative costs to expenditure for public-benefit purposes. The decisive factor is whether the spending behaviour is appropriate, taking into account the circumstances of the individual case. This is the case if it makes economic sense and contributes to ensuring that the proportion of funds that directly and effectively benefit the charitable purpose is as high as possible. Overall, the spending behaviour must make it clear that the majority of the funds received are generally used for public-benefit purposes.

**22. Does civil and/or tax law require a foundation to spend a certain percentage of its overall assets within a certain period of time (e.g. within the next financial year)? In particular, can a foundation accumulate these expenses over a period of time (and if so, what kind of authorisation is required to do so)?**

Subject to § 62 AO, a public-benefit foundation shall in principle use its funds promptly for the tax-privileged purposes set out in its statutes. The use of funds for the acquisition or creation of assets serving the purposes set out in the statutes shall also constitute an appropriate use. Funds shall be deemed to have been used promptly where they are used for the tax-privileged purposes set out in the statutes by no later than two calendar or financial years following their accrual. (§ 55 (1) No. 5 AO)

**23. Under what conditions does the civil law in your country recognise a foreign foundation? Do they have to register? Does your law recognise the concept of trusts?**

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

**24. Does the law in your country allow a foundation to conduct (some or all) activities (grantmaking, operating, asset administration, fundraising) abroad? Is there any limitation?**

There are no limitations in civil law.

**25. Does the law in your country impose any restrictions on ability to receive donations from abroad? If so, please describe.**

There are no restrictions.

**26. Does the civil law in your country allow the transfer of the seat of a foundation (in the EU) and/or cross-border mergers?**

The transfer of the seat of a foundation is not prohibited by civil law. However, there is also no explicit permission norm.

The relocation of the seat of a foundation is effected by amending the foundation statutes and can only be approved if the interpretation of the founder's will, as it results from the foundation business and the statutes stipulated by the founder, leads to the conclusion that the founder would have agreed to the relocation of the seat.

## II. Tax treatment of foundations

### 1. What are the requirements to receive tax exemptions?

- Pursuing public-benefit purposes
- Non-distribution constraint
- Being resident in the country
- Other

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. These purposes are public-benefit purposes (gemeinnützige Zwecke), benevolent purposes (mildtätige Zwecke), and the support of churches. The foundation must 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 the year of establishment and the following three years (Art. 62 (4) AO). Without losing the tax privileges, one-third of the income can be spent on the living expenses of the founder or their close relatives or on the care of their graves (§ 58 No. 6 AO). The income of a foundation must be used directly, which means before the end of the two following years.

### 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 public funds (grants received from public bodies/state/municipality/etc.)?

Tax law does not require a specific reporting for the use of public funds.

### 4. Is there an obligation to report to public authorities on donors and beneficiaries? If so, to which authority and what type of information?

Except for the regular proofs of expenditure there is no further obligation to report to public authorities on donors and beneficiaries.

### 5. Is there a statutory definition of what a public-benefit purpose (charitable purpose) is in the civil law (foundation law, trust law) of your country? If yes, please give us the definition. If so, is the determining definition that subsequently links to tax benefits?

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

### 6. Is there a statutory definition of what a public-benefit purpose is in the tax law of your country? If yes, please give us the definition.

The definitions for those tax-privileged purposes can be found in §§ 52 and 53 AO.

*§ 52 AO – Public-benefit purposes:*

(1) A corporation shall serve public-benefit purposes if its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. It shall not be deemed an advancement of the general public if the group of persons benefiting from such advancement is circumscribed, for instance by membership of a family or the workforce of an enterprise, or can never be other than small as a result of its definition, especially in terms of geographical or professional attributes. Advancement of the general public may not be contended merely because a corporation allocates its funds to a public-law entity.

(2) Subject to the provisions of subsection (1) above, the following shall be recognised as advancement of the general public:

1. The advancement of science and research.
2. The advancement of religion.
3. The advancement of public health and of public hygiene, in particular the prevention and control of communicable diseases, also by hospitals within the meaning of section 67, and of epizootic diseases.
4. The advancement of assistance to young and old people.
5. The advancement of art and culture.
6. The advancement of the protection and preservation of historical monuments.
7. The advancement of upbringing, adult education and vocational training including assistance for students.
8. The advancement of nature conservation and of Landscape management within the meaning of the Federal Nature Conservation Act and the nature conservation acts of the Länder, of environmental protection, of coastal defence and of flood defence.
9. The advancement of public welfare, in particular of the purposes of the officially recognised voluntary welfare associations (section 23 of the VAT Implementing Ordinance), their subsidiary associations and their affiliated organisations and institutions.
10. The advancement of relief for people persecuted on political, racial or religious grounds, for refugees, expellees, ethnic German repatriates who migrated to the Germany between 1950 and 1 January 1993, ethnic German repatriates migrating to Germany after 1 January 1993, war victims, dependents of deceased war victims, war disabled and prisoners of war, civilian war disabled and people with disabilities as well as relief for victims of crime; the advancement of the commemoration of persecutees, war and disaster victims; the advancement of the tracing service for missing persons.
11. The advancement of life saving.
12. The advancement of fire prevention, occupational health and safety, disaster control and civil defence as well as of accident prevention.
13. The advancement of internationalism, of tolerance in all areas of culture and of the concept of international understanding.
14. The advancement of the protection of animals.
15. The advancement of development cooperation.
16. The advancement of consumer counselling and consumer protection.
17. The advancement of welfare for prisoners and former prisoners.
18. The advancement of equal rights for women and men.
19. The advancement of the protection of marriage and the family.
20. The advancement of crime prevention.
21. The advancement of sport (chess shall be considered to be a sport).
22. The advancement of local heritage and traditions.
23. The advancement of animal husbandry, of plant cultivation, of allotment gardening, of traditional customs including regional carnival, of the welfare of servicemen and reservists, of amateur radio, of aeromodelling and of dog sports.
24. The general advancement of democratic government in the territory of application of this Code; this shall not include endeavours which are solely in pursuit of specific individual interests of a civic nature or which are restricted to the local-government level.
25. The advancement of active citizenship in support of public-benefit, charitable or religious purposes.

To the extent that the purpose pursued by the corporation does not fall under the first sentence above, but the general public is correspondingly advanced altruistically in material, spiritual or moral aspects, this purpose may be declared as being for the public benefit. The highest revenue authority of each Land shall designate a revenue authority within the meaning of the Fiscal Administration Act which is responsible for decisions pursuant to the second sentence above.

*§ 53 AO – Charitable purposes:*

A corporation shall be deemed to serve charitable purposes if its activity is dedicated to altruistic support for persons

1. Who on account of their physical, mental or emotional state are dependent upon the assistance of others, or

2. Whose means are not greater than four times the standard rate of social assistance as defined in section 28 of the Social Code, Book XII; in the case of a single person or single parent, five times the standard rate shall apply instead of four times. This shall not apply to persons whose assets are sufficient to effect a lasting improvement in their upkeep and who may reasonably be expected to use those assets for such purpose. In the case of persons whose financial circumstances have been transformed by special reasons into a state of need, the means or assets may exceed the stated limits. Means for the purposes of this provision shall be:

a) Income as defined in section 2(1) of the Income Tax Act, and

b) Other means intended or suitable for the provision of subsistence accruing to all household members. Maintenance payments, both paid and received, shall also be taken into account. As defined here, the need for economic assistance shall be deemed proven for persons who receive benefits pursuant to the Social Code, Book II or XII; the Housing Benefits Act; section 27a of the Federal War Victims' Relief Act; or section 6a of the Federal Child Benefits Act. The corporation may provide proof on the basis of the respective benefits notice applicable for the period of support or on the basis of a confirmation from the benefits provider. The requirement to provide proof of the need for economic assistance may be waived upon application by the corporation if, based on the particular type of support provided, it can be assured that support is provided only to persons in need of economic assistance as defined here; section 60a(3) to (5) shall apply accordingly with regard to notifications waiving the requirement to provide proof.

**7. Please indicate whether the following purposes would or would not be accepted for tax privileges in your country (noting that the tax status often depends on additional requirements):**

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 (e.g. exchange programmes/ other activities aimed at building bridges between nations)	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			
Party political activity				x
Advocacy				x
Advancement of religion	x			
<i>Other – please list other purposes accepted in tax law for tax privileges in your country</i>				

## 8. Support of “the public at large”

- a) Do the activities of a foundation with public-benefit status for tax purposes generally have to benefit “the public at large”?

Yes.

- b) If yes, can a foundation with public-benefit status for tax purposes support a closed circle in a sense that beneficiaries can be identified based on legal or family affiliations?

It depends, see the table of examples below:

	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 an university	X				
Award for the best student of an university	X				

## 9. Non-distribution constraint

- a) Does a foundation with public-benefit status for tax purposes generally have to follow a “non-distribution constraint” which forbids any financial support of the foundation board, staff, etc.?

Yes.

- b) What happens with the foundation’s assets in case of dissolution - can the assets revert to private ownership or do they have to stay in the public-benefit sphere?

The assets have to stay in the public-benefit sphere. § 61 (1) AO requires a regulation in the foundation’s statutes which specifies to whom the assets belong in case of dissolution and for which purpose they have to be used.

## 10. “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**?

Only if the statutes allow the payment of a remuneration. The remuneration has to be reasonable/appropriate.

- 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)

A donation is a voluntary service, which is given with a certain purpose. It must not be in return for something. A thank you letter or a postcard as a thank you is not harmful from a tax point of view.

- c) Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**? If yes, how are “administration costs” defined? 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

There is no strict legal rule on the programme and administrative costs ratio, although many local foundation laws demand that administrative costs should be as low as possible. There is no general rule on what this means in percentages. Fiscal authorities will evaluate the programme and administrative 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 costs are generally higher in operating foundations than in grant-giving foundations. The types of expenditures in the list above would all be considered as “administration costs”.

### 11. 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, their spouse and descendants.	x				
The founder retains a beneficial reversionary interest in the capital of a property or other asset for their own continuing use.					x
The gift consists only of 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 favour of the founder (or another member of their family) as tenant.			x		
A foundation distributes a (small) part of its income to the founder or their 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, their 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 their own continuing use.					x
The gift consists only of 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 favour of the founder (or another member of their family) as tenant.					x
A foundation distributes a (small) part of its income to the founder or their family.	x				

## 12. Distributions and timely disbursement

a) Are foundations allowed to spend down their endowment?

Only if the founder has made provisions for spending down capital in the statutes.

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?

The minimum life span of a spend-down foundation is ten years (Section 80 (2) of the Civil Code (BGB)).

c) Does the **civil law** and/or **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 yes, 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 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)?

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 pay-out rule”, German tax law (§ 55 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 their public-benefit activity. This must be effected in a timely manner, meaning within the next two calendar or fiscal years (“rule of timely disbursement”). But there are several exceptions to this rule, which are of great practical importance. First, 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 (§ 62 (1) Nr. 1 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. Second, a foundation can build a general contingency reserve (§ 62 (1) Nr. 3 AO) not exceeding 1/3 of its annual surplus from asset management (income after deduction of cost of administration for asset management). If the maximum amount for the establishment of the free reserve is not exhausted in a given year, this non-allocation may be made up in the following two years.

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.

Third, a newly established foundation is allowed to build an accrual reserve (§ 62 (4) AO) by using all profit from asset management and economic activity, provided that it complies with the foundation’s statutes. The right to build accrual reserves expires three years after the year of 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 **tax law** of your country require a foundation to spend a percentage of its overall assets in the form of a “pay-out rule”?

Example: Does the **civil law** of your country require the following 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 require the following 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

### 13. Are activities abroad in another country compatible with the public-benefit tax status?

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 (§ 51 (2) AO). The usage of funds must be proved by a comprehensive statement of accounts.

### 14. Can public-benefit organisations with a tax-exempt status also support/give grants to for-profit organisations (such as a small green start-up)?

According to § 58 No. 1 and 2 AO, only grants to other tax-privileged institutions are privileged. A cooperation with commercial enterprises is only possible through the involvement as a so-called auxiliary person (§57 (1) AO), if the actions of the auxiliary person are to be considered as own work of the public-benefit corporation.

### 15. Corporate income tax treatment. How are the following types of income treated for corporate income tax purposes? Are they taxable or exempt?

- a) Grants and donations

Foundations pursuing public-benefit purposes are not required to pay income tax on grants and donations.

- b) 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.

- c) 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.

Economic activity which is related to the public-benefit purpose is tax exempt, if it is considered as a dedicated activity under § 65 AO. A dedicated activity shall be deemed to exist where:

1. The overall design of the economic activity is 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
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 running a hospital/museum/opera
  - 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 merchandise (activity not related to the pursuance of the public-benefit purpose)
  - Income from intellectual property (e.g. royalties and licence fees)
- d) 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 a related economic activity, the respective rules apply (see above).

- e) Is major shareholding in a business undertaking 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.

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

Since 1 January 2018, funds are partially taxable with respect to certain domestic income. This relates in particular to dividends and income from real estate. These are now taxed at fund level with 15% corporate income tax, regardless of whether the fund is domestic or foreign. However, all other types of income, such as interest, remain tax free at fund level. Investors can neither refund nor offset the tax paid at fund level. In return, the tax liability at fund level will in future be offset by the so-called partial exemption at investor level.

The legislator provides for an exemption from corporation tax at fund level if the group of investors in a fund or individual share classes is limited to tax-exempt investors from the outset and the free trading of the units is also restricted. Tax-privileged foundations can either invest in unit classes or funds for exclusively tax-privileged investors, in which case no tax is levied at fund level. Alternatively or in addition, foundations can invest in retail funds, which initially levy tax on domestic income and have this tax refunded in the following year in a bureaucratic procedure.

## **17. 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 a number of sources of income for 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.

**18. 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.

**19. Are there taxes on the transfer/ sale of assets by foundations?**

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

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

Public-benefit foundations are exempt from real property tax.

**21. Can a foreign foundation (EU and other) 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 locally-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 German foundation tax law was amended: To be eligible for tax incentives, public-benefit foundations - whether they are resident in Germany or not - must pursue activities that possibly benefit the German public.

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, §§ 51 to 68 FC.

First it should be noted that income derived by a foreign-based foundation is only taxable in Germany under the additional requirements of sec. 49 ITA. Particularly 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, however.

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

- The PBO is organised in a legal form recognised by the law of an 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 PBOs would have to fulfil all requirements that resident PBOs have to fulfil. 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 PBOs activities are able to contribute to the Federal Republic of Germany's international reputation (§ 51 (2) AO).

However, there are specific regulations for foreign-based PBOs in some of Germany's double tax agreements overriding the requirements stated above.

**22. Does your country have signed bi-lateral tax treaties, which provide for reciprocal tax treatment of public-benefit organisations? If so, with which countries?**

The Federal Republic of Germany has now concluded double taxation agreements or tax treaties with more than 100 countries. A list of all agreements can be viewed on the website of the Federal Ministry of Finance. It is not known how many and which of these double taxation agreements contain provisions on the equal treatment of non-profit organisations. It was not possible to find an overview so the individual agreements would have to be consulted to determine if such provisions exist.

**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 must pay withholding tax but can apply for reimbursement up to a certain amount.

### III. Tax treatment of donors of foundations

#### 1. Is there a system of tax credit or tax deduction or other mechanisms such as tax allocation systems or matching grants?

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 (e.g. cash, real estate, in kind or other)

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

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

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

In these cases the foundation must prove to the German tax authorities that the donation is spent for the furtherance of 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? (e.g. cash, real estate, in kind, or other)

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

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?

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, §. 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 taxpayer has the burden of proof that all requirements are met.

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 donations given within one year is either 20% of the total income as laid out in sec. 2 (4) ITA or .4% of 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)

(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 PBO’s activities are able to contribute positively to the Federal Republic of Germany’s international reputation.

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

**5. Other frameworks such as percentage law systems, whereby the donating tax payer may assign part of the tax due to a public-benefit organisation?**

There are no other frameworks.

**6. What are the requirements that the donor must fulfil and/or what is the information they must provide in order to claim tax benefits? What information must donors provide to their tax authority in order to receive tax incentives for their donation (e.g. submitting details on the organisation they support: statutes, annual financial report, documents providing evidence for certain tax law requirements, for instance to show that income was actually spent for public-benefit purposes)?**

What information must donors provide to their tax authority in order to receive tax incentives for their donation (e.g. submitting details on the organisation they support: statutes, annual financial report, documents providing evidence for certain tax law requirements e.g. that income was actually spent for public-benefit purposes?)?

Donors must 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 must donors to foreign-based organisations provide in order to receive tax incentives for their donation (e.g. statutes, annual financial report, documents providing evidence for certain tax law requirements, for instance to show that income was actually spent for public-benefit purposes)? Are translations of documents required?**

The donor must establish that the foreign donee fulfils the requirements of German non-profit law. Therefore the donor must provide all relevant and necessary information (including but not limited to the organisation’s 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.

**8. Do donors get tax incentives when donations are done via specific tools such as:**

- Requesting money in public (street, door-to-door)
- Via TV and radio campaigns
- Via sms
- Crowdfunding

Do they have to follow any kind of particular process? If so, which one?

A tax deduction is granted if the requirements for a donation to a PBO are met.

## IV. Tax treatment of beneficiaries

(i.e. those receiving a grant or other benefit from a foundation)

**1. Individuals: Are individual beneficiaries of grants required to pay taxes or are the grants tax exempt?**

Only 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: Is there any legal/fiscal framework for beneficiaries conducting economic activities so that they can be eligible for foundation funding? Are there any limitations on the economic activities of the beneficiaries?**

Public-benefit funds may only be used for the promotion of the general public. This means that beneficiaries may not use the funds for (self-) economic purposes. However, this does not exclude the possibility that a public-benefit beneficiary may be economically active within the framework of the non-profit law. For this purpose, an economic business operation (§ 64 AO) to generate income that can be used for charitable purposes or the maintenance of a special-purpose business (§§ 65 ff. AO) can be considered.

A special-purpose enterprise is given if all of the following criteria are met:

1. The economic business operation in its overall direction serves to realise the tax-privileged statutory purposes of the corporation.
2. The purposes can only be achieved through such business operations.
3. The economic business does not compete with non-beneficiary businesses of the same or similar type to a greater extent than is unavoidable when fulfilling the tax-privileged purposes.

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

## V. Gift and inheritance tax

- 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 public-benefit organisations (PBOs)? Which PBOs 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?**

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.

- 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 United States).

## 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? Any changes being discussed with regard to the free movement of trust structures resulting from the [Panayi Trust](#) and [Olsen and Others](#) cases?
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)? Has it for example become more difficult to:

- Set up a public-benefit foundation
- Obtain permission to transfer funds across borders
- If able to transfer of funds across borders, has the process become more burdensome administratively
- Open a new bank account
- Maintain a bank account
- Fund certain activities
- Fund certain regions/countries
- Fund certain organisations (please explain the reason - foreign funding restriction?)
- Report to authorities/deal with administration
- Other

It has become particularly difficult for development aid organisations to transfer funds abroad. This is particularly true in relation to countries where terrorist organisations are active. The transfer of funds to countries on sanctions lists is practically impossible. The same applies to organisations that are themselves on sanctions lists or that employ persons who are on a sanctions list.

With regard to the opening of bank accounts, the disclosure obligations with regard to board members have been extended. These go far beyond the disclosure obligations in the BO register.

3. Does the national law consider foundations as obliged entities as defined by the Anti-Money Laundering Directive?

Foundations are not listed as obliged entities in § 2 of the Money Laundering Act.

4. Does the national law define/specify who is considered as a Beneficial Owner (BO) of a foundation?

Section 3 (3) of the Money Laundering Act contains the following definition:

In the case of foundations with legal capacity and legal structures with which assets are administered or distributed in a fiduciary capacity or the administration or distribution is entrusted to third parties, or in the case of these comparable legal forms, the beneficial owners are deemed to be the beneficiaries. These include:

1. Any natural person acting as settlor, trustee or protector, if any.
2. Any natural person who is a member of the board of the foundation.
3. Any natural person designated as beneficiary.
4. The group of natural persons in whose favour the assets are to be managed or distributed, if the natural person who is to become the beneficiary of the assets under management has not yet been determined.

5. Any natural person who, directly or indirectly, exercises a dominant influence, by any other means, over the management of assets or the allocation of income.

6. Any natural person who can directly or indirectly exercise a dominant influence on an association, who is a member of the board of directors of the foundation or who has been designated as a beneficiary of the foundation.

**5. Does your country have a specific register for BO of legal entities/foundations or does the foundation/company/association register serve as a BO register?**

There is a BO register in which those organisations must be registered for which there is no other reliable public register that can provide the information required under the Money Laundering Act, or if there is no other reliable source of information.

**6. Are there any other recent trends or developments affecting the legal and fiscal environment for public-benefit foundations in your country such as one or more of the following?**

- a) Law revision in the pipeline
- b) Discussion about the role of supervisory authorities (civil law, charity regulator, tax authority) and collaboration among them? Decentralisation or centralisation of supervisory structures? Use of watchdog/rating agencies?
- c) Tendency towards more transparency requirements?
- d) Tendency towards more self-regulation? Self-regulation replacing hard law regulation?
- e) Tendency to use alternative forms to classic public-benefit foundations
- f) Other?

A reform of foundation civil law has been planned for several years. The draft bill was to appear in spring 2020, but it is still not available. Instead, the academic community has presented a "Professorial Draft on the Foundation Law Reform 2020", which represents a counter draft to the draft of the Federal and State Working Group on Foundation Law.

In addition, the Federal Ministry of Finance is working on a draft bill for the reform of the fiscal law on public-benefit organisations. A concrete timetable has not been fixed for the draft, which is currently in the process of being coordinated. However, it is the aim of the ministry to pass the non-profit status reform before the end of this legislative period.

**7. Public fundraising: Are there any specific laws that regulate fundraising and do they affect foundations?**

There are no specific laws regulating fundraising.

## VII. Further information

### Useful contacts

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### Selected law texts online

[German Fiscal Code](#)

[German Civil Code](#)

## VIII.About

### Philanthropy Advocacy

The Dafne and EFC joint advocacy project “Philanthropy Advocacy” acts as a monitoring, legal analysis and policy engagement hub for European philanthropy. Its main objective is to shape the national, European and international legislative environment by implementing the European advocacy roadmap for a Single Market for Philanthropy.

[www.philanthropyadvocacy.eu](http://www.philanthropyadvocacy.eu)

### Donors and Foundations Networks in Europe (Dafne)

Dafne brings together 30 national associations from 28 countries across Europe, representing over 10,000 public-benefit foundations, big and small, who want to make a difference in society. We have created an alliance for collaboration across philanthropy networks in Europe to address big philanthropy questions of our time in a coordinated and effective manner. We lead, strengthen and build the field for the common good in Europe. We are involved in four key areas: advocacy, peer exchange, communications and research. Our work is needs-based and future-oriented. We value ideas over hierarchy and believe in a truly collaborative approach.

[www.dafne-online.eu](http://www.dafne-online.eu)

### European Foundation Centre (EFC)

As a leading platform for philanthropy in Europe, the EFC works to strengthen the sector and make the case for institutional philanthropy as a formidable means of effecting change. We believe institutional philanthropy has a unique, crucial and timely role to play in meeting the critical challenges societies face. Working closely with our members, a dynamic network of strategically-minded philanthropic organisations from more than 30 countries, we:

- Foster peer-learning by surfacing the expertise and experience within the sector
- Enhance collaboration by connecting people for exchange and joint action
- Advocate for favourable policy and regulatory environments for philanthropy
- Build a solid evidence base through knowledge and intelligence
- Raise the visibility of philanthropy’s value and impact

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

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