GERMANY

Current as of June 2017

Comments related to any information in this Note should be addressed to Mai El-Sadany.

Table of Contents

1. Summary
    1. Types of Organizations
    2. Tax Laws
2. Applicable Laws
3. Relevant Legal Forms
    1. General Legal Forms
    2. Public Benefit Status
4. Specific Questions Regarding Local Law
    1. Inurement
    2. Proprietary Interest
    3. Dissolution
    4. Activities
    5. Political Activities
    6. Discrimination
    7. Control of Organization
5. Tax Laws
    1. Tax Exemptions
    2. Deductibility of Donations to German and EU-based NPOs by Individuals and Corporations Based in Germany
    3. Gift and Inheritance Tax
    4. Value Added Tax (VAT)
    5. Other Taxes
    6. Double Tax Treaties
6. List of Knowledgeable Contacts

I. SUMMARY

A. TYPES OF ORGANIZATIONS

Germany is a federal civil law country with three primary forms of nongovernmental, not-for-profit organizations (NPOs):

- Associations (*Verein*)
- Foundations (*Stiftung*)
- Limited liability companies (*Gesellschaft mit beschränkter Haftung,* or *GmbH*)

The limited liability company, or GmbH, is increasingly used in Germany to create not-for-profit entities.

Other forms of NPOs are outside the focus of this Note due to their limited interaction with foreign grantmakers. The excluded forms include public institutions (*Anstalten des öffentlichen Rechts*); foundations established under church law and public law; cooperatives (*Genossenschaften*, which are formed and regulated under the *Genossenschaftsgesetz*); and joint stock companies (*Aktiengesellschaften*, which are formed and regulated under the *Aktiengesetz* Law).

B. TAX LAWS

Generally, only those NPOs that exclusively and directly pursue public benefit, benevolent, and church-related purposes are exempted from Germany's corporation tax (*Körperschaftsteuer*), commercial tax (*Gewerbesteuer*), and gift and inheritance tax (*Erbschaft-und Schenkungsteuer*). Sections 52-54 of the Fiscal Code (*Abgabenordnung*, or *AO)* describe these exempted purposes.

Germany subjects most sales of goods and services to a Value Added Tax (VAT). Many types of public benefit activities are exempt from VAT, including health-related, educational, cultural, and scientific activities. If an activity of a tax-benefited organization is subject to VAT and it falls under the organization's statutory purposes, the applicable VAT rate is reduced from 19 percent to 7 percent. If a grant to an NPO complements VAT taxable services, the VAT included in the project's expenditure might be recoverable. If a grant does not fall under any VAT taxable service, the VAT included in the expenditure will not be recovered by the tax office. In that case the NPO is in the position of a final consumer.

II. APPLICABLE LAWS

- German Constitution (*Grundgesetz*) (German) (English)
- German Federal Civil Code (*Bürgerliches Gesetzbuch,* or *BGB*), First Book (General Provisions), First Subsection (Persons), Second Title (Legal Entities): Chapters I (Associations, Sections 21-79), II (Foundations, Sections 80-88), & III (Public Law Juridical Entities, Section 89) (German) (English)
- Law on Associations (*Vereinsgesetz*) of 1964 (German)
- Laws on Foundations of the 16 German states (*Bundesländer*):
  - Baden-Württemberg (German)
  - Bayern (German)
  - Berlin (German)
  - Brandenburg (German)
  - Bremen (German)
  - Hamburg (German)
  - Hessen (German)
  - Mecklenburg-Vorpommern (German)
  - Niedersachsen (German)
  - Nordrhein-Westfalen (German)
  - Rheinland-Pfalz (German)
  - Saarland (German)

    - Sachsen (German)
    - Sachsen-Anhalt (German)
    - Schleswig-Holstein (German)
    - Thüringen (German)
- Limited Liability Company Law (*GmbH-Gesetz*)
- Fiscal Code (*Abgabenordnung*, or *AO*) of 1976, as amended, Part III (tax-privileged purposes) (German) (English)
- Fiscal Code implementing rules (*Anwendungserlass zur Abgabenordnung BStBl I S. 630)* (German)
- Corporate Income Tax Law (*Köperschaftssteuergesetz, BGBl. I. S. 817*) of 1999, as amended, Sections 5(9) (exempt organizations) & 9 (deductions for donors) (German)
- Corporate Income Tax Law implementing rules (*Körperschaftsteuer-Richtlinie)*
- Local Commercial Tax (*Gewerbesteuer* – a tax imposed by the municipalities) (German)
- Income Tax Law (*Einkommensteuergesetz, BGBl. I S. 821*) of 1997, as amended, Section 10(b) (tax incentives for individual donors) (German)
- Income Tax Law implementing rules, *Einkommensteuer-Durchführungsverordnung (BGBl. I S. 717) & Einkommensteuer-Richtlinien* (German)
- Inheritance and Gift Tax Law of 1997 (*Erbschaftsteuer-und Schenkungsteuergesetz BGBl. I S. 378*), Sections 13 & 29 (tax exemptions) (German)
- Value Added Tax Law (*Umsatzsteuergesetz*) of 1999 (German)

III. RELEVANT LEGAL FORMS

A. GENERAL LEGAL FORMS

Under German law, almost any type of private legal entity – including associations, foundations, and corporate enterprises – can be used to form an NPO.

The legal forms of NPOs are the association (formal and informal), the foundation (formal and informal), and in some cases the limited liability business company (GmbH). Formal associations, formal foundations and business companies all have legal personality. Informal associations traditionally were considered to lack legal personality, but according to the current view they have aspects of legal personality as well. Informal foundations, on the other hand, do not have legal personality, but are established as a "gift contract" or as a "trust contract." [1]

German NPOs are generally governed by federal law. Foundations also are partly subject to the law of the German states (*Länder*).

Federal law is used to determine whether an organization is eligible to receive tax benefits, but it is the local tax office that makes the determination.

1. ASSOCIATIONS (*VEREINE*)

An association (*Verein*) is a membership organization whose members have come together to permanently pursue a common purpose. Both public benefit and mutual benefit associations are permitted. For that reason, the designation "e.V." (*eingetragener*

Verein, which describes the status of a formal association) does not reflect the existence of a public benefit organization, nor does it reflect its tax status.

Associations are formally established by notary deed. The notary deed contains the articles of association. Non-economic associations (*nichtwirtschaftliche Vereine / Idealvereine*) must have a primary aim and activity other than conducting business. The law provides that the association may have any lawful purpose as long as it is not the "purpose" of a trading business, though the interpretation of this rule is not absolutely clear (see infra, Section IV(D)). Non-economic associations receive legal personality upon registration at the local court. (Civil Code §21) When such an association is registered, it assumes the designation "e.V." (*eingetragener Verein*). (Civil Code §55) To register, an association must have at least seven members. (Civil Code §59) Once registered, an association may have fewer than seven members, but not fewer than three.

A German state (*Land*) may, in limited cases, also grant legal personality to a different type of association that primarily conducts business (*Wirtschaftlicher Verein*). (Civil Code §22) No state has done so in recent years, however.

There is relatively little state supervision of associations after the association has been established. In some cases the public authorities may intervene on the basis of the Associations Law (*Vereinsgesetz*), which among other things states the grounds for prohibiting an association. Such cases are very rare, however.

2. FOUNDATIONS (*STIFTUNGEN*)

A foundation (*Stiftung*) established under Sections 80-88 of the Civil Code (*Stiftungen bürgerlichen Rechts*) is a legal entity whose earnings on assets are used to pursue a specific purpose set forth by the founder. [2] The current federal legislation in the Civil Code, which was modified in 2002 (Law to Modernize the Foundation Law – *Gesetz zur Modernisierung des Stiftungsrechts*) and in 2013 (Law to Support Voluntary Activities– *Ehrenamtsstärkungsgesetz*), is not extensive.

Under the Civil Code, a foundation has legal personality which it receives upon recognition by the competent authority in the state (*Land*) in which the foundation seeks to be headquartered. (Civil Code §80) The authority must recognize the foundation if it meets the legal requirements. Both natural and legal persons may be the founder of a foundation. Section 80 also provides that foundations may be established for any lawful purpose, including family foundations. There is some disagreement, however, as to whether it is permissible to have a "foundation for the founder," in which the founder is the only beneficiary. (The mainstream view does not accept this as a valid foundation.)

The law does not require a specific initial amount to form a foundation, but requires that permanent and sustainable promotion of the foundation's purpose must appear to be assured. Accordingly, the competent regional authorities impose rather different minima – usually at least €50,000. In 2013, the legislature clarified that a foundation may also be established only for a certain time period, which should not be shorter than ten years. (Civil Code §80(2) sentence 2)

State supervision of foundations is undertaken by the Ministries or other administrative bodies of the 16 states (*Länder*), according to the states' foundation laws. Foundations are

obliged to file annual reports to the state supervisory authority. Additionally, in certain cases the provincial foundation laws require the state supervisory authority's approval after a foundation's establishment. Historically, many of the foundation laws of the *Länder* had extensive requirements for approval, but since the early 1990s many of these requirements have been abolished. (They were regarded as ineffective, costly, and overly bureaucratic.) Finally, in all *Länder*, approval by the state supervisory authority is necessary in order to amend the foundation's statute or to liquidate the foundation. However, the term "approval" should not be misunderstood: The state supervisory authority generally has no discretion but must follow the law and intention of the founder.

Generally the *Länder* foundation laws allow inquiries by the state supervisory authority if there is an important enough reason. In cases of serious misconduct, the state supervisory authority may even be entitled to dismiss board members, appoint new board members, and to act on behalf of the foundation. However, such extreme interventions must be proportionate to the misconduct and may be reviewed by a court.

It is also worth noting that the German word for "foundation" ("*Stiftung*") is not limited to legal foundations. Other legal forms of organizations, such as associations, stock companies, and limited liability companies are also allowed to bear the additional name "*Stiftung*" (so-called "*Ersatzformen*"). Thus, the appendix "*Stiftung*" does not guarantee that an NPO is, in a legal sense, a foundation. One of the biggest German foundations – the Robert Bosch Stiftung – for example, operates under the legal form of a limited liability company, or GmbH.

3. CORPORATE ENTERPRISE (KAPITALGESELLSCHAFTEN)

NPOs may also take a corporate form, specifically the limited-liability company (*Gesellschaft mit beschränkter Haftung)*, or GmbH, which is registered and regulated under a special law. The GmbH is a commercial company in corporate form, with legal personality. It has stock originating from its shareholders. The shareholders are not liable for the debts of the company. NPOs often choose this legal form when their purpose includes the delivery of services without remuneration.

B. PUBLIC BENEFIT STATUS

There is no special legal form for NPOs with a public benefit purpose. As described above, a foundation or association can be formed for private benefit, public benefit, or, in the cases of associations and corporate enterprises, mutual benefit purposes. Nonetheless, public benefit organizations (organizations serving the general interest) may enjoy special tax benefits if they meet the requirements of the tax law.

1. DEFINITION OF TAX-EXEMPT PURPOSES

The definition of "public benefit" is found in the Fiscal Code (*Abgabenordnung,* or *AO*). Tax benefits are defined in the various tax codes with regard to the Income Tax, the Corporate Income Tax, Commercial Tax, VAT, and the Inheritance and Gift Tax. The Fiscal Code, however, sets forth what qualifies as a tax-privileged purpose. In addition, the Fiscal Code determines special requirements for organizations carrying out tax-privileged purposes.

The Fiscal Code defines three types of purposes as being tax-privileged:

- public benefit (*Gemeinnützige Zwecke*, §52)
- benevolent (*Mildtätige Zwecke,* §53)
- church-related (*Kirchliche Zwecke,* §54)

According to the first subsection of Fiscal Code §52, an organization pursues public benefit purposes (*gemeinnützige Zwecke*) if "its activities aim to support the general public materially, intellectually, or morally." The beneficiaries must not be limited to a closed circle of people, such as members of one family or employees of one corporation.

The second subsection of Fiscal Code §52 provides a list of subjects that are regarded as supporting the general public, provided that the requirements of the first subsection are met. The list has remained unchanged since 2007 and includes the following: (1) science; (2) religion; (3) public health care; (4) youth and older persons; (5) arts and culture; (6) historical preservation; (7) education; (8) environmental protection; (9) public welfare; (10) victims, handicapped and politically persecuted people; (11) lifeguards; (12) the prevention of injuries; (13) international understanding and tolerance; (14) animal protection; (15) development aid; (16) consumer protection; (17) rehabilitation of prisoners; (18) emancipation of genders; (19) marriage and family; (20) crime prevention; (21) sports (including chess); (22) local history and geography; (23) animal husbandry, plant breeding, allotments, traditional customs (including Carnival), troop entertainment, amateur radio, model airplane and dog sports; (24) the democratic political system in Germany; and (25) civic commitment for public benefit purposes. Additional purposes can be added by a specific administrative procedure. Further explanations are found in the implementing rules of the Fiscal Code (*Anwendungserlass zur Abgabenordnung*).

An organization pursues "benevolent purposes" (*mildtätige Zwecke*) if it aims to support and help people in need, either because of their economic situation or because of their physical, psychological, or mental condition. (Fiscal Code §53)

"Church-related purposes" (*kirchliche Zwecke*) include the support of public law religious communities, construction of houses of worship, spiritual development, and religious education. (Fiscal Code §54)

Additionally, the public has to be promoted. This means that the potential beneficiaries of the organization may not be restricted according to private criteria (for instance, limited to family members). (Fiscal Code §52(1))

2. FURTHER REQUIREMENTS FOR THE TAX-EXEMPT STATUS

Apart from the promotion of a public benefit purpose, there are several additional requirements in order to acquire the status of a tax-exempt organization.

First, a tax-exempt organization must support its public benefit purpose exclusively. (Fiscal Code §56) Thus, a tax-exempt organization must not distribute its assets to its members, directors or other non-beneficiaries without adequate compensation. In case of liquidation, the organization's remaining assets must be granted to another tax-exempt organization. The rule does not prohibit administration expenses as long as they are reasonable.

There is only one exemption to the above rule: Full tax relief is given to a foundation that distributes up to one-third of its net income to the founder or the founder's family (Fiscal

Code §58 Number 5), but the amount of this private distribution must not be unreasonably high.

Fiscal Code §55 additionally provides for:

> (1) A duty of loyalty: This includes a non-distribution constraint and a prohibition on private distributions (see more detailed discussion infra, Section IV).
>
> (2) The rule of timely disbursement (*Gebot der zeitnahen Mittelverwendung*): According to this rule, a tax-exempt organization generally may hold in reserve up to one-third of its proceeds from passive income, in addition to one-tenth of other disposable income. There are a number of exceptions, however – mainly to allow reasonable retentions and the preservation of a foundation's endowment. Where the organization can submit specific projects to be undertaken within a definite time period, retention is allowed.
>
> (3) The rule that a tax-exempt organization must not "in the first line promote its interests or the economic interests of its members": The meaning of this rule is still not entirely clear. For example, an association with the purpose of promoting regional tourism may generally be accepted as a tax-exempt organization because its purpose may be regarded as a public benefit (according to Fiscal Code §52(22) – local history and geography). However, if the members of such an association are the owners of the hotels and tourist attractions, the organization promotes the economic interests of its members and may violate the provisions of Fiscal Code §55.

According to Fiscal Code §56, the tax-exempt organization must also promote the purpose directly by itself, or through "*Hilfspersonen*" (auxiliary persons) such as employees, free-lancers, or other legal persons through which the organization is acting, e.g. by contract or assignment. However, there are several exemptions.

Finally, the law imposes some formal requirements: A tax-exempt organization must declare in its statute some of the fundamental rules of the tax law requirements (e.g., that in case of the liquidation the remaining assets will be granted to another tax-exempt organization).

IV. SPECIFIC QUESTIONS REGARDING LOCAL LAW

A. INUREMENT

The prohibition on private inurement for tax-exempt organizations can be found only in the tax law, specifically in the Fiscal Code (*Abgabenordnung*, or *AO*). Fiscal Code §55 states the rule against inurement as the following:

1. The assets of the organization must be used exclusively and directly to pursue its tax-exempt purposes.
2. Members of associations, shareholders, and founders of foundations and their heirs must not receive distributions from the organizations to which they belong or which they founded. Fiscal Code §58(5), however, allows a foundation to use up to one-third of its income to support the founder and his or her close relatives, or to maintain

their graves. In addition, an organization may use up to one-third of its profits to preserve the endowment.
3. No one shall receive special private benefits from the organization, including unreasonable salaries.
4. In case of dissolution, remaining assets must be used solely for tax-privileged purposes. This requirement is met if remaining assets are transferred to an organization pursuing tax-privileged purposes, or to a public body for tax-privileged purposes.
5. For NPOs that form as corporate enterprises, shareholders may – on termination of their membership or on liquidation of the corporate enterprise – receive a return of no more than their capital contribution and the fair market value of their in-kind capital contributions. The remaining assets must then be distributed to pursue tax-exempt purposes.

B. Proprietary Interest

As stated above, in order to be eligible for tax-exempt status, an NPO must carry out its tax-privileged purpose altruistically, exclusively, and directly. Foundations may, however, spend up to one-third of their income to support the founder and his or her close relatives, or to care for their graves and the remembrance of the founders. (Fiscal Code §58(5)) For NPOs formed as corporate enterprises, the Fiscal Code states that shareholders may receive their initial cash contribution and the fair market value of their in-kind capital contributions upon dissolution or termination of their membership. (Fiscal Code §55)

C. DISSOLUTION

If a tax-exempt organization is dissolved, either voluntarily or involuntarily, the remaining assets must be used for similar, tax-privileged purposes. This requirement is met if remaining assets are transferred to an organization pursuing tax-privileged purposes, or to the state for the pursuit of tax-privileged purposes. (Fiscal Code §55)

In the case of an NPO formed as a corporate enterprise, shareholders can receive a return of no more than their capital contribution and the fair market value of their in-kind capital contributions. The remaining assets must then be distributed for tax-exempt purposes.

Regarding foundations, the merging of two or more foundations is also possible.

D. ACTIVITIES

1. GENERAL ACTIVITIES

As stated above, German NPOs may be formed as legal persons or as entities without legal personality. As legal persons, they are permitted to engage in all legal activities of corporate bodies except as provided otherwise by the laws discussed in this Note.

2. PUBLIC BENEFIT ACTIVITIES

As stated above, the term “public benefit activities” is not related to or dependent on the form of organization. A foundation, association, or corporate enterprise can be formed for either public or private benefit purposes.

The definition of “public benefit” for the sake of tax benefits can be found in the Fiscal Code, as discussed above.

3. ECONOMIC ACTIVITIES

With regard to tax benefits, German NPOs are generally allowed to engage in economic activities. If the activity is necessary to pursue the organization’s statutory purpose and it does not compete with for-profit organizations more than necessary, profits are not taxed and VAT is reduced to 7 percent (so-called “*Zweckbetrieb*,” Fiscal Code §65). Commercial activities which are not necessary to pursue the statutory purposes of the NPO are taxed at ordinary rates if the annual gross income of non-statutory commercial activities exceeds €35,000. (Fiscal Code §64)

As to organizational law, there is a limitation on trading by non-profit associations (*Idealvereine*), as mentioned above. According to the wording of the law, the association may have any lawful purpose as long as it is not the “purpose” of a trading business. The interpretation of this rule is still not absolutely clear. According to the prevailing view, associations are limited to economic activities that are “subordinate” to their “idealistic” activities, and mutual commercial trading (i.e., among or between members) is not acceptable. [3] However, there is some disagreement as to which activities are “idealistic” and which activities should be regarded as “subordinate.” According to the courts, an association is allowed to conduct economic activities beyond the “privilege of subordinate activities” through a subsidiary business company which is owned entirely by the association. Many large associations do in fact take advantage of this possibility. Some authors have criticized this practice and have advocated taking the rules of group law into account, with the consequence that in some cases the economic activities of the subsidiary should be attributed to the economic activities of the association.

E. POLITICAL ACTIVITIES

Germany’s tax laws provide some limitations on political activities: First, organizations pursuing tax-privileged purposes must not spend any of their assets for the direct or indirect benefit of political parties, for instance through campaigning. (Fiscal Code §55(1))

The bylaw to Fiscal Code §52 in the implementing rules (*Anwendungserlass*) distinguishes “political” purposes from “public benefit” purposes. In the discussion of the meaning of the term “political,” the rules indicate that some activities relating to the development of public opinion are acceptable. An organization is allowed to comment on politics related to its tax-exempt purpose, for instance, and is also allowed to communicate with legislators about proposed legislation without losing tax-exempt status. General political education and the general support of democratic development both qualify as tax-privileged purposes, as well.

The decision as to whether the “political” activities of a specific NPO are in line with the requirements of tax law is to be made on a case-by-case determination. One prominent example of such a case is the organization Attac. According to a decision of the Fiscal Court of Hessia, the activities of Attac (especially its campaign to introduce a Financial Transaction Tax and a Wealth Tax) satisfy the requirements of tax law because they promote the public benefit purpose of “political education” and do not merely serve as a campaign for a specific political party. [4]

F. DISCRIMINATION

The German Constitution provides the basic legal prohibitions against discrimination. Article 3 provides that all persons are equal before the law, and that it is the responsibility of the state to eliminate existing inequality between the sexes. Article 3 further prohibits unequal treatment on the grounds of sex, parentage, race, language, homeland and origin, faith, religious or political opinions, and disability.

Constitutional rights in Germany, though formally enforceable only against the state, also have a strong influence in the private sector.

G. CONTROL OF ORGANIZATION

The board of directors is generally responsible for making most decisions in the management of an NPO. For some fundamental decisions, other bodies may exert more control.

With regard to stock companies (GmbH), there are no specific rules for the governance of a NPO. The law does not require a certain number of shareholders, and they may be natural or legal persons. Therefore, it is possible for a for-profit entity or an American grantor charity to establish and control a German NPO and (in the case of a tax-exempted company) own it as the sole shareholder. Limitations only exist in tax law, if the NPO wants to receive tax benefits (see supra, Section IV(A)-(C)).

As for associations, Sections 55 et seq. of the Civil Code regulate the internal management structure. An association has two internal bodies: the board of directors and the general meeting of the members. (The articles of association may provide for other bodies, however.) The managing board is charged with the management of the association, the setting of general policies, and the representation of the association. This board shall convene the general meeting of members as often as it shall be considered necessary, or when required by law or the articles of association, or upon the written application of a number of members. The general meeting of members has several, mostly mandatory, competences regarding the appointment and dismissal of the members of the management board, the amendment of the articles of association, dissolution of the association, conversion, merger and division.

The management of a foundation is less clearly provided for in the Civil Code and elsewhere. The board of directors is the only internal body. Foundations do not have membership, so there is no general meeting of members. However, the foundation's statutes may provide for other internal bodies. The statutes also provide for the appointment or dismissal of the members of the management board, as this is not regulated by law.

V. TAX LAWS

Tax-exempt organizations receive a number of tax exemptions, tax reductions, and are subject to further rules such as facilitation in order to determine the tax assessment base.

A. TAX EXEMPTIONS

Regarding taxation on the income of tax-exempt organizations, German income tax law differentiates four areas, taking into consideration the different sources of the funds (See Corporate Tax Act §5 part 1(9); Fiscal Code §14 & §65 et seq.):

(1) Non-material ("idealistic") earnings: income in the form of membership fees or donations. This form of income is generally exempted from income tax. However, income tax is imposed on "hidden considerations," such as membership fees paid in consideration of services or goods received (there is a problem of delineation here).

(2) "Passive" earnings derived from asset management (i.e., investment): returns from investment in interest-yielding bonds, shares, real estate, etc. This form of income is also generally exempted from income tax.

(3) Earnings derived from purpose-related economic activities aimed at achieving the purpose of the tax-exempt organization. This form of income is exempted from income tax as long as there is no distortion of competition. In several cases the law explicitly accepts some activities as purpose-related, independent of the question whether there is a distortion of competition (e.g. activities of hospitals and youth hostels).

(4) Earnings derived from other economic activities *unrelated* to the purpose of the tax-exempt organization. For example, a tax-exempt organization holding the controlling shares of a noodle-producing company. This form of income (in the example provided, share dividends) is subject to income tax. However, there is a tax-free allowance of €35,000 per annum of the gross earnings. It follows that tax-exempt organizations in Germany are partially subject to income taxation, insofar as their income is generated from economic activities unrelated to the purpose of the organization.

Further tax benefits for tax benefit organizations can be found in many other specific tax laws, discussed below.

B. DEDUCTIBILITY OF DONATIONS TO GERMAN AND EU-BASED NPOS BY INDIVIDUALS AND CORPORATIONS BASED IN GERMANY

Germany's Income Tax Law (*Einkommensteuergesetz*), Corporate Tax Law (*Köperschaftssteuergesetz*), and Commercial Tax Law (*Gewerbesteuergesetz*) allow individual as well as corporate donors to deduct contributions to tax-exempt organizations.

For contributions made by individuals or corporations, a deduction of up to 20 percent of their respective taxable income is available for income tax, corporate tax and municipal commercial tax. (For corporations, a deduction of up to 0.4 percent of the sum of the turnover, wages, and salaries is an alternative basis for calculating the maximum deduction.) Donations exceeding the deductible limits may be carried forward to subsequent fiscal years.

In addition, an individual donor can deduct up to €1,000,000 for a donation to the endowment of a foundation with qualifying purposes. The deduction can be taken in the year of donation and/or divided over the following nine years.

According to Section 10b(1) of the Income Tax Law, the recipient of a tax deductible donation must have its legal seat in Germany or in another EU member state. [5] The same requirement applies to the Corporation Tax Law and the Commercial Tax Law as well.

C. GIFT AND INHERITANCE TAX

A gift or inheritance tax is levied at a progressive rate on the transfer of property to a German foundation, except when the donation is made to support qualifying tax-privileged purposes. This exemption also applies to donations made to foreign organizations in cases of tax reciprocity (see below). A complete exemption from inheritance tax is also given when the inheritance is passed on to a tax-privileged purpose foundation within two years after the succession. (See Inheritance and Gift Tax Law of 1997 §13 part 1(16) & §29 part 1(4))

D. VALUE ADDED TAX (VAT)

Germany generally subjects the sale of goods and services to Value Added Tax (VAT). Some standard public benefit activities are exempt from the VAT, including health-related, educational, cultural, and scientific activities. A reduced VAT rate of 7 percent is applied to taxable remunerations for services which are necessary to pursue an NPO's statutory purposes (*Zweckbetrieb*), or for those services which are considered to be mere asset management (such as the lease of premises or the exploitation of rights, especially copyrights, royalties, etc.). Grants are generally not subject to the VAT.

E. OTHER TAXES

NPOs that pursue public benefit purposes as listed in Sections 51-68 of the Fiscal Code do not pay trade or commercial taxes (*Gewerbesteuer*).

The wealth tax (*Vermögensteuer*) was generally abolished in 1997.

F. DOUBLE TAX TREATIES

Germany and the United States have signed two double-tax treaties. The first of these is the Convention Between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes (dated August 29, 1989). In addition to preventing double taxation, the treaty provides for a form of reciprocity: According to Section 27 of the Convention, a tax-exempt organization of one country will also be tax-exempt in the other country, to the extent that the organization would be tax-exempt in the second country if it were organized and active solely in that country.

A second treaty creates another form of tax reciprocity: Property transferred to an organization pursuing public benefit purposes, which is resident and tax exempt in one country, shall be exempted from gift and inheritance tax by the other country, if that property transfer would also be tax-exempt if made to a domestic organization. (See Section 10 of the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation with Respect to Taxes on Estates, Inheritances, and Gifts, dated December 21, 2000).

VI. LIST OF KNOWLEDGEABLE CONTACTS

- Thomas Von Hippel - thomas.vonhippel@ag.justiz.hamburg.de
- Dr. Michael Ernst-Pörksen - factory@eurocom.org

FOOTNOTES

[1] The remainder of this Note will assume that “association” and “foundation” refer to the formal, legally established entities, unless otherwise noted.

[2] Informal foundations (“*nicht rechtsfähige*” or “*unselbständige Stiftung*”) do not acquire legal personality. Their establishment is subject to the general rules on contract law of the Civil Code, which governs the contract between the founder and the trustee. Such a contract be may qualified as a “gift contract” or as a “trust contract.” This relationship is comparable to a common law trust. The provisions of the Civil Code and of the state foundation laws are not applicable to informal foundations, and as such they are not supervised by the state supervisory authorities.

Informal foundations may nonetheless enjoy the same tax benefits as formal, legally-recognized foundations. Given this, the informal foundation may be an adequate tool for smaller initiatives, because there are less mandatory requirements and no specific state supervision.

[3] An informal association follows a comparable rule: If its “economic” activities are not “subordinate,” then it is regarded as a partnership (*Gesellschaft bürgerlichen Rechts*), with the effect that its “members” are personally liable for the debts of the informal association.

[4] Fiscal Court of Hessia, 10 November 2016 (4 K 179/16). See Weitemeyer/Kamp, DStR (Deutsches Steuerrecht) 2016, 2623 et seq.

[5] Before 2009, qualifying organizations had to have their seat in Germany only. The change in the regulation is the result of the decision of the European Court of Justice (ECJ) in the so-called Persche Case, named after the German taxpayer who brought the case before the Court.