Germany

International Estate Planning Guide

IBA Private Client Tax Committee

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A. Basic principles

Under the universal succession principle, title and possession transfers automatically at death to the heirs. This comprises unlimited personal liability for the deceased's debts; limitation shall be entitled to be reached using special legal provisions.

An heir may renounce the inheritance by submitting a formal disclaimer within six weeks from the date on which the individual becomes aware of his or her inheritance. If this period expires, the inheritance is considered accepted. If the deceased's last habitual residence was abroad or the heir was abroad at the beginning of the period, the deadline extends to six months.

Legatees named in a will only possess a personal claim against the heirs, limited to the extent of the disposable portion of the estate. They bear no personal liability for the deceased's obligations.

The estate itself is not treated as a separate legal entity under German law.

An appointed executor shall be entitled to have the sole right of disposal regarding the estate.

B. Forced heirship

The German Civil Code provides strict forced heirship rules enabling certain persons to claim a share of an estate in the event that they shall be excluded from succession by the decedent's last will. Based on the German principle of *ordre public*, German courts shall be entitled to apply these forced heirship rules, even in cases where, pursuant to German conflict of laws rules, the general foreign inheritance law of a country without forced heirship rules would apply (eg, English inheritance law).

The descendants and spouse of the decedent shall be entitled to claim an amount of up to half their intestacy share. Please note that the claim shall be for cash only and shall not entitle the (partially) excluded claimant to any property *in specie* that forms part of the estate.

Forced heirship claims amount to a cash value equivalent to the share of the fair market value (FMV) of the estate on intestacy:

1. less the FMV of any *inter vivos* gifts from the decedent to the claimant in the event that, at the time of donation, the donor stipulated that the gift ought to be credited against the mandatory share;

2. plus the FMV of any *inter vivos* gift from the decedent to a third person within the ten-year period prior to the death of the decedent; the addition shall be reduced by one-tenth for each full year that has lapsed after the date of the gift before the time of death; and

3. if the gift was made to the spouse, the ten-year period does not begin before the dissolution of the marriage.

According to a ruling by the German Federal Court of Justice (Bundesgerichtshof) under an earlier version of the relevant law, the ten-year period does not begin until the donor has fully relinquished all economic benefits of the gift. For example, if the donor retains a right of usufruct (*Nießbrauch*), the ten-year period does not start until that right ends.

Potential claimants may waive their forced heirship rights in advance through a formal notarial deed. In some cases, the law requires that the claimant receive independent legal advice for the waiver to be valid.

C. Intestacy

A will is a legal document that regulates an individual's estate after his or her death. Germany normally accepts the formal validity of a will drawn up under the laws of the deceased's habitual residence at the time the will is made or at the time of death. Whether an individual has the personal legal capacity to make the dispositions in a will is generally governed by the law of the deceased's habitual residence.

If there is no valid will at the deceased's death, his or her estate passes under predetermined rules known as intestate succession. If the deceased's habitual residence was abroad, in general, the law of this state of residence applies.

German intestate succession follows the principle of succession *per stirpes*, dividing heirs into successive orders according to their relationship to the deceased. The closest living order excludes all more distant orders.

Order	**Heirs**
1st order	Descendants
2nd order	Parents and their descendants
3rd order	Grandparents and their descendants
4th order	Great-grandparents and their descendants
Further heirs	More distant relatives and descendants
No heirs	The public sector

Within the first three orders, a system of *per stirpes* distribution and lineal heirs applies.

The intestacy rules shall be partially influenced by the matrimonial property regime.

Statutory regime	**Spouse and one child survive**	**Spouse and two children survive**	**Spouse and three children survive**
Community of accrued gain	a. Spouse: one-quarter + one-quarter	a. Spouse: one-quarter + one-quarter	a. Spouse: one-quarter + one-quarter
	b. Child: half	b. Child: one-quarter each	b. Child: one-sixth each
Separate property	a. Spouse: half	a. Spouse: one-third	a. Spouse: one-quarter
	b. Child: half	b. Child: one-third each	b. Child: one-quarter each
Community of property	a. Spouse: one-quarter	a. Spouse: one-quarter	a. Spouse: one-quarter
	b. Child: three-quarters	b. Child: three-eighths each	b. Child: one-quarter each

The children of a predeceased child of the intestate parent take their parent's share.

If only the spouse survives (no children), the surviving spouse shall be entitled to half the estate in the event that relatives of the second order or grandparents of the decedent shall still be alive at that time and shall be entitled to the whole estate in the event that only more distant relatives of the decedent shall be alive.

D. International private law: European Union Succession Regulation

Succession planning for people who take up residences abroad and own assets in various jurisdictions is a very complex subject on the grounds of the diversity of both the substantive inheritance law rules and conflict-of-law rules. The same applies to questions on matrimonial property regimes with cross-border implications.

The EU Succession Regulation (EU-Erbrechtsverordnung), which shall be binding for Germany, in accordance with very few exemptions, harmonises the conflict-of-law rules on cross-border succession of 25 EU Member States. Denmark and Ireland, along with the United Kingdom, Switzerland and other countries that are not part of the EU, are not directly bound by it, but shall be entitled to also be affected, as Germany applies the rules of the EU Succession Regulation vis-à-vis any other state.

From a German perspective, the applicable law on succession shall essentially be the law of the state in which the deceased had his or her habitual residence at the time of death.

Testators shall be entitled to make a choice of law and determine the law applicable to their succession. However, this choice of law shall be restricted to the law of the

nationality of the deceased at the time of making the choice or at the time of death and ought to be made expressly in the form of a disposition of property upon death.

II. Matrimonial regimes

A. *Background*

Since 1 October 2017, same-sex couples in Germany have had the legal right to marry. It is no longer possible to enter into a registered same-sex partnership, but existing partnerships may be converted into marriages upon application.

German family law distinguishes between three marital property regimes.

B. *Statutory marital property regime (Zugewinngemeinschaft)*

The statutory marital property regime is also called community of accrued gain (*Zugewinngemeinschaft*). According to this regime, spouses hold their assets as separate property during their marriage, although there are partial restraints on management and disposal. Upon divorce or death, the gain accrued on the property of the spouses during the marriage shall be shared. Note that the determination of the claim for such division shall be in accordance with a rather complex procedure, which is beyond the scope of this publication. The statutory regime shall be entitled to be modified (within certain limits) by a marriage contract, which shall be implemented by a notarial deed.

By marriage contract, the spouses shall also be entitled to elect one of two contractual matrimonial property regimes, which shall be entitled to be further modified (within certain limits) by contract as well.

C. *Separation of property (Gütertrennung)*

Under this regime, each spouse holds his or her property independently in separate ownership. Management and disposal shall not be in accordance with any limitations deriving from the marital status, and there shall be no equalisation of the accrued gain at the end of the marriage.

D. *Community of property (Gütergemeinschaft)*

Under this regime, all assets become the joint property of the spouses (common property). Immediate joint ownership shall be also presumed for any assets acquired by each spouse during the marriage or the partnership while this property regime is in force. Assets that cannot be transferred by legal transaction do not become common property (*Sondergut*). Within the marriage contract, the spouses may agree to exclude certain

assets from common property (*Vorbehaltsgut*). Assets acquired on inheritance at death or by gift shall also be excluded in the event of being stipulated by the decedent or donor.

E. International private law: EU Matrimonial Property Regime Regulation

The EU recently adopted the EU Matrimonial Property Regime Regulation (EU-Güterrechtsverordnung), which shall be applied by Germany. It regulates all marriages concluded after 29 January 2019 for which national law applies to matters of matrimonial property law. This is relevant for spouses with different nationalities or in the event that the (first) joint residence is abroad after the marriage. The spouses shall be entitled to make a choice of law and determine the law applicable to their matrimonial regime.

In parallel with the EU Matrimonial Property Regime Regulation, the Council of the EU adopted a largely identical regulation, which applies to registered same-sex partnerships. It ought to be noted that only 18 EU Member States apply this regulation. The non-participating EU Member States, as well as non-EU countries, shall not be directly bound by it, but shall be entitled to be affected, as Germany applies the rules of the EU Matrimonial Property Regime Regulation vis-à-vis any other state.

III. Inheritance and gift tax

A. Basic principles

Germany levies a unified inheritance and gift tax known as *Erbschaft- und Schenkungsteuer* (ErbSt). This tax applies to any transfer of property, whether it occurs upon death, by *inter vivos* gift or through a deemed gift. The taxable event is the benefit received by the transferee (the heir, beneficiary or donee), not the estate itself in the case of inheritance. ErbSt is regulated at the federal level, whereas the tax revenue is allocated to the individual German federal states (Bundesländer).

Note that the Federal Constitutional Court is currently reviewing the constitutionality of the German inheritance and gift tax system. A ruling is expected soon. If the Court finds the current system unconstitutional, significant reforms are likely.

For German family foundations, there is a deemed transfer of assets every 30 years, subject to unlimited German inheritance and gift tax (the so-called *Erbersatzsteuer* or substitute inheritance tax). The 30-year period begins on the date of the initial endowment of assets to the foundation.

B. Subject to inheritance and gift tax

1. UNLIMITED LIABILITY

A transfer of worldwide net assets, whether by inheritance, gift or deemed gift, is subject to unlimited German inheritance and gift tax if either the donor/decedent or the beneficiary/donee is tax resident in Germany at the time of transfer.

A person is considered tax resident in Germany if any of the following conditions are met:

1. the individual has a residence or habitual place of abode in Germany;

2. a non-resident German citizen has been tax resident in Germany at any time during the five years preceding the transfer;

3. a non-resident German citizen is employed by a German public-law entity; dependents living in the same household are also considered German tax residents; and

4. a corporation, legal entity or estate has its place of management or registered office in Germany.

The place of residence is defined as a dwelling maintained for more than temporary use, evidenced by objective circumstances. The habitual abode is the location where a person is physically present under circumstances indicating that the stay is not merely temporary. Generally, a stay exceeding six months constitutes a habitual abode. Brief interruptions do not affect this classification.

In cases of dual residency, special rules in double-taxation treaties (DTTs) determine tax residence. For instance, under the Germany–United States Inheritance and Gift Tax Treaty, a dual resident who is a citizen of one contracting state is treated as resident of that state for ten years following a change of residence.

2. LIMITED LIABILITY

Any individual or legal entity who is not resident as aforementioned shall be in accordance with ErbSt only upon the transfer of net property, which shall be regarded as German-situated pursuant to German national tax law. German-situated property means:

1. real estate, agricultural and forestry property situated in Germany;

2. located in Germany;

3. shareholdings in German resident corporations in the event that the shareholder owns (individually or jointly with other persons closely related to the shareholder), directly or indirectly, at least ten per cent of the registered share capital;

4. inventions, designs and topographies recorded in a German register;

5. assets that have been leased to a commercial business operated in Germany;

6. mortgages or any other receivables secured by German-situated real estate or by German-registered ships, except for such receivables for which negotiable bonds have been issued;

7. claims arising from silent partnerships and profit participating loans in the event that the debtor has a residence, his or her habitual place of abode, or, in the case of a corporation, its place of management or legal seat in Germany; and

8. any beneficial interests (eg, right of usufruct) in the assets.

Non-residents are subject to limited German inheritance and gift tax only on German-situated assets, including:

1. real estate and agricultural or forestry property in Germany;

2. assets of a permanent establishment located in Germany;

3. shareholdings of at least ten per cent in a German corporation;

4. patents, designs or topographies registered in Germany;

5. assets leased to a German business;

6. mortgages or receivables secured by German property or ships;

7. claims from silent partnerships or profit-participating loans with German debtors; and

8. beneficial interests (eg, usufruct rights) in the above assets.

Extended limited tax liability may apply to certain non-resident German nationals if they were tax resident within the past ten years, are citizens of Germany, reside in

a low-tax jurisdiction and maintain significant economic interests in Germany under German-controlled foreign corporation (CFC) rules.

C. INHERITANCE TAX RATES

The applicable inheritance or gift tax rate depends on the relationship between the acquirer and the donor or decedent (ie, the tax class) and the value of the taxable acquisition after exemptions and reliefs.

The progressive tax rates are as follows:

Taxable value of the acquisition exceeds (€)	**Acquirer in**		
	Tax Class I (%)	**Tax Class II (%)**	**Tax Class III (%)**
	7	15	30
75,000	11	20	30
300,000	15	25	30
600,000	19	30	30
6m	23	35	50
13m	27	40	50
26m	30	43	50

Assets exempt under a DTT are still added to the taxable base for determining the applicable rate (progression clause). All transfers from the same donor within ten years are aggregated and tax paid earlier is credited.

Recipients outside Tax Class I who inherit or receive business, agricultural or forestry assets, partnership interests or significant corporate shareholdings may qualify for a rate reduction. This reduction equals the difference between the actual rate and the rate applicable to Tax Class I.

Tax Class I includes spouses, children, stepchildren, descendants and parents (inheritance only).

Tax Class II includes parents (by gift), siblings, nephews, nieces, stepparents, in-laws and divorced spouses.

Tax Class III covers all others, including legal entities.

D. Exemptions and reliefs

German inheritance and gift tax law provides multiple exemptions and reliefs, including asset-related, purpose-related and personal allowances. Certain categories of business, agricultural and forestry assets also enjoy special treatment.

1. ASSET AND PURPOSE-RELATED EXEMPTIONS

The following exemptions apply in particular:

Household goods and personal effects up to €41,000, and other movable property up to €12,000 are exempt for persons in Tax Class I. For Classes II and III, the exemption limit is €12,000. Cultural assets, such as art collections, archives or libraries of public interest, may receive 60–85 per cent exemptions or even total exemption under certain conditions. Family homes are tax-free when gifted between spouses or transferred upon death if used personally for ten years. Children and stepchildren may inherit tax-free if the home does not exceed 200 square metres.

2. BUSINESS ASSETS, AGRICULTURAL OR FORESTRY

A tax exemption shall be granted for certain tax-privileged assets in transfers of agricultural, forestry or other businesses, interests in trading or professional partnerships, or substantial shareholdings (direct participation of more than 25 per cent of the registered share capital) in corporations' resident in Germany, the EU or the European Economic Area (EEA) (in the following eligible assets). The privilege amounts to 85 per cent or 100 per cent of the FMV of the tax-privileged assets. For smaller business properties, an allowance of up to €150,000 shall be granted additionally to the privilege of 85 per cent on the tax-privileged assets. Under certain conditions, which require long-term tax planning, family businesses may apply for a further 30 per cent reduction of the tax base.

To gain the 85 per cent privilege, the heir or donee shall keep the eligible assets during a five-year period after the inheritance or donation, and the direct wage costs during this period shall amount to 400 per cent of the average wage costs in the last five years before the tax accrues. To gain the privilege of 100 per cent, the assets shall be kept for seven years and the direct wage costs during this seven-year period shall amount to 700 per cent. Facilitations for small businesses apply.

If the prerequisites for tax-privileged treatment shall no longer be met, the 85 per cent or 100 per cent privileges shall be forfeited with retroactive effect on a pro rata basis that triggers supplementary taxation. However, the 85 per cent privilege shall be only granted in the event that eligible assets shall be transferred and the ratio of the value of non-privileged, non-operating assets (*Verwaltungsvermögen*) to the

total net value of the eligible assets (*Verwaltungsvermögensquote*) at the time of the transfer does not exceed 90 per cent. The 100 per cent privilege shall be only granted based on an additional test, pursuant to which the ratio of non-privileged, non-operating assets after certain setoffs shall not be entitled to exceed 20 per cent of the net value of the eligible assets. Furthermore, the privilege of 85 per cent or 100 per cent shall not be applied in view of non-operating assets (*Verwaltungsvermögen*) that have been kept for a period of less than two years (*Junges Verwaltungsvermögen*).

Tax-privileged assets, in principle, comprise the following assets, as long as they shall not be expressly defined as non-operating assets (see below):

1. operating assets in Germany (individual companies or interests in partnerships) or foreign operating assets that serve a permanent establishment in the EU and EEA;

2. proportionate operating assets of German corporations and corporations in the EU and EEA in which the decedent or donor held a direct share of more than 25 per cent or, in the event that these are shareholdings of less than 25 per cent, in the event that the shares shall be in accordance with a pooling agreement and may only be disposed of pursuant to certain rules set out in such a pooling agreement or may only be transferred to other shareholders being or becoming pool members upon the share transfer, and the voting rights vis-à-vis shareholders not bound by the pooling agreement may only be exercised unanimously; and

3. German operating assets of agricultural or forestry businesses, as well as corresponding foreign assets that serve a permanent establishment in the EU and EEA.

Non-operating assets (*Verwaltungsvermögen*) include the following assets, if they exceed ten per cent of the eligible assets:

1. real estate, portions of real estate, rights equivalent to real estate rights and buildings provided to third parties for use;

2. shares of 25 per cent or less in a subsidiary corporation;

3. collections of art, art items, precious metals, precious stones (gems), coin collections, libraries, archives, scientific collections and other items serving a private lifestyle;

4. securities and comparable receivables; and

5. the FMV of the amount of currency, (bank) money and other claims in the event that it exceeds 15 per cent of the FMV of business assets after the deduction of liabilities (regulation shall not be applicable for finance companies within groups and for certain assets of other financial institutions).

In the case of an acquisition by death, non-operating assets may become privileged assets retroactively based on reinvestment into privileged assets within two years in the event that this investment shall be based on an investment plan that existed at the time of death.

The exemption shall be, in general, limited to transfers from one donor (decedent) to one acquirer with a total value of €26m in a rolling ten-year period. Acquisitions totalling more than €26m shall be in accordance with a decreasing exemption reaching zero per cent at an acquisition value of €90m.

Alternatively, for acquisitions above a value of €26m, the acquirer may file for an assessment of 'need for tax relief', in which he or she only has to pay inheritance or gift tax in the amount of 50 per cent of the non-privileged assets acquired plus 50 per cent of the assets owned by him or her before the acquisition, which would not be in accordance with a tax privilege in the event that transferred. However, in the case of a further acquisition by gift or inheritance of non-privileged assets within the next ten years, relief shall be cancelled. Then a new filing for relief shall be possible, considering an additional 50 per cent of the non-privileged assets acquired by the further gift or inheritance.

3. PERSONAL EXEMPTIONS

In addition to asset- and purpose-related exemptions, personal allowances shall be available upon taxable acquisitions. These allowances shall be granted only once within a rolling ten-year period in each transferor/transferee relationship.

Personal allowances include €500,000 for spouses; €400,000 for children; €200,000 for grandchildren; €100,000 for other Class I relatives; and €20,000 for Classes II and III. Additional allowances are €256,000 for surviving spouses (less pensions) and €52,000 for children under 27 (age-adjusted).

E. Filing procedures

Any transfer of property subject to inheritance or gift tax must be reported to the German tax authorities within three months. The recipient is primarily responsible, though donors must also report *inter vivos* gifts. Where the gift is notarised in Germany, the notary files the notification automatically.

The tax office may request a formal return from any involved party, granting at least one month to file (extensions are possible). Tax liability arises upon receipt of the assessment notice, with payment due one month thereafter.

Deferrals may be granted: up to seven years (interest-free in the first year) for agricultural, forestry or business assets, and up to ten years (also interest-free in the first year) for residential property used as housing.

F. Assessments and valuations

The basis for inheritance and gift tax is the FMV of the assets, determined under the German Valuation Act (Bewertungsgesetz or BewG). Different methods apply depending on the asset type.

1. REAL ESTATE

For real estate, undeveloped land is valued using the land area and standard land values (*Bodenrichtwerte*). Developed properties are valued via:

1. sales comparison (for residential and comparable properties);
2. capitalised earnings (for rental, commercial and mixed-use properties); or
3. asset value approach (when no market or income data is available).

i. Sales comparison approach (for apartments, part-ownership, semi-detached and detached houses)

The sales comparison approach involves determining the market value of real estate based on actual purchase prices paid for real estate that shall be comparable in terms of location, use, layout, type and age of the building.

ii. Capitalised earnings method (for rented residential property, commercial and mixed-use real estate)

The value comprises both the value calculated for the buildings based on the earnings (building earnings value) and land value, which shall be calculated in the same way as for undeveloped real estate. The building earnings value shall be calculated using the net annual rent less operating costs and the interest on the real estate value multiplied by a factor that depends on the property rate and remaining useful life.

iii. Asset value approach (for other built-up property, and in the absence of comparative values for apartments, part-ownership, semi-detached and detached houses, and commercial and mixed-use real estate)

Using the asset value approach, the value comprises the standardised production costs for the installation on the real estate, as well as the real estate value.

2. BUSINESS ASSETS AND COMPANY SHARES

Business assets are valued uniformly regardless of legal form. Listed shares use stock prices, whereas unlisted shares and businesses use a sales comparison or capitalised earnings methods. Under the simplified capitalised earnings method, business value equals average earnings (over three fiscal years) multiplied by a capitalisation factor (13.75), adjusted periodically. If this value is below the net asset value, the minimum taxable value is the net FMV of assets minus liabilities.

i. Sales comparison approach (for apartments, part-ownership, semi-detached and detached houses)

The sales comparison approach involves determining the market value of real estate based on actual purchase prices paid for real estate that shall be comparable in terms of location, use, layout, type and age of the building.

ii. Capitalised earnings method

If there are no sales within the last year before the date of taxation, the FMV must be estimated by considering earnings prospects or another recognised method that is also customary in ordinary business for non-tax matters.

iii. Capitalised earnings method (for rented residential property, commercial and mixed-use real estate)

The value comprises both the value calculated for buildings based on the earnings (building earnings value) and land value, which shall be calculated in the same way as for undeveloped real estate. The building earnings value shall be calculated using the net annual rent less operating costs and the interest on the real estate value multiplied by a factor that depends on the property rate and remaining useful life.

iv. Asset value approach (for other built-up property, and in the absence of comparative values for apartments, part-ownership, semi-detached and detached houses, and commercial and mixed-use real estate)

Using the asset value approach, the value comprises the standardised production costs for the installation on the real estate, as well as the real estate value.

G. Foundations and trusts

1. FOUNDATIONS

1. Basic principles

According to German civil law, a foundation (*Stiftung*) is an organisation whose assets are dedicated to promoting a special purpose set by the founder. Traditionally, the capital of the foundation needs to be preserved and only income shall be spent for the defined purpose. Alternatively, the foundation may be set up to consume its assets within a predefined period of at least ten years.

A foundation has statutes regulating its organisational structure and codifying the purposes set by the founder. A foundation has no members or shareholders and shall be formed as a legal entity.

A foundation is formed as a legal entity by way of a unilateral declaration of intent (*Stiftungsgeschäft*) of the founder and the approval of the supervising authority (*Stiftungsaufsichtsbehörde*) of the federal state where the foundation is located. The founder declares the establishment of the foundation, sets the statutes and endows the original capitalisation. The statutes set out the purpose and regulations for the organisation of the foundation.

2. Taxation of the foundation

The foundation itself shall be taxed in accordance with tax law. Charitable foundations exclusively pursue special charitable purposes pursuant to the German General Fiscal Code and enjoy tax shelter status. If the only purpose of the foundation is the provision of benefits to the founder's family members (*Familienstiftung*), the foundation shall not be tax privileged.

3. Taxation of the endowment with capital

The endowment with capital of a foundation, either by the first endowment or an external donation, shall be regarded as a gift on the grounds that the founder or donor does not receive anything in return (eg, a share or membership right). If a foundation inherits capital, the inheritance shall be regarded as an acquisition by reason of death. Such endowments shall be generally in accordance with inheritance and gift tax, provided the foundation is factually and legally able to freely dispose of the assets endowed to it by the founder.

If the endowment with capital is in accordance with inheritance and gift tax, the higher tax rate of Tax Class III shall be applicable. For a foundation established mainly to foster the interests of one family or specific families in Germany, Tax Class I or Tax Class II applies, depending on the degree of relationship of the furthermost beneficiary and the founder pursuant to the deed of foundation. In addition, these foundations (*Familienstiftung*) shall be in accordance with a special inheritance tax every 30 years (*Erbersatzsteuer*).

The endowment with capital of a charitable foundation in Germany by the founder or donor is exempt from inheritance and gift tax, provided the foundation maintains its charitable status for at least ten years. Under further prerequisites, this may also apply to foreign charitable foundations.

4. Taxation of the founder

Donations made to German charitable foundations shall be tax deductible up to 20 per cent of the taxable income of the donor or up to four per cent of the total of his or her sales, wages and salaries, always within the respective tax year. The precondition for a tax deduction of donations shall be that the income of the donor shall be in accordance with income tax and assessed to taxation. Under further prerequisites, this may also apply to EU/EEA charitable foundations.

Donations of individuals to the capital reserve (*Vermögensstock*) of a charitable foundation shall be entitled to be deductible for income and trade tax purposes up to a maximum of €1m in addition to the general tax deduction for donations. Spouses who made an endowment or donation to a charitable foundation and who shall be assessed jointly may together deduct up to €2m for donations. Donations or endowments to the capital reserve of a charitable foundation may be deducted in the year of payment or in the nine years following. During this ten-year period, the maximum tax deduction of €1m (€2m for spouses) may only be requested once.

5. Taxation of beneficiaries

The provision of benefits to beneficiaries (*Destinatäre*) of the foundation shall be in accordance with income tax for the beneficiaries. If the benefits shall be, from an economic point of view, comparable to dividends distributed by a corporation, they shall be in accordance with a flat rate withholding tax (*Abgeltungssteuer*) for the beneficiaries (tax rate of 25 per cent).

Furthermore, the distribution of the funds of the foundation when it is dissolved is subject to German gift tax.

2. TRUSTS

1. Basic principles

German civil law does not provide for the concept of a trust, nor has Germany ratified the Hague Convention on the Law Applicable to Trusts and on Their Recognition of 20 October 1984. Consequently, trusts are not recognised under German civil law.

For instance, a foreign trust established by a will that holds property located in Germany would be invalid under German civil law. In such cases, the trust is recharacterised as the legal arrangement under German law that most closely resembles its substantive provisions (eg, a fiduciary arrangement, foundation, pool of assets, nominee structure or the execution of a will).

2. Taxation of trusts

For tax purposes, the German tax authorities classify trusts primarily based on the following criteria:

- Revocable trust: The transfer of ownership to the trust is disregarded. The income and assets remain attributable and taxable to the settler; and

- Irrevocable discretionary trust: The transfer of ownership to the trust is recognised. The trust itself becomes the taxable entity, and its income and assets are subject to taxation accordingly.

3. Taxation of the endowment with capital

The German tax treatment of a trust established under foreign law depends on the economic substance of the arrangement. The key criterion for determining whether the establishment of a trust constitutes a taxable transfer under German law is whether the transaction involves a final and irrevocable divestment of ownership by the settler.

A transfer of assets to a trust is subject to German gift tax only if the trust is legally and factually entitled to freely dispose of the assets.

According to the German Federal Fiscal Court (Bundesfinanzhof), this assessment must be based solely on the civil law position. The economic ownership of the assets is not relevant. Therefore, if the settler retains extensive control rights under the trust deed (specifically, the rights to amend the trust instrument at any time, revoke the trust at any time or issue binding instructions to the trustee), then the

structure is considered a revocable trust and no taxable gift is deemed to have occurred.

Transfers to a foreign trust that are subject to German gift tax fall under Tax Class III.

4. Taxation of beneficiaries

The establishment of a foreign trust may give rise to income tax consequences for German residents. Specific risks arise, particularly with pre-immigration trusts, as follows:

- Revocable trusts: If the settler can revoke the trust or reclaim the assets, and retains substantial influence over the trustee's investment decisions, the trust is treated as a nominee arrangement. Consequently, all income and assets of the trust are attributed to the settler and subject to German income tax;

- Irrevocable discretionary trusts with family beneficiaries: If more than 50 per cent of the beneficiaries or remaindermen are relatives of the settler, the trust is treated as a foreign family foundation under German CFC rules. Accordingly, if the settler is tax resident in Germany, the trust's income is attributed directly to the settler, regardless of whether distributions are made;

- Non-resident settler, German-resident beneficiaries: Where the settler is non-resident but a beneficiary or remainderman is resident in Germany, the trust's income and assets are proportionally attributed to such a beneficiary or remainderman and are taxable in Germany, irrespective of actual distributions;

- Underlying companies: If the trust (alone or with related parties) controls a lower-tier company, the income of that company may also be attributed proportionally to the settler or beneficiaries under the German CFC regime;

- EU/EEA exception: The above attribution rules generally do not apply if the trust or its management is domiciled in an EU/EEA Member State. However, beneficiaries must provide evidence that they have been legally and factually deprived of control over the trust assets; and

- Distributions: Distributions from an irrevocable trust to German-resident beneficiaries are subject to German income tax, unless already taxed under the CFC regime, which takes precedence. Furthermore, distribution upon the dissolution of the trust may also trigger German gift tax.

To achieve similar economic objectives while complying with German law, alternative civil-law mechanisms may be employed instead of foreign trusts. These include:

- Provisional and reversionary heirs (*Vor- und Nacherbschaft*): For example, a testator may appoint the spouse as the provisional heir (with broad lifetime rights) and the children as reversionary heirs (acquiring full ownership upon the spouse's death). This structure can replicate the economic effect of a trust succession arrangement; and

- Usufruct/life interest (*Nießbrauch*): The donor may retain the usufruct while transferring ownership of the asset, or vice versa. In such cases, only the reduced value (asset value less the usufruct value) is subject to German inheritance or gift tax. The termination of a usufruct upon the usufructuary's death does not constitute a taxable event.

To summarise, Germany does not recognise the legal concept of a trust. For tax purposes, the classification of a foreign trust depends primarily on the settler's retained rights and the trust's degree of independence. Revocable trusts are generally transparent, while irrevocable trusts may be treated as separate taxable entities or as family foundations under the CFC rules. Where appropriate, civil-law mechanisms such as *Vor- und Nacherbschaft* or *Nießbrauch* can achieve similar economic outcomes without adverse legal or tax implications.

H. Estate tax treaties

1. UNILATERAL RULES

Foreign tax on the acquisition of certain foreign assets by death or gift, which is comparable to German inheritance and gift tax, may be credited against the ErbSt incurred on the acquisition of these assets.

2. DOUBLE-TAXATION TREATIES

Germany has concluded estate, inheritance and gift tax treaties with the following countries: Denmark, France, Greece (applies only to inheritance tax regarding movable property), Sweden, Switzerland (applies only to inheritance tax and the corresponding application to gift tax for business assets, in individual cases; application upon request is possible) and the US.

I. Real estate transfer tax

The direct or indirect transfer of German real estate shall essentially be in accordance with a real estate transfer tax of between 3.5 per cent and 6.5 per cent, depending on

the federal state in which the real estate is located. However, a transfer by inheritance or gift is usually exempt from real estate transfer tax.