



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Germany: Private Client

This country-specific Q&A provides an overview to private client law in Germany.

It will cover taxes, succession laws, wills, trusts and their structures.

This Q&A is part of the global guide to Private Client. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/private-client/>

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1. **Which factors bring an individual within the scope of tax on income and capital gains?**

Tax liability in Germany is determined by the concept of residence. The concept of domicile, however, is not recognised in Germany. An individual is a German resident if he or she has either a permanent home (accommodation permanently available to the individual which is used at least from time to time) or a habitual abode in Germany. The resident individual's worldwide income and gains are subject to German income tax.

2. What are the taxes and rates of tax to which an individual is subject in respect of income and capital gains and, in relation to those taxes, when does the tax year start and end, and when must tax returns be submitted and tax paid?

Income and gains are generally taxed at a progressive income tax rate, ranging from 14 to 45%. In addition, a solidarity surcharge of 5.5% of the tax due is levied, which is payable to finance German reunification. However, income and gains from privately held capital investments are subject to a flat rate of 25% plus the solidarity surcharge. The tax year for individuals is the calendar year. Tax returns must be filed by the end of July of the following year (a prolongation of the term is possible) and the tax becomes due one month after its assessment by the fiscal authority. However, a withholding tax may apply or income tax retainer payments may be assessed which may become due in instalments over the year (e.g. with respect to income from self-employment). It should be noted that shareholdings of at least 1% in corporations (German or other) which are held by individuals who have been resident in Germany for more than 10 years may be subject to a deemed disposal at market value if the individual gives up his or her German residence or if the potential German taxation right with respect to a share sale will be infringed by another event, e.g. a transfer of the relevant shares to a non-German resident on death (exit taxation).

3. Are withholding taxes relevant to individuals and, if so, how, in what circumstances and at what rates do they apply?

A withholding tax of 26,375% (+ church tax where applicable) will apply to dividends paid by German corporations and income or gains from capital investments in custody with a German bank. Also salaries for dependent services are subject to withholding tax at the rate of the prospective individual tax rate. Where a non-resident receives income from German sources, withholding taxes may apply in certain other cases (e.g. income from licensing or board memberships).

4. Is there a wealth tax and, if so, which factors bring an individual within the scope of that tax, at what rate or rates is it charged, and when must tax returns be submitted and tax paid?

There is currently no wealth tax in Germany.

5. Is tax charged on death or on gifts by individuals and, if so, which factors cause the tax to apply, when must a tax return be submitted, and at what rate, by whom and when must the tax be paid?

Transfers of worldwide assets on death or on gifts are subject to German inheritance or gift tax if at least one of the individuals (transferor or transferee) is resident in Germany. If none of them is a German resident, German inheritance or gift tax may apply to the extent as certain assets located in Germany are transferred (e.g. German real estate, business property which belongs to a permanent establishment in Germany, shares in German companies). A tax treaty may provide shelter from German taxation in certain cases. The applicable tax rate ranges between 7-50 % depending on the value of the assets received and the relationship between the parties involved. Notice on a taxable transfer must be given to the competent authority within 3 months after the transfer. A tax return will then have to be filed within a term to be determined by the authority and the tax will usually become due 30 days after the tax has been assessed by the authority. In general, the tax is to be paid by the transferee.

6. Are tax reliefs available on gifts (either during the donor's lifetime or on death) to a spouse, civil partner, or to any other relation, or of particular kinds of assets (eg business or agricultural assets), and how do any such reliefs apply?

There are personal allowances available for transfers on death or by gift which are available every 10 years. E.g. the allowance for spouses is € 500.000, for children € 400.000, for grandchildren € 200.000. There are also allowances for certain assets that may apply, e.g. for the transfer of the family home. Business property relief may apply with up to 100% for transfers of business (including shareholdings) or agricultural assets. However, this is subject to various conditions to be tested in the individual case.

7. Do the tax laws encourage gifts (either during the donor's lifetime or on death) to a charity, public foundation or similar entity, and how do the relevant tax rules apply?

Transfers on death or by gift to charities etc. are exempt from inheritance or gift tax.

However, gratuitous transfers to foreign charitable entities are only tax free if certain conditions are met which has to be confirmed in each individual case.

8. How is real property situated in the jurisdiction taxed, in particular where it is owned by an individual who has no connection with the jurisdiction other than ownership of property there?

Generally, a sale of German real property held by a non-resident as a private asset will only be taxable if the holding period does not exceed 10 years. Rental income from the property will be taxable in Germany as well. Also German inheritance or gift tax may apply with respect to the property (see No. 5 above). Furthermore, an annual property tax may be due (on the basis of an assessed uniform value of the property) at the discretion of the relevant local authority. A transfer of German real estate or a transfer of shares (at least 95%) in a company holding German real estate may trigger real estate transfer tax at 3,5 - 6,5%.

9. Are taxes other than those described above imposed on individuals and, if so, how do they apply?

There is VAT (19%, in general) on goods and services. Members of the catholic or evangelic church will also be subject to church tax (about 9% of the income tax).

10. Is there an advantageous tax regime for individuals who have recently arrived in or are only partially connected with the jurisdiction?

There are no special tax rules for arrivers.

11. What steps might an individual be advised to consider before establishing residence in (or becoming otherwise connected for tax purposes with) the jurisdiction?

As there's no automatic step-up for assets held by an individual moving to Germany (safe for the case of shareholdings in corporations of at least 1% if the state of

expatriation levies an exit tax), it may be advisable to check the options of a tax efficient step up before becoming tax resident in Germany. As German gift tax will apply once the donor or donee has become tax resident, it should also be considered to make inter-vivos gifts before moving. Furthermore, as Germany has quite unfavourable rules on the taxation of settlors or beneficiaries of foreign trusts, also trusts structures should be checked with respect to the potential tax consequences for German residents.

12. What are the main rules of succession, and what are the scope and effect of any rules of forced heirship?

The main rules of succession are (1.) "Vonselbsterwerb" which means, that the assets of the deceased's pass to the heir(s) of the deceased automatically upon his death, and (2.) "Gesamtrechtsnachfolge" (universal succession) which means, that the estate of the deceased (except for shares in a partnership) passes to his heirs "as a whole".

In case of intestacy, the deceased's estate passes to his spouse (or civil partner) and his relatives. The share of the spouse depends on the applicable matrimonial regime (see question 13). The shares of the relatives are determined as follows: Children and - as a substitute - their descendants are heirs of the first degree, parents and - as a substitute - their descendants are heirs of the second degree, grandparents and - as a substitute - their descendants are heirs of the third degree and so on. Heirs of a lower degree exclude heirs of a higher degree. Heirs of the same degree inherit in equal shares (succession per stirpes).

There is a forced heirship regime under which the descendants, the spouse (or civil partner) and the parents of the deceased have the right to a compulsory portion in cash. The compulsory share is 50% of the value of the individual's share in case of intestacy.

13. Is there a special regime for matrimonial property or the property of a civil partnership, and how does that regime affect succession?

German Family Law provides for three different matrimonial property regimes: the community of surplus ("Zugewinnngemeinschaft"), the separation of property ("Gütertrennung") and the community of property ("Gütergemeinschaft"). In absence of a prenuptial agreement the rules of the community of surplus apply. In this case the

surviving spouse (or civil partner) inherits

- 50% of the estate if relatives of the first degree survive and
- 75% if (only) relatives of the second degree or grandparents survive.

In case of community of property the surviving spouse (or civil partner) receives

- 25% of the estate if relatives of the first degree survive and
- 50% of the estate if (only) relatives of the second degree or grandparents survive.

In case of separation of property the surviving spouse and each child inherit in equal shares if one or two children of the deceased are entitled as heirs on intestacy together with the surviving spouse.

14. **What factors cause succession laws to apply on the death of an individual?**

According to the EU Succession Regulation the inheritance law applicable to an individual's succession is determined by his last habitual residence if (1.) the deceased is not manifestly more closely connected to another jurisdiction and (2.) if he has not opted for the succession law of his citizenship.

15. **How does the jurisdiction deal with conflict between its succession laws and those of another jurisdiction with which the deceased was connected or in which the deceased owned property?**

A renvoi to German inheritance law by the conflict of law rules of another jurisdiction is accepted according to the EU Succession Regulation.

In respect to Turkey, Iran and the Russian Federation and other successor states of the Soviet Union bilateral conventions with individual conflict of laws rules apply.

In what circumstances should an individual make a Will, what are the consequences of dying without having made a Will, and what are the formal requirements for making a Will?

An individual should make a Will if he or she doesn't want the intestacy rules (of the state of his last habitual residence) to apply. Regarding German intestacy rules see questions 12 and 13. Regarding the possibility to opt for the succession law of another jurisdiction see question 14.

A testamentary disposition (last Will, joint Will, inheritance contract) in the form of a notarial deed might avoid the necessity of a certificate of inheritance. Such a certificate is generally speaking necessary in order to adapt the land registry and to prove the succession e.g. to a bank.

According to German law there are basically two valid forms of Wills: the holographic and the public Will. Whereas the holographic Will has to be handwritten and signed by the testator, the public Will is a notarial deed. Neither form of Will requires the presence of a witness.

Furthermore, the testator can enter into a contract of succession with another person or establish a joint Will with his spouse (or civil partner). A contract of succession has to meet the same formal requirements as the public Will.

Germany recognises the HCCH Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961.

17. How is the estate of a deceased individual administered and who is responsible for collecting in assets, paying debts, and distributing to beneficiaries?

In the absence of an executor (see below), the estate is administered by the heir or the community of heirs ("Erbengemeinschaft"), if there is more than one. In this case the heir(s) are responsible for all actions mentioned above.

16.

If an executor has been appointed by the testator, all rights and duties concerning the estate are exercised by him. There are only few exceptions.

18. Do the laws allow individuals to create trusts, private foundations, family companies, family partnerships or similar structures to hold, administer and regulate succession to private family wealth and, if so, which structures are most commonly or advantageously used?

German laws allow the creation of private foundations (“Familienstiftung”), family companies (“Familiengesellschaften i.F.v. Kapitalgesellschaften”) and family partnerships (“Familiengesellschaften i.F.v. Personengesellschaften”). Trusts as they are understood in common-law jurisdictions are not known to German law.

Family companies and family partnerships are very common as they are an adequate means to implement a family corporate governance. A particular advantage of private foundations is the possibility to shelter the assets from claims of creditors of the settlor or beneficiaries (see below question 23).

19. How is any such structure constituted, what are the main rules that govern it, is there any requirement for registration with or disclosure to any authority or regulator, and what information about the structure is available to the public?

A private foundation needs to be approved by the foundation supervisory authority (“Stiftungsaufsicht”). It is subject to the rules established in its articles and certain statutory provisions. The beneficial owners of such a foundation need to be registered in the transparency register which has been established on 1 October 2017 and is open to any individual with a legitimate interest.

Family companies and partnerships need to be registered with the commercial register. However, the legal regimes are different: Generally speaking, the legal regime of a partnership is more flexible compared to the one of a company. In contrast to family partnerships and private foundations the articles of association of family companies need to be notarised and are available to the public through the commercial register.

20. **How are such structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?**

Non-charitable foundations with German residence are subject to German corporate tax (about 15,8% including the solidarity surcharge). However, a participation exemption may apply for shareholdings in corporations. Transfers of the founders to the foundation may trigger gift tax (however, business property relief may apply). A distribution of income to beneficiaries will be taxed just like a dividend; withholding tax will apply. There is no special tax regime for family companies or partnerships. The taxation of the entity and its shareholders/partners will depend on various factors, including the legal form of the entity and the assets held in the individual case.

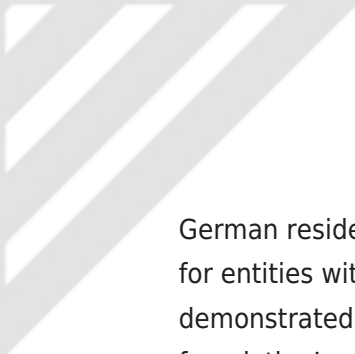
21. **Are foreign trusts, private foundations, etc recognised?**

Foreign trusts are not recognised by German law. Furthermore, Germany did not ratify the HCCH Convention on the Law applicable to Trusts and on their Recognition 1985. As a consequence, German property law does not recognise the transfer of assets located in Germany to a foreign trust. It depends on the terms of the trust whether those assets are considered to remain the property of the settlor or the trustee for German civil law and tax law purposes.

Foreign private foundations are recognised in Germany if their structure is comparable to the structure of a German foundation as provided for in the German civil code.

22. **How are such foreign structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?**

The tax treatment very much depends on the individual structure. If the settlor or beneficiaries have significant control over the foreign trust's or foundation's assets, the entity may be completely disregarded for German tax purposes and assets, income and gains may be directly attributed to the controlling individual(s) for all tax purposes. In case of a fully discretionary and irrevocable structure without significant control of the settlor or beneficiaries, the foreign entity will generally be recognized for German tax purposes. German gift tax may apply to transfers to and from this entity in case German resident or property located in Germany is involved (see above No. 5). Accumulated income or gains of the entity will generally be attributed to a settlor or beneficiary with



German residence according to his or her “share”. However, there is an escape clause for entities within the European Union or European Economic Area if it can be demonstrated that the settlor and beneficiaries have no control over the trust’s or foundation’s assets. Distributions at least of income or gains (yet unclear whether this would also apply to a distribution of assets) to beneficiaries with German residence may also trigger German income tax (if the relevant income or gains have not been attributed already as the escape clause did not apply).

23. To what extent can trusts, private foundations, etc be used to shelter assets from the creditors of a settlor or beneficiary of the structure?

An irrevocable trust that has been effectively formed under foreign trust law can shelter assets that are governed by foreign property law and that have been transferred to the trust from claims of the settlor’s or beneficiary’s creditors.

A German private foundation is an adequate means to shelter assets from the creditors of the settlor or a beneficiary as the foundation is the only legal owner of its assets and neither the settlor nor the beneficiaries hold any property interests in the assets of the foundation or the foundation itself. Thus, assets held by the foundation are completely protected from claims by spouses or individuals that have the right to a compulsory portion in cash once those assets have been transferred to the foundation more than ten years ago.

24. What provision can be made to hold and manage assets for minor children and grandchildren?

According to German law minors can hold assets regardless of their age. However, it is their parents who manage their assets on their behalf. Though, in certain cases a legal guardian needs to be appointed, for example when at least one parent or a close relative is a party of a contract that does not only provide legal benefits for the minor. Furthermore, if a contract establishes an economically considerable obligation of the minor (e.g. sale or purchase of real property, of business or shares) it has to be approved by the family court.

In case of inheritance the testator can name in his Will a person other than the minor’s

parents to administer those assets that the minor will receive by way of succession. Instead the testator may appoint an executor for his estate who would manage the assets for minors until they reach a certain age.

25. Are individuals advised to create documents or take other steps in view of their possible mental incapacity and, if so, what are the main features of the advisable arrangements?

In case an individual loses his legal capacity, a guardian is appointed by the court. The guardian represents the individual's interests and is supervised by the court.

It is highly recommended that an individual stipulates both a Patient Decree ("Patientenverfügung") and a power of attorney ("Vorsorgevollmacht"). Thus, the appointment of a guardian that is a third person can be avoided as in this case the guardian chosen by the individual will be appointed by the court.

26. What forms of charitable trust, charitable company, or philanthropic foundation are commonly established by individuals, and how is this done?

Charitable foundations ("gemeinnützige Stiftungen") in the meaning of the German civil code are quite common. They have to be approved by the foundation supervisory authority ("Stiftungsaufsicht") and constitute a legal entity. As such they realise their altruistic purpose chosen by the settlor. In contrast to charitable foundations the legal regime of charitable companies is much less rigid. For example, the terms of a charitable company can be changed much easier than the articles of a charitable foundation.

27. What important legislative changes do you anticipate so far as they affect your advice to private clients?

The disposition on German foundation law will be revised. Presumably, the legal regime will be more liberal. However, a legislative proposal has not yet been issued. It isn't expected before summer/autumn 2018.