

# Private Client 2020

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# Private Client 2020

**Contributing editors****Anthony Thompson and Nicole Aubin-Parvu****Forsters LLP**

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Private Client*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Guernsey and Jersey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Anthony Thompson and Nicole Aubin-Parvu of Forsters LLP, for their continued assistance with this volume.



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# Germany

Andreas Richter and Katharina Hemmen

P+P Pöllath + Partners

## TAX

### Residence and domicile

#### 1 | How does an individual become taxable in your jurisdiction?

Tax liability in Germany is determined by the concept of residence. An individual is a German resident for tax purposes if he or she has either a permanent home or a habitual abode in Germany. Tax residence is assessed using objective criteria. The concept of domicile is not recognised in Germany.

The worldwide income and assets of individuals whose tax residence is located in Germany (hereinafter referred to as residents) are subject to:

- income tax (see questions 2 and 3); and
- inheritance and gift tax (IGT) (see questions 4 and 5).

### Income

#### 2 | What, if any, taxes apply to an individual's income?

An individual's income is subject to income tax. Income tax covers income from seven sources, as follows:

- income from agriculture or forestry;
- income from trade or business;
- income from the self-employment;
- income from employment (salaries and wages);
- income from capital investments;
- income from letting property, especially real property or groups of assets; and
- other items of income, for example, income from leases of movable assets.

Income is generally taxed at a progressive tax rate, ranging from 14 to 45 per cent. In addition, a solidarity surcharge of 5.5 per cent of the tax due is still being levied. This surcharge was intended to finance the German reunification of 1990. Recently, the government decided on the gradual abolition of the surcharge, with the aim to have it completely abolished by 2021; however, high-income earners will not benefit from this tax relief.

Income from capital investments is subject to withholding tax at a flat rate of 25 per cent plus the solidarity surcharge (a total of 26.375 per cent plus church tax, if any).

### Capital gains

#### 3 | What, if any, taxes apply to an individual's capital gains?

An individual's capital gains are subject to income tax (see question 2).

### Lifetime gifts

#### 4 | What, if any, taxes apply if an individual makes lifetime gifts?

Lifetime gifts are taxable in accordance with transfers on death under the German Inheritance and Gift Tax Act (see question 5).

### Inheritance

#### 5 | What, if any, taxes apply to an individual's transfers on death and to his or her estate following death?

Each transferee is generally liable for IGT on the value of the assets transferred, regardless of his or her personal wealth. The tax rates range from 7 to 50 per cent, depending on the relationship between the transferor and the transferee, and the value of the share of the estate received. Spouses and descendants pay IGT at a rate of 7 to 30 per cent. Transfers between most other relatives are taxed at a rate of 15 to 43 per cent. Between unrelated persons, the applicable tax rate is either 30 per cent or 50 per cent for a value of more than €6 million.

The following tax-free allowances apply:

- spouses receive a personal allowance of up to €500,000 and a maintenance allowance of up to a maximum of €256,000; and
- descendants receive a personal allowance of up to €400,000 and an age-dependent maintenance allowance of up to €52,000.

There is no IGT on a lifetime transfer of the family home to a spouse, nor on an equalisation of the gains accrued during the course of a marriage where the statutory matrimonial property regime of the community of surplus (as provided for by the German matrimonial regime or a similar foreign regime) applies.

### Real property

#### 6 | What, if any, taxes apply to an individual's real property?

A real estate transfer tax with differing regional rates ranging from 3.5 to 6.5 per cent applies to:

- the acquisition of real property; and
- the acquisition of a substantial shareholding (at least 95 per cent) in a company holding real property.

In addition, an annual property tax may be due on the value of real property (on the basis of an assessed uniform value that is often less than the fair value of the property) at the discretion of the relevant local authority. Although the assessed uniform value is quite low, the property tax is becoming more and more significant because of the continuously rising rates of assessment. Furthermore, the German Federal Constitutional Court recently held that the property values that were last assessed in 1964 or 1935 are inconsistent with the constitutional principle of equality of taxation. Therefore, in June 2019, the German government sent a draft bill to the German parliament, which is supposed to change how the

assessment of property values will be conducted by local authorities from 1 January 2022 onwards. On 18 October 2019, the draft was accepted by the German parliament. According to the bill, the federal states will have the possibility of regulating the property assessment individually by implementing their own assessment methods and criteria. This could lead to very different tax burdens, including significant increases in the real estate tax burden, in different parts of the country. The new real estate tax law is supposed to come into effect on 1 January 2025.

Income from real property is subject to income tax at the standard rates (see question 2).

### Non-cash assets

**7** | What, if any, taxes apply on the import or export, for personal use and enjoyment, of assets other than cash by an individual to your jurisdiction?

The import of assets to Germany may trigger value added tax (VAT). There are different rules for transactions within the European Union and transactions to or from non-EU states.

The import of goods for personal use and enjoyment from non-EU states by an individual into Germany triggers import turnover tax. The import turnover tax rate equals the VAT rates of 19 per cent or 7 per cent and has to be paid to the customs authority. The import turnover tax cannot be refunded as input tax if the imported assets are not used for business but for personal use and enjoyment. The export of such goods to countries outside the European Union is generally VAT-free in Germany.

The import of assets for personal use and enjoyment from EU member states by an individual does not trigger VAT. However, Germany levies VAT on goods exported for personal use and enjoyment into EU member states.

### Other taxes

**8** | What, if any, other taxes may be particularly relevant to an individual?

Wealth tax has not been levied in Germany since 1997 owing to it being declared unconstitutional by the German Federal Constitutional Court.

VAT applies to the net turnover of an entrepreneur at a tax rate of either 19 per cent or 7 per cent (for certain tax-privileged turnover, such as food).

### Trusts and other holding vehicles

**9** | What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed?

Trusts, domestic as well as foreign, are not recognised in Germany (see question 12). However, the following can trigger IGT or income tax, or both:

- foreign trusts created by residents;
- the transfer of assets located in Germany to a trust; and
- a distribution to beneficiaries during the trust period or on the trust's dissolution if the beneficiary is a German resident or as far as assets located in Germany are distributed.

German corporation tax may apply to:

- income received by a foreign trust from German sources; and
- the worldwide income of a foreign trust if its place of management is in Germany and if certain other conditions are met.

Income received by a foreign trust can be attributed to the settlor or the beneficiaries if they are German residents.

Instead of trusts, corporations, fiscally transparent partnerships and foundations (see questions 10 and 13) are used as asset-holding vehicles in Germany.

Corporations and non-charitable foundations are subject to corporation tax at a rate of 15 per cent, plus a solidarity surcharge of 5.5 per cent of the tax. An additional trade tax of approximately 15 per cent (at the discretion of the competent local authority) is due for all corporations. Foundations are subject to trade tax only to the extent that they are engaged in trade or business.

Partnerships are treated as fiscally transparent; the income is attributed to the partners according to their interest in the partnership and subject to income tax at their level. The partnership itself may be subject to trade tax; the partners will receive a tax credit for their personal income tax for any trade tax levied at the partnership's level. IGT is levied if a non-charitable foundation is created or endowed with assets.

### Charities

**10** | How are charities taxed in your jurisdiction?

Charities are tax-privileged in Germany. Recognition as a charitable foundation or corporation requires that the charity's activities be dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. These purposes must be pursued altruistically, exclusively and directly. The formation of a charity does not trigger IGT, nor does it trigger real estate transfer tax if real property is transferred gratuitously to the charity. A charity is exempt from almost every current form of taxation, especially corporate tax and trade tax.

Special rules apply for charitable foundations. For example, a charitable foundation may use one-third of its income for the maintenance of the founder and his or her family. In addition, an endowment of up to €1 million made to increase the capital stock of the foundation may be deducted from the assessment basis for income tax purposes in addition to the deductions that can be made for gifts to other charities.

### Anti-avoidance and anti-abuse provisions

**11** | What anti-avoidance and anti-abuse tax provisions apply in the context of private client wealth management?

For persons who have become established in Germany by tax residency, controlled foreign corporation rules may apply for offshore corporations controlled by them.

For shareholders of foreign corporations claiming a relief from withholding tax, the Income Tax Act provides for a substance test to avoid granting the relief to shareholders of corporations that have been established solely to allow such a relief.

Income of an offshore family foundation or trust may be allocated to the settlor or the beneficiaries if they become residents in Germany.

If no specific anti-avoidance rule applies, a general provision in the Fiscal Code of Germany may apply to prevent the avoidance of taxes. According to this general provision, legal constructions are invalid if they are not intended by law and are therefore legally inappropriate, and if they lead to a tax advantage for the taxpayer or a third party.

To prevent money laundering and the financing of terrorism, the German Anti-Money Laundering Act contains provisions that require certain corporations, registered partnerships and other legal entities, such as trusts and foundations, to disclose information about their beneficial owners in a transparency register from the beginning of October 2017. Certain exemptions apply, for example, to stock corporations and to companies that are already listed on other registers, such as the register of companies. The obligation generally only arises concerning beneficiaries with an interest exceeding 25 per cent of the shares or of the voting rights, or who exercise similar control. The information must include the name, date of birth and home address of the beneficiary,

and the nature and value of the beneficial interest. Non-compliance may result in administrative fines of up to €1 million.

Furthermore, the German government is currently working on the national implementation of Council Directive (EU) 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

## TRUSTS AND FOUNDATIONS

### Trusts

#### 12 | Does your jurisdiction recognise trusts?

Trusts, domestic as well as foreign, are not recognised. Germany has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985.

### Private foundations

#### 13 | Does your jurisdiction recognise private foundations?

German civil law provides for the creation of private foundations, which can be established as a corporate body for any legal purpose. A family foundation can also be set up for the benefit of the settlor and his or her family. The foundation's directors are bound to the foundation's statutes as provided by the settlor. A private foundation resident in Germany is subject to supervision by a local authority under the applicable law of the respective federal state where the foundation's registered seat is. However, this supervision is very limited. Foreign private foundations are recognised as well, provided that the structure is comparable to a foundation as provided for in German civil law.

## SAME-SEX MARRIAGES AND CIVIL UNIONS

### Same-sex relationships

#### 14 | Does your jurisdiction have any form of legally recognised same-sex relationship?

From 1 August 2001, same-sex couples could enter into a registered civil partnership. A civil partnership is a recognised form of legal relationship similar to marriage, except with regard to the rules concerning the adoption of children.

On 20 July 2017, a law was passed allowing same-sex marriage. The law entered into force on 1 October 2017 and established full equality for same-sex couples. Since then, no new civil partnerships can be entered into, civil partners may opt for a conversion to marriage, and same-sex couples not yet in a civil partnership may enter into marriage. With regard to inheritance and tax law, same-sex marriages will not differ from heterosexual marriages and civil partnerships.

### Heterosexual civil unions

#### 15 | Does your jurisdiction recognise any form of legal relationship for heterosexual couples other than marriage?

Other legal relationships for heterosexual couples do not exist.

## SUCCESSION

### Estate constitution

#### 16 | What property constitutes an individual's estate for succession purposes?

For succession purposes, an individual's estate is constituted by his or her property as a whole (universal succession). Legal ownership determines whether an asset belongs to the estate. Debts and other liabilities,

as well as the individual's interest, for example, in the co-ownership of an asset, are part of the estate to the extent that the individual was their legal owner.

### Disposition

#### 17 | To what extent do individuals have freedom of disposition over their estate during their lifetime?

Generally, an individual can dispose of his or her estate during his or her lifetime without restrictions. However, there are narrow exceptions to this rule: a spouse may enter into a contract on his or her property as a whole or on household articles only if the other spouse agrees to the contract.

An unsatisfied creditor may reclaim property:

- within 10 years if the property was disposed of to harm the creditor's interest;
- within four years if the property was gifted to a non-related person; or
- within two years if the property was transferred to a related person in circumvention of the creditor.

#### 18 | To what extent do individuals have freedom of disposition over their estate on death?

Generally, individuals can dispose freely of their estate by will or by a contract of succession. Thereby, an individual can:

- choose his or her heirs and provide what share each heir receives; or
- entitle a person to a legacy without making that person an heir. This legacy claim can be for an amount of money, a share of the deceased's estate, an item or anything else.

However, if spouses have entered into a contract of succession or into a joint will and one of them dies, the surviving spouse may not rescind the contract or the will to change dispositions unless the changes correspond to the intention the spouses originally agreed to in the contract or the will.

There is a forced heirship regime, under which the following categories of relatives are entitled to make a claim for a compulsory share of the deceased's estate if they are excluded from the testator's will or if the share granted to them is less than their compulsory share: descendants; spouse; civil partner; and parents.

A relative's compulsory share under a will generally amounts to 50 per cent of the value of that relative's share on intestacy. It is a monetary claim and not a claim for a share of the estate.

If the deceased is not survived by any of these individuals, he or she can freely distribute his or her whole estate.

### Intestacy

#### 19 | If an individual dies in your jurisdiction without leaving valid instructions for the disposition of the estate, to whom does the estate pass and in what shares?

On intestacy, the order of succession is as follows (each of the following categories precludes the subsequent heirs from receiving a share of the deceased's estate):

- children of the deceased and, subordinated, their descendants;
- parents of the deceased and, subordinated, their descendants;
- grandparents of the deceased and, subordinated, their descendants; and
- great-grandparents of the deceased and, subordinated, their descendants.

Relatives within a particular category inherit in equal shares (succession per stirpes).

The surviving spouse (or civil partner) also has a right of inheritance, determined by the applicable matrimonial regime.

### Community of surplus

The surviving spouse is entitled to:

- 50 per cent of the inheritance if relatives in the first category (see above) survive; or
- 75 per cent of the inheritance if there are no surviving relatives in the first category but relatives in the second category survive.

### Separation of property or community of property

The surviving spouse is entitled to:

- 25 per cent of the inheritance if relatives in the first category survive; or
- 50 per cent of the inheritance if there are no surviving relatives in the first category, but relatives in the second category survive.

If there is a separation of property regime and the surviving spouse is entitled together with one or two children of the deceased, the surviving spouse and each child inherit in equal shares.

### Adopted and illegitimate children

**20** | In relation to the disposition of an individual's estate, are adopted or illegitimate children treated the same as natural legitimate children and, if not, how may they inherit?

Generally, adopted and illegitimate children are treated the same as natural legitimate children. However, if an individual is adopted after he or she has reached the age of 18, he or she is treated as a child of the adopter but not of the adopter's family. This can be important for maintenance and succession reasons.

### Distribution

**21** | What law governs the distribution of an individual's estate and does this depend on the type of property within it?

For successions on and after 17 August 2015, the conflict of laws rules of the EU Succession Regulation apply. They are valid in all EU member states except Denmark, Ireland and the United Kingdom. According to the Regulation, the deceased's habitual residence at the time of his or her death is relevant for the question of which succession law is applicable, rather than his or her nationality. If it is obvious that the deceased had a closer relationship to another state, that state's law will apply under certain circumstances. There is, however, the opportunity to opt for the succession law of an individual's nationality by a will, a joint will or by an agreement regarding succession.

In addition, provisions on legal jurisdiction, recognition and enforcement of decisions and authentic instruments, and on the European certificate of succession are part of the Regulation. As a general rule, the legal jurisdiction shall be determined by the habitual residence at the time the individual died.

The Regulation is not applicable to trusts; hence, the respective national conflict of law regime applies.

### Formalities

**22** | What formalities are required for an individual to make a valid will in your jurisdiction?

There are two valid forms of will:

- a holographic will, which is handwritten, dated and signed by the testator; and

- a public will, which is signed before and certified by a notary public.

Neither form of will requires a witness.

A testator can also enter into a contract of succession with another person or a joint will with his or her spouse or civil partner. A contract of succession must be signed before and certified by a notary public (a handwritten contract does not meet the formal requirements).

### Foreign wills

**23** | Are foreign wills recognised in your jurisdiction and how is this achieved?

Germany recognises the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961 (the Hague Testamentary Dispositions Convention). A will is valid if it complies with the law of any of the following:

- the state of the testator's nationality;
- the state where the testator made the will;
- the state of the testator's residence; and
- the state where the assets are situated (in the case of real estate).

According to article 75 of the EU Succession Regulation, the Hague Testamentary Dispositions Convention prevails over the provisions of the Regulation with regard to the formal validity of a will.

### Administration

**24** | Who has the right to administer an estate?

A testator can appoint an executor at his or her own discretion. The executor has to be legally competent. According to the German Federal Court of Justice, an executor does not have to be a lawyer, a tax adviser, a notary public or any other person who has to take out liability insurance.

An executor can ask the probate court for a certificate of executorship, which officially verifies his or her authority to act as executor.

German law gives broad powers to executors, but the testator can limit these powers. For example, an executor can be given the power to:

- distribute the estate;
- administer a single bequest; or
- administer the estate for a defined period of time (eg, until the date of the executor's death or until the naming of a successor executor who may be appointed within 30 years of the testator's death).

**25** | How does title to a deceased's assets pass to the heirs and successors? What are the rules for administration of the estate?

The estate vests automatically in the heirs on the deceased's death. The heirs also administer the estate if an executor has not been appointed.

The deceased's will and other dispositions taking effect on death must be filed with the probate court (unless the documents are already in the court's custody).

The probate court will officially read the will and disclose its contents to the heirs.

After the will has been read (or, in the case of intestacy, immediately) the heirs can ask the probate court for a certificate of inheritance. The certificate specifies: the heirs' names; their share in the inheritance; and the executor's name if the testator has appointed one (see question 24).

The certificate of inheritance gives the heirs the legitimacy to administer the estate, provided that there is no executor. If the law of a foreign jurisdiction governs the succession, the probate court issues a certificate relating only to assets and property located in Germany.

The beneficiaries must file a notice of inheritance with the competent tax authority within three months of receiving the notice of

succession. At the request of the tax authority, the beneficiaries (or the executor, if appointed) must file an inheritance tax return.

The estate is distributed in kind among the heirs according to what is agreed and there is no time limit for distribution. Until distribution, the estate remains joint property of the heirs.

### Challenge

#### 26 | Is there a procedure for disappointed heirs and/or beneficiaries to make a claim against an estate?

Heirs or beneficiaries cannot make a post-death variation.

Heirs or beneficiaries can challenge the validity of a will before a civil court. If the court sets the will aside, then intestacy rules will apply if there is no other valid will.

Under the intestacy rules, it is not possible for heirs or beneficiaries to challenge the adequacy of their provision.

An heir can sell his or her share in the estate after the death of the testator by entering into a contract before a notary public.

If an heir does not want to receive his or her portion of the estate, he or she must disclaim his or her right within six weeks of receiving notice of the death of the deceased and the inheritance. The time limit is extended to six months if either: the deceased had his or her habitual abode outside Germany; or the heir was abroad when the period began to run.

The disclaimer is made by a declaration to the probate court. The declaration must be made in the presence of, and recorded by, the probate court or in certified notarial form.

## CAPACITY AND POWER OF ATTORNEY

### Minors

#### 27 | What are the rules for holding and managing the property of a minor in your jurisdiction?

A minor can own assets (see question 28). Usually, it is the parents' duty to manage these assets on the minor's behalf. The following rules apply:

- all contracts of substantial economic impact that are entered into by the parents on the minor's behalf and that establish an obligation of the minor (eg, sale or purchase of real property, sale or purchase of a business or of shares in a business entity, and similar transactions) are subject to approval by the family court; and
- for specified transactions, particularly for contracts between the minor and his or her parents or other close relatives, the parents must not act on the minor's behalf. Instead, the family court appoints a legal guardian to act on the minor's behalf.

### Age of majority

#### 28 | At what age does an individual attain legal capacity for the purposes of holding and managing property in your jurisdiction?

Children under 18 years of age are minors. However, having legal personality, a minor can hold assets regardless of his or her age. Parents usually have joint custody of their child. Parents with custody administer the minor's estate, including his or her inheritance (see question 27). If the minor and the parents are heirs of the same testator, it may be necessary to appoint a guardian to distribute the estate.

A testator can name in his or her will a person other than the minor's parents to administer the minor's inheritance. If the testator does not name a person, the court will nominate a guardian.

### Loss of capacity

#### 29 | If someone loses capacity to manage their affairs in your jurisdiction, what is the procedure for managing them on their behalf?

When a person loses capacity, a guardian is appointed to represent that person in all legal matters, under supervision by a court. The applicable law is that of the nationality of the incapacitated person.

A power of attorney is recognised in Germany if it complies with the law of the nationality of the incapacitated person.

## IMMIGRATION

### Visitors' visas

#### 30 | Do foreign nationals require a visa to visit your jurisdiction?

EU citizens generally do not require any residence or settlement title to stay, work or settle in Germany.

Non-EU citizens, however, need a visa, a temporary residence permit or a permanent settlement permit (see question 31) to enter and stay in Germany.

#### 31 | How long can a foreign national spend in your jurisdiction on a visitors' visa?

A visa enables the holder to entry or short stays in Germany of up to 90 days within a period of 180 days. In the event of longer stays, a temporary residence or permanent settlement permit is required.

Temporary residence permits are issued for specified purposes (eg, education or training, gainful employment, or humanitarian, political or family reasons). They allow the holder to stay in Germany for at least six months. Permission to work in Germany is not always part of a temporary residence permit.

Permanent settlement permits are issued if a foreign national has possessed a residence permit for five years and meets additional requirements (eg, a secure income, no criminal record, adequate command of the German language). Permanent settlement permits are valid for an unlimited period of time. However, they can be taken back or revoked if the foreign national does not meet the requirements.

### High net worth individuals

#### 32 | Is there a visa programme targeted specifically at high net worth individuals?

Germany does not have a visa programme targeted at high net worth individuals.

#### 33 | If so, does this programme entitle individuals to bring their family members with them? Give details.

Not applicable.

#### 34 | Does such a programme give an individual a right to reside permanently or indefinitely in your jurisdiction and, if so, how?

Not applicable.

#### 35 | Does such a programme enable an individual to obtain citizenship or nationality in your jurisdiction and, if so, how?

Not applicable.



**UPDATE AND TRENDS****New legislation and current developments**

36 | Are there any proposals in your jurisdiction for new legislation or regulation, or to revise existing legislation or regulation, in areas of law relevant to high net worth individuals, particularly those coming to or investing in your jurisdiction? Are there any other current developments or trends relevant to such individuals that should be noted?

As mentioned in question 11, the German government is currently working on the national implementation of Council Directive (EU) 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

As mentioned in question 6, in June 2019, the German government sent a draft bill to the German parliament, which is supposed to change how the assessment of property values will be conducted by local authorities from 1 January 2022 onwards. According to the bill, which was accepted by the German parliament on 18 October 2019, the federal states will have the possibility of regulating the property assessment individually by implementing their own assessment methods and criteria. This could lead to very different tax burdens, including significant increases in the real estate tax burden, in different parts of the country. The new real estate tax law is supposed to come into effect on 1 January 2025.

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