



BUCERIUS LAW SCHOOL  
HOCHSCHULE FÜR RECHTSWISSENSCHAFT

INSTITUT FÜR STIFTUNGSRECHT UND  
DAS RECHT DER NON-PROFIT-ORGANISATIONEN

# Governance and regulation of charities in Germany including recent reforms to foundation law

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# Agenda

- I. Need to improve transparency and governance in the nonprofit sector
- II. Current reforms - creation of new registers and registration obligations
- III. Legal capacity for foundation by entry in legal register
- IV. Further Foundation Governance Reforms
- V. Further proposals for associations and foundations
- VI. Conclusion

# I. Need to improve transparency and governance in the nonprofit sector

## 1. Initial situation

- booming third sector since 1970
- More than 600,000 associations
- Around 24,000 foundations
- Around 25,300 Non-Profit-Corporations (GmbH – Limited Liability Corporation with tax exemption)
- Nonprofits in the welfare industry employ about 10 % of all employees in Germany

# I. Need to improve transparency and governance in the nonprofit sector

## 1. Initial situation

- non-profit organizations claim tax benefits (Corporate Tax, VAT, Property Taxes, Tax deduction for donors)
- tax authorities examine the NPOs' accounting in accordance with the requirements of the non-profit tax law of §§ 51 et seq. AO and the individual tax laws
- but:
  - only nonprofit corporations are obliged to publish their balance sheets
  - external control of NPOs is considered insufficient
  - call for improvements in the transparency of NPOs

# I. Need to improve transparency and governance in the nonprofit sector

## 2. International comparison

- **USA:** Guide-Star → platform through which tax data of NPOs is generally accessible
- **Austria:** differentiated internal accounting obligation for associations according to size class; mandatory audit for large associations
- **Switzerland:** mandatory audit for large associations; new accounting law, which also applies for charities and foundations
- **UK:** all charities are monitored by the Charity Commission

# I. Need to improve transparency and governance in the nonprofit sector

## 3. State of discussion in Germany

- no mandatory transparency requirements for a long time for association and foundation; only for GmbH and private initiatives
- only general criterion: Whether the spending pattern makes economic sense and helps to ensure that the highest possible proportion of the funds directly and effectively benefits those in need
- e.g.: fiscal administration and case law recognize a certain level of necessary **administrative costs** up to 50 %
- while in Austria the administrative quota is of a maximum of 10 % in relation to donation income

# I. Need to improve transparency and governance in the nonprofit sector

## 3. State of discussion in Germany

- e.g. **excessive salary payments** to members or employees are prohibited
- the German Supreme Tax Court (BFH) ruled that a CEO of a nonprofit organisation must not earn more than a CEO in the same industry, irrespective of being employed in the forprofit or the nonprofit part of the industry
- plus the court grants a certain range of reasonable salary
- plus a minimis limit
- If not, the organisation loses its tax exemption for the specific year

# I. Need to improve transparency and governance in the nonprofit sector

## 3. State of discussion in Germany

- But control by the tax authorities only takes place retrospectively
- in order to improve transparency and thus the governance of NPOs, it remains necessary to standardize the accounting rules affecting NPOs
- and make them available for everyone
  - tax fairness
  - protection against misappropriation of funds



## II. Current reforms - creation of new registers and registration obligations

1. Transparency register for all legal forms as of 1.10.2017
  - with effect from 26.6.2017, the Money Laundering Act (AMLA) was amended in significant respects
  - as legal entities, **foundations** with legal capacity and **associations** must obtain and retain information on the **beneficial owners**, keep it up to date and notify the registry office without delay for entry in the transparency register
  - Even the organization is tax exempt and does not have any real beneficial owners:
  - any natural person who is a member of the board of directors must be entered in the transparency register as a beneficial owner
  - Up to 1.1.2020 right of inspection for anyone

## II. Current reforms - creation of new registers and registration obligations

2. Tax beneficiary register for non-profit NPOs as of 1.1.2024
  - a) Prohibition of profit distribution as a common denominator of NPOs – the nondistribution constraint is mostly supervised by tax authorities in Germany as seen above
  - b) Motives
    - legal certainty, transparency
    - helps citizens and institutional donors identify the organizations with which they would like to make a concrete financial or personnel commitment
    - until 2024 German tax authorities are not allowed to give any information about taxpayers due to fiscal secret

## II. Current reforms - creation of new registers and registration obligations

2. Tax beneficiary register for non-profit NPOs as of 1.1.2024
  - c) Entries and effects
    - name, address, tax-privileged purpose, tax office , date of the last notice of tax exemption, bank account
  - d) Foreign NPOs
    - even foreign nonprofits will be allowed to register after been checked by tax authorities to fulfill all the requirements according to German tax law
  - e) Political parties and other political organizations
    - are registered because donations to political parties qualify for tax deduction for the donors as well (but only within certain maximum limits for reasons of equal treatment of all parties and voters (poor or rich)

## II. Current reforms - creation of new registers and registration obligations

### 3. Foundation register as of 1.1.2026

#### a) Significance and specificity of the foundation sector

- reform of the foundation law in 2002 triggered a boom in the establishment of foundations
- some foundations manage assets or real estate worth billions
- foundations are nowadays allowed to hold significant stakes in companies as Fresenius Medical Care or Thyssen-Krupp

#### b) Motives

- up to then no existing public foundation register
- the existing foundation directories of the 16 federal states do not have any publicity effect
- e.g. restriction of power of the executive board of the **German stroke foundation** in the articles of association to nonprofit transactions was confirmed by the German Supreme Tax Court – a contract worth millions of euros was invalid

## II. Current reforms - creation of new registers and registration obligations

### 3. Foundation register as of 1.1.2026

#### b) Entries and effects

- nationwide foundation register with publicity effect as of January 1, 2026
- registration of the foundation itself and its members of executive board with the boundaries of power of presentation (e.g. only nonprofit transactions, real estate transaction only up to a certain value)
- third parties can rely on the entries

#### c) Criticism

- anyone can inspect the documents submitted to the register
- personal data of the founder or beneficiaries of family foundations
- value of the donation
- fear of criminal offense against founders or beneficiaries

## II. Current reforms - creation of new registers and registration obligations

### 4. Relationship of the 3 registers to each others

#### a) „Transparency tsunami“?

- all registers fulfill different functions
- request to avoid multiple registration and to create a **once only principle**

## II. Current reforms - creation of new registers and registration obligations

### 4. Relationship of the 3 registers to each others

#### b) Especially foundations

- foundations should acquire legal capacity through constitutive entry in a legal register as corporations or associations or foundations in the USA or in Switzerland
- not through recognition by the foundation authority
- this would improve the registration of foundations by independent courts rather than by dependent authorities (e.g. Klimaschutzstiftung Mecklenburg-Vorpommern)

### III. Legal capacity for foundation by entry in legal register

- Example
  - Klimastiftung Mecklenburg-Vorpommern to build a shelter against US-sanctions versus pipeline Nord Stream 2
  - was built on January 8<sup>th</sup> 2021
  - was permitted the day after by Ministry of Justice





## IV. Further Foundation Governance Reforms

### 1. Initial situation

- principle of separation and solidification in foundation
- foundations have no members or shareholders
- lack of member control in foundations is increased by their nonprofit orientation
- supervision needed to ensure that the foundation does not become a vehicle for the pursuit of management interests unrelated to the foundation, but that the historical will of the founder is allowed to develop
- external control of foundations by the foundation supervisory authority and the financial authorities is not sufficient (only legal control, not efficiency control)

## IV. Further Foundation Governance Reforms

### 2. No mandatory supervisory bodies in foundations

- legal requirements for governance of associations and foundations are rudimentary
- only a single person as executive “board”
- general meeting in associations
- but no other organ in foundations, insufficient in particular for large foundations

## IV. Further Foundation Governance Reforms

### 3. Introduction of a Business Judgment Rule

- initially, the reform of the law governing foundations only decreased liability, but did not improve governance
- Business Judgment Rule exempts foundation bodies from liability under certain circumstances, even though they have made decisions in the course of management, in "decisions under uncertainty" and in the exercise of their discretion, which have led to damage for the foundation
- need of statutory regulation that BJR also applies analogously to association management boards

## V. Further proposals for associations and foundations

### 1. Accounting and publicity

- Starting point
  - no mandatory rules for accounting or publicity for associations or foundations
  - although a wide range of commercial activities are allowed
  - according to models in Switzerland, UK, USA, Austria
- Implementation in the form of a step-by-step model
  - legal form-neutral rules on the accounting of non-profit organizations
  - graded according to size categories, should be created

## V. Further proposals for associations and foundations

### 1. Accounting and publicity

- Publicity

- obligation to publish the financial statements in public registers for organizations with income or expenses of more than one million euros or with donation income of more than 100,000 euros
- obligation to publish the financial statements on the organization's website

# V. Further proposals for associations and foundations

## 2. National Non Profit Governance Code

- need for comparability of the effectiveness of NPOs
- since the mandatory transparency requirements can only provide basic standards, a uniform Non Profit Governance Code can help to discuss, formulate, anchor in public awareness and further develop requirements for NPOs that go beyond this

## V. Further proposals for associations and foundations

### 3. Economic activity and insolvency liability

- in Germany, non-profit organizations such as associations and foundations are permitted economic activities on the market to a very considerable extent
- hotly debated in the law on associations, only little impact on the world of foundations
- therefore they should fulfill the normal regulation of insolvency law, worker participation or group law (Konzernrecht)

# V. Further proposals for associations and foundations

## 4. Foundation Supervisory Complaint

### – Need

- the official duty of the foundation authority to supervise the foundation bodies exists exclusively against the foundation
- outside third parties with a legitimate interest in the foundation, such as the living founder and his descendants or beneficiaries, have neither a right to intervention by the authority nor a right to payment of damages to the foundation
- special need for protection of the foundation without members
- right of action in an emergency by interested parties of the foundation at least in the event that the foundation authority refuses to intervene in breach of its duties
- especially since the legislator, by introducing the Business Judgment Rule, has increased the control deficit in foundations by partially exempting them from liability



## VI. Conclusions

### **Entire nonprofit sector**

- first step towards more transparency in the entire nonprofit sector with the establishment of a beneficiary register and the restriction of tax secrecy
- Increasing transparency of nonprofits is still necessary
- uniform national non-profit governance code should be drawn up which, by linking it to a declaration of conformity obliges all NPOs to make further disclosures

# VI. Conclusions

## Foundations

- the introduction of genuine foundation registers with publicity effect served to protect legal transactions
- in favor of the foundation bodies, their liability could be limited to an appropriate extent by the application of the Business Judgment Rule
- however, there is a lack of effectuation in the governance of foundations
  - creation of additional mandatory control bodies and mandatory accounting disclosure for large foundations
  - recognition of a foundation supervision complaint, which would make foundation supervision more effective

# THANK YOU FOR YOUR ATTENTION!

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