ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SONDERHEFT / SPECIAL ISSUE 11 (2018)

Information Duties

Japanese and German Private Law

Edited by
Marc Dernauer / Harald Baum / Moritz Bälz

Carl Heymanns Verlag

ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SONDERHEFT 11 / SPECIAL ISSUE 11 (2018)

Verlag / Publisher: Carl Heymanns Verlag – a brand of Wolters Kluwer Germany, Luxemburger Straße 449, D-50939 Köln, phone: +49 221-943 73-7000; Internet: www.heymanns.com; Customer Service: phone: +49 2631-801-2222, e-mail: info-wkd@wolterskluwer.de

Bezugspreis: Das Sonderheft kann über den Verlag zum Preis von 69,– € zzgl. Versandkosten bezogen werden. Mitglieder der Deutsch-Japanischen Juristenvereinigung e.V. können das Sonderheft zum Vorzugspreis von 59,– € zzgl. Versandkosten beziehen.

Subscription price: The special issue can be purchased from the publishers for € 69 plus postage. Members of the German-Japanese Association of Jurists may buy the special issue for the preferential price of € 59 plus postage.

Anzeigenverkauf / Advertisement Sales: Janosch Kleibrink, Phone: +49 221-943 73-7797, e-mail: janosch.kleibrink@wolterskluwer.com

Anzeigendisposition / Advertisement Disposition: Wolters Kluwer Germany, Advertisements, Karin Odening, Luxemburger Str. 449, D-50939 Köln, phone: +49 221-943 73-7760, e-mail: anzeigen@wolterskluwer.com. Price list No. 11, 1 January 2018.

Druckerei / Printed by: rewi Druckhaus, Reiner Winters GmbH, Wissen

ISBN 978-3-452-29117-2

www.ZJapanR.de

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Information Duties under the German Law Governing Non-profit Entities

Moritz Bälz[*]

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I. Introduction

The number of non-profit entities in Germany continues to grow.[1] One recurring theme in this context is the issue of transparency in the non-profit sector.[2] This already indicates that an analysis of information duties in private law, as undertaken by the contributors to this volume, should benefit from including the law of non-profit entities as well. Furthermore, it seems worthwhile to contrast the German rules with the Japanese experience in this field as outlined in this volume.[3] This contribution therefore undertakes to give a concise sketch of information duties in the law governing non-profit entities in Germany.

I shall start by giving an introduction to non-profit entities under German law (II.). In a second step, the information duties in the rules applicable to the two most frequently used forms of non-profit entities, namely a

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1 J. Priemer/H. Krimmer/A. Labigne, Ziviz Survey 2017. Vielfalt Verstehen. Zusammenhalt Stärken. (Berlin 2017) 5.

2 See, e.g., H. Krimmer et al. Transparenz im Dritten Sektor. Eine wissenschaftliche Bestandsaufnahme (Hamburg 2014).

3 M. Arai, Information Duties under the Japanese Law Governing Public Interest Incorporated Associations and Foundations, *supra* pp. 121 (in this volume).

registered association *(eingetragener Verein)* and a foundation with legal personality *(rechtsfähige Stiftung)*, shall be examined more closely (III.). Given the importance of tax law for the emergence of financially robust non-profit entities as well as for, at least indirectly, the governance of non-profit entities, the analysis shall be complemented by a brief outline of the rules under which non-profit entities can receive tax-privileged status (IV.). I shall conclude with a summary of my key findings (V.).

II. Non-profit Entities in German Private Law

The term "non-profit entity" as found in English literature on the various legal forms used by the so-called third sector (i.e., non-state, non-market actors), does not have a legally defined equivalent in German law.[4] The smallest common denominator of the various types of non-profit entities observed under German law is that these entities may not distribute profits (the so-called non-distribution constraint).[5]

1. Three Common Forms of Non-profit Entities

There are primarily three common forms of non-profit entities under German private law:

Firstly, there is the registered association (*eingetragener Verein*, abbreviated *"e.V."*). Among the more than 600,000 registered associations in Germany,[6] well-known examples include the German Red Cross (*DRK*), the General German Automobile Club *(ADAC),* the German Academic Exchange Service *(DAAD)* and the German Soccer Association (DFB).[7] Among the forms of non-profit entities in Germany, the registered association is by far the most common. The rules on registered associations are stipulated in Sects. 21 to 79 of the German Civil Code (BGB).[8]

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4 For the definition of public benefit *(gemeinnützig)* under tax law see *infra* at IV.

5 T. von Hippel, Grundprobleme von Nonprofit-Organisationen (Tübingen 2007) 12; T. von Hippel, Nonprofit Organizations in Germany, in: Hopt/von Hippel (eds.), Comparative Corporate Governance of Nonprofit Organizations (Cambridge et al. 2010) 197, 200.

6 Priemer/Krimmer/Labigne, *supra* note 1, 9.

7 Most sports clubs are organized as registered associations, even those with major professional soccer teams. In such a case, the professional division is hived-down into a subsidiary. There is some controversy on whether an association should still be considered as non-profit under these circumstances. See *infra* at II.2.a).

8 It may be mentioned here that besides their importance for the non-profit sector, the rules on registered associations are foundational for all corporations under German law. To the extent no special rules are stipulated, the rules on registered associations apply also to companies organized as limited liability companies *(GmbH)* or stock

Sect. 21 BGB reads as follows:

> An association whose object is not commercial business operations acquires legal personality by entry in the register of associations of the competent local court [*Amtsgericht*].[9]

If registered, the association thus can be subject to rights and duties, act in its own name, sue and be sued, and hold assets including real estate. Creditors of the association can only look to the assets of the association.

Secondly, there is a foundation with legal personality (*rechtsfähige Stiftung*). Prominent examples of this type of non-profit entity include the VolkswagenStiftung, the Bertelsmann Stiftung, and the Fritz Thyssen Stiftung. Besides these large and wealthy foundations, the number of small foundations has increased in recent years. The rules on foundations are set forth in Sects. 80 to 88 BGB as well as in the state foundation laws of the individual states *(Länder)*.[10] The former contain most of the applicable private law rules, whereas the latter regulate in particular administrative matters. Currently, a major reform of the law of foundations is being discussed, which *inter alia* aims at unifying and simplifying the applicable rules through stronger regulation on the federal level.[11]

As of now, Sect. 80(1) BGB, standing as the basic rule on foundations, reads as follows:

> The creation of a foundation with legal personality requires an endowment transaction and recognition of the foundation by the competent public authority of the *Land* [state] in which the foundation is to have its seat.

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companies *(Aktiengesellschaft)*. An important example is Sect. 31 BGB providing for liability of the association for acts committed by the association's organs.

9 Unless stated otherwise, the English translations of German statues used in this contribution follow the translation prepared on behalf of the German Federal Ministry of Justice and Consumer Protection (BMJV) available at *https://www.gesetze-im-internet.de/Teilliste_translations.html*.

10 For a list of the foundation laws of the *Länder* see the homepage of the Bundesverband Deutscher Stiftungen at *https://www.stiftungen.org/stiftungen/basiswissen-stiftungen/stiftungsgruendung/landesstiftungsgesetze.html*.

11 See the report published by a joint working group of the federal government and the governments of the *Länder*, Bericht der Bund-Länder-Arbeitsgruppe "Stiftungsrecht" an die Ständige Konferenz der Innenminister und –senatoren der Länder vom 9. September 2016 at *https://www.innenministerkonferenz.de/IMK/DE/termine/to-beschluesse/2016-11-29_30/nummer%2026%20reform%20stiftungsrecht.pdf*. For a comprehensive assessment of these proposals see B. WEITEMEYER, Reformbedarf im Stiftungsrecht aus rechtsvergleichender Perspektive, Archiv für civilistische Praxis (AcP) 217 (2017) 431. In part, reform efforts also aim at answering to the challenges posed to foundations by the current low-interest-rate environment.

The most fundamental difference between a registered association and a foundation with legal personality is that the former must have members and thus constitutes a membership association, whereas the latter must not have members and thus constitutes an organization without members.[12]

Thirdly, limited liability companies *(GmbH)* are increasingly used for charitable purposes. As is well known – and contrary to Japan, where the German-inspired limited liability company *(yūgen gaisha)* never proved particularly popular with larger enterprises and where the form is since the enactment of the Companies Act[13] no longer available for newly established corporations[14] – the GmbH is the dominant corporate form in Germany, whereas the stock company is used primarily by financial institutions and those corporations aiming at financing through capital markets.[15] Even large international companies such as the automotive supplier Robert Bosch GmbH are organized as a limited liability company.[16] The latter is an interesting example here, as the majority of its shares are held by the Robert Bosch Foundation, which – irrespective of its name – is also organized as a GmbH and counts among the largest philanthropic foundations in Germany.[17] Today, kindergartens, homes for the elderly and hospitals are also often organized as limited liability companies.

The rules on limited liability companies are contained in the Limited Liability Companies Act (GmbHG), which in its Sect. 1 expressly provides that a GmbH can be formed by one or several persons for any purpose permitted by law. Where the purpose is charitable in nature, such a limited liability company can under certain conditions acquire public benefit status *(Gemeinnützigkeit)* under tax law. Sect. 4 sentence 2 GmbHG allows such charitable limited liability companies to indicate their special status in their trade name by using the abbreviation "gGmbH" for *gemeinnützige Gesellschaft mit beschränkter Haftung*:

> If the company exclusively and directly pursues tax-privileged purposes in accordance with sections 51 to 68 of the Fiscal Code *[Abgabenordnung, AO],* the abbreviation "gGmbH" may be used.

12 VON HIPPEL, Nonprofit Organizations, *supra* note 5, 200.

13 *Kaisha-hō*, Act No. 86/2005.

14 See H. KANSAKU/M. BÄLZ, § 3 Gesellschaftsrecht, in: Baum/Bälz (eds.) Handbuch Japanisches Handels- und Wirtschaftsrecht (Köln 2011) n. 2 with further references.

15 This owes partly to the fact that the rules of the German Stock Company Law *(AktG)* are in principle of a mandatory nature (Sect. 23 AktG) and thus offer far less flexibility than the rules applicable to a GmbH.

16 Remarkably, the Japanese subsidiary of Robert Bosch GmbH is organized as a stock company *(kabushiki kaisha)* and until rather recently even used to be listed on the Tokyo Stock Exchange.

17 See the homepage at *http://www.bosch-stiftung.de/de/verfassung-des-hauses-bosch*.

It should be mentioned that non-profit activities in Germany are pursued also in various other forms. As the focus here is on non-profit legal entities under civil law, public law entities as they are used, for instance, by most universities and churches, are not covered in the following discussion. Nor will those non-profit activities be dealt with which are pursued without (full) legal personality. Therefore, falling beyond the scope of the contribution are, in particular, associations without legal personality *(nicht rechtsfähiger Verein)*[18] and foundations without legal personality *(nicht rechtsfähige Stiftungen)*. As to the former, many exist in Germany, including – for historical reasons – political parties; the latter, which are also often referred to as foundation trusts *(Treuhandstiftungen),* constitute in essence a specific form of gift contract.[19] Not covered here, finally, are cooperatives *(Genossenschaften),* even though they sometimes are included in a broad definition of the non-profit sector.[20]

2. Key Features of the Main Forms of Non-profit Entities

The three main forms of non-profit entities under German private law differ significantly with regard to their key features. As illustrated by the table next page, this concerns the rules on, *inter alia*, establishment, the entry and exit of members, a change of structure or dissolution, and governance.

a) Registered association

A registered association is set up fairly easily by agreement of its founding members. To be registered, at least seven members have to sign the articles of association (Sects. 56, 59(3) BGB). No minimum capital is required. An application for registration may not be denied if the statutory conditions are fulfilled *(System der Normativbedingungen).*

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18 According to Sect. 54 BGB, associations without legal personality are subject to the rules on civil law partnerships, and any person entering into a transaction on behalf of an association without legal personality is personally liable. However, there is a strong tendency nowadays to also treat associations without legal personality – notwithstanding the wording of the code – as a subject of rights and duties and to apply the rules for registered associations *mutatis mutandis*. On this issue see M. SCHÖPFLIN, in: Bamberger/Roth/Hau/Poseck, Beck'scher Online Kommentar BGB (45th ed., 2017), Sect. 54, n. 4 f.; A. ARNOLD, in: Münchener Kommentar BGB (7th ed., Munich 2015) Sect. 54, n. 3 ff.

19 See VON HIPPEL, Nonprofit Organizations, *supra* note 5, 204.

20 The establishment of many German cooperatives predates 1945, but the last 20 years have witnessed a kind of boom of newly established cooperatives, especially in the field of alternative energy. See H. KRIMMER / J. PRIEMER, Ziviz Survey 2012. Zivilgesellschaft verstehen (Berlin 2013) 17.

	Registered association *(eingetragener Verein)*	Foundation with legal personality *(rechtsfähige Stiftung)*	(g)GmbH *((gemeinnützige) Gesellschaft mit beschränkter Haftung)*
Establishment	few formalities (fundamental prohibition against commercial operations), registration	adequate endowment plus recognition by the state required	notary public required, in principle minimum share capital of € 25,000
Entry/Exit	flexible	[no members/ owners]	transfer of shares only in notarial deed
Change of structure/dissolution	at any time	inflexible; exists in principle forever	at any time
Governance	representation by board, general assembly as supreme organ (voting by headcount)	board acting independently restricted by founder's will (additional board of trustees is common)	shareholders govern (voting according to share)

In practice, whether the association will be registered and thus acquire legal personality depends fundamentally on the prohibition against commercial business operations. An association whose purpose is commercial business operations *(Wirtschaftsverein)* acquires legal personality only by state grant (*Konzessionssystem*, Sect. 22 BGB). In practice, such a concession is granted only very rarely. The rationale behind this rule is that, in the interest of creditors in particular, commercial activities should normally be carried on in the various forms provided for by commercial law (i.e., corporations, commercial partnerships, etc.).[21] By contrast, an association whose purpose is not commercial business operations *(Idealverein)* can acquire legal personality by registration (Sect. 21 BGB).

The important distinction between a non-profit association and a for-profit association is made typologically based not only on what is defined in the articles as the association's purpose, but also with view to its de facto activities.[22] However, Sect. 21 BGB does not prohibit non-profit associa-

21 Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 22, 240, 244.

22 For an in-depth discussion see SCHÖPFLIN, *supra* note 18, Sec. 21, n. 90 ff.

tions from engaging in any commercial activities altogether. Rather, as long as a non-profit association's commercial activities remain subordinate to and serve its non-profit activities, the activities are considered compatible with Sect. 21 BGB *(Nebenzweckprivileg).*[23] The Federal Supreme Court (BGH) takes a fairly generous view on this point. In a recent case concerning a registered association running nine day-care facilities for children, the court held that the association, while undoubtedly engaging in significant commercial activity, could still be considered a non-profit association (and thus should not be deleted from the registry for violating Sect. 21 BGB) as the association's commercial activities served the association's non-profit purpose.[24] The court even expressly acknowledged that an association could pursue non-profit activities through commercial activities without becoming a for-profit association.[25] Furthermore, the Federal Supreme Court's famous, though controversial, ADAC case of 1982 has allowed non-profit associations to engage in commercial activities through a subsidiary organized as a separate legal entity under commercial law, the argument being that in such cases the subsidiary's creditors remain protected by the rules applicable to the subsidiary (normally, a GmbH or a stock company).[26] Well-known sports clubs do the same. For instance, FC Bayern München e.V., holds 75% in Bayern München AG, a stock company into which the association has hived down its professional soccer activities with a turnover amounting to hundreds of millions of euros. Nevertheless, the Munich District Court has recently confirmed the association's status as non-profit association.[27]

Members of an association can join and leave the association in principle freely (subject to the formalities stipulated in the articles). Also, the general assembly can decide upon an amendment of the articles and even on dissolution at any time. To do so, a super-majority is required (Sects. 33, 41 BGB). Governance is characterized by voting per headcount in the general

23 The details are controversial. For an overview see T. HEIDEL/D. LOCHNER, in: Heidel/Hüßtege/Mansel/Noack, Nomos Kommentar BGB (3rd ed., Baden Baden 2016) Sect. 21, n. 32 ff.

24 Bundesgerichtshof, Neue Juristische Wochenschrift (NJW) 2017, 1943. A key argument for the court was that the association in question had been granted tax-privileged status as serving public benefit *(gemeinnützig)*.

25 *Id*. at n. 31–32.

26 Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 85, 84.

27 See the press release of the Amtsgericht (AG) München at *https://www.justiz.bayern.de/gerichte-und-behoerden/amtsgerichte/muenchen/presse/2016/73.php*. An analysis of this remarkable case is provided by U. SEGNA, Die Registersache FC Bayern München, Zeitschrift für das Recht der Non Profit Organisationen (npoR) 2017, 3.

assembly as the association's supreme organ (Sect. 32 BGB). In addition, the association must have a board. The appointment of the members of the board is by resolution of the general assembly, which in principle can revoke the appointment at any time (Sect. 27 BGB).

b) Foundation

The establishment of a foundation with legal personality, by contrast, requires an endowment transaction and recognition by the competent state authorities (Sect. 80 BGB). Nowadays, this recognition is not at the discretion of the supervisory authorities, but it must be granted if the conditions are met. In practice, the authorities tend to withhold recognition for lack of adequate funding unless the endowment amounts to at least 50,000 euros (Sect. 80 BGB).[28] By definition, in a foundation no members or owners exist.

At the core of the foundation lies its purpose, as it has to be defined in the charter. The founder is free to define any purpose unless it endangers the common good (Sect. 80(2) BGB). If not stipulated otherwise in the charter, a foundation is established for an unlimited period of time. If the purpose of the foundation has become impossible to fulfil, the competent public authority may revise the purpose or dissolve the foundation (Sect. 87 BGB). In practice, dissolution for lack of assets is the most common example in this regard. Under normal circumstances the purpose of the foundation cannot be amended after it has been established, not even by the founder. According to the prevailing view, the charter cannot stipulate a general right of the founder to amend the purpose during her lifetime. Whether this should be changed remains disputed even in the current reform debate.[29] Foundations with legal personality are governed independently by a foundation board, whose composition must be specified in the charter (Sect. 81(1)(5) BGB). The board is restricted by the founder's will as expressed in the charter. It is quite common to have a board of trustees in addition.

c) Charitable limited liability company

The rules on non-profit limited liability companies are in principle the same as those for a GmbH used for commercial purposes. Establishment can be

28 A. SCHLÜTER/S. STOLTE in: Schlüter/Stolte (eds.), Stiftungsrecht (3rd ed., Munich 2016) Chapter 5, n. 65.

29 See Bericht der Bund-Länder Arbeitsgruppe "Stiftungsrecht", *supra* note 11, 82 ff. and WEITENAUER, *supra* note 11, 474 ff.; J. NIKOLAI/N. KUSZLIK, Reform des Stiftungsrechts. Wichtige Ziele für die derzeit tagende Arbeitsgruppe des Bundes und der Länder, Zeitschrift für Rechtspolitik (ZRP) 2016, 47 f.

accomplished by a single person and requires notarization of the articles of association (Sects. 1, 2 GmbHG). The GmbH starts to exist as such once it is registered in the commercial registry at the place of its registered office (Sect. 11 GmbHG). In principle, establishing a GmbH requires a minimum share capital of 25,000 euros (Sect. 5(1) GmbHG). Reacting to regulatory competition, in particular to the increasing number of English Private Companies Limited by Shares (Ltd.) having their effective seat of administration in Germany, the German legislature, effective 2008, introduced the entrepreneur company with limited liability *(Unternehmergesellschaft (haftungsbeschränkt))* as a special form of the GmbH. For an entrepreneur company a minimum share capital of one euro suffices, but the company may not distribute, but must accumulate profits until there is sufficient equity to increase the share capital to 25,000 euros (Sect. 5a GmbHG). The UG can also be used for non-profit purposes.[30]

Entry into and exit from a GmbH are comparatively cumbersome, as transfer of any shares can only be accomplished by notarial deed (Sect. 15(3) GmbHG). The GmbH is governed by its shareholders, who vote according to their shares (Sect. 47 GmbHG). The GmbH must have one or more directors who represent the company. The shareholders can change the company's structure by amending the articles of association or dissolve the company, both of which require a supermajority (Sects. 53, 60(1) GmbHG).

d) Additional subjective motives influencing choice

Those initiating a non-profit entity in principle may choose the form most suitable for their purposes. Apart from the aforementioned differences in the applicable rules, their choice may be influenced by subjective motives as well. For example, a foundation *(Stiftung)* may be appealing where the founder wishes to express in the entity's name his or her charitable intention, given the fact that the German verb *stiften* has strong connotation of doing something good. Where the entity aims at collecting gifts, donating to a foundation may sound more attractive than donating to a GmbH.[31] However, even a registered association or a charitable GmbH may under certain conditions include the word *Stiftung* in its name (as it is the case in the aforementioned example of the Robert Bosch Stiftung GmbH or in the

30 See M. RIEDER, in: Fleischer/Goette, Münchener Kommentar zum GmbHG (3rd ed., Munich 2018) Sect. 5a, n. 56b; P. OBERBECK/S. WINHELLER, Die gemeinnützige Unternehmergesellschaft – Die Pflichtrücklage nach § 5a Abs. 3 GmbHG als Stolperstein?, Deutsches Steuerrecht (DStR) 2009, 516.

31 I. VAN RANDENBORGH, in: Schauhoff (ed.), Handbuch der Gemeinnützigkeit (3rd ed, Munich 2010) § 1 Rechtsformwahl, n. 5.

case of the majority of the political "foundations" established by the major political parties (Konrad-Adenauer-Stiftung e.V., Friedrich-Ebert-Stiftung e.V., etc.). Using the word *Stiftung* in the name of a registered association may be considered misleading, unless the association possesses sufficient assets to fulfill its charitable purpose at least for a certain time.[32]

3. Non-profit Entities as a Social Factor

Non-profit entities play an important role in many fields of German society, including, but by no means limited to, sports and leisure, education and science, health, and environmental politics. For some time, statistics have been showing an increase in the numbers of non-profit entities. Traditionally, associations with legal personality make up by far the largest part, their number since 2016 exceeding 600,000.[33] In recent years, the number of foundations with legal personality and charitable limited liability companies has increased particularly sharply.[34] As of 31 December 2017, there were more than 22,000 foundations with legal personality[35] and as of August 2016 more than 11,000 charitable GmbHs.[36]

Whereas many foundations and particularly associations are rather small, some non-profit entities own very substantial assets or have millions of members. The Bertelsmann Foundation, for example, owns a majority of the shares in the media giant Bertelsmann Group and thus is able to spend about 70 million euros annually on their influential studies and other social reform projects. Respected by many as an important voice in the public debate, the foundation also faces sharp criticism for promoting its allegedly neo-liberal agenda.[37] The General German Automobile Club (ADAC), with almost 20 million members, is an influential political player. In recent years, the association also has made headlines for vote-rigging in its prestigious annual "car of the year" award competition; it is now undergoing substantial restructuring.

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32 VAN RANDENBORGH, *supra* note 31, § 1 Rechtsformwahl, n. 5; Oberlandesgericht (OLG) Köln, Neue Juristische Wochenschrift Rechtsprechungs-Report (NJW-RR) 1997, 1531.

33 PRIEMER et al. *supra* note 6, 9.

34 KRIMMER/PRIEMER, *supra* note 20, 18.

35 See the statistics on the homepage of the Bundesverband Deutscher Stiftungen at *https://www.stiftungen.org/stiftungen/zahlen-und-daten/statistiken.html.*

36 PRIEMER et al. *supra* note 6, 51.

37 See recently, P. MUNZINGER, Eine Stiftung vermisst die Welt, Süddeutsche Zeitung 9 May2018, online at *http://www.sueddeutsche.de/bildung/gesellschaft-und-politik-das-glashaus-1.3899280.*

Repeated scandals involving associations and foundations have, in fact, contributed their share in keeping alive the debate on stricter regulation and enhanced transparency of non-profit entities. Additional examples here include the Hertie Foundation, alleged to have been used for tax avoidance, the corruption charges lodged against the German Soccer Association (DFB) in connection with the 2006 FIFA World Cup, and the embezzlement of donations at the Deutsches Tierhilfswerk e.V.

III. Information Duties in the Law of Non-profit Entities

Let us now turn to information duties in the law applicable to non-profit entities in German private law. With the exception of the rules on tax-privileged status,[38] these rules depend on the respective legal form of the entity. The following description focusses on information duties in the law of registered associations and foundations with legal personality. For charitable limited liability companies, the same rules apply as for commercial limited liability companies (especially Sect. 51a GmbHG regarding shareholders' information rights), which are covered elsewhere in this volume.[39]

1. Information Duties in the Law of Registered Associations

As regards registered associations, several information duties can be distinguished. The association's board as an organ owes an information duty to the association, which corresponds to a collective information right of the association (a.). In addition, each member is generally assumed to have an individual information right resulting from membership (b). Finally, there is limited disclosure vis-à-vis the public based on the registry of associations (c.). In principle, even for large associations no obligation to audit or file accounts exists (d.).

a) The board's information duty (collective information right of the association)

The board *(Vorstand)*[40] owes the association – here represented by the general meeting – an information duty. Pursuant to Sect. 27(3) BGB, the relationship between the association and its board is governed by the rules on mandate *(Auftrag)* contained in Sects. 664–670 BGB). Sect. 666 BGB reads:

38 See *infra* at IV.

39 I. Saenger, Information Duties under German Trade Law and Company Law, *supra* pp. 191 (in this volume).

40 The board may consist of one person only (Sect. 26(2) BGB).

The mandatary is obliged to provide the mandator with the required reports, and on demand to provide information on the status of the transaction and after carrying out the mandate to render account for it.

Under Sec. 666 BGB, three different duties of the board can be distinguished, which are subject to modifications in the articles of association (Sect. 40 BGB).[41]

Firstly, the board must provide reports *(Berichtspflicht)*. For the general meeting to effectively exercise its rights (the right to appoint and dismiss the members of the board, the right to issue directives, etc.), even without being so requested the board must provide the necessary information. Therefore, the scope of the information to be provided primarily depends on the powers vested in the general meeting and the organizational structure of the specific association.[42] Most commentators assume that written form may be required depending on the circumstances.[43]

Secondly, the board must answer requests for information raised at the general meeting *(Auskunftspflicht)*. If the board is requested by a resolution of the general meeting, it may not refuse to provide such information, not even "in the interest of the association", as the general meeting is the association's supreme organ.[44] In principle, this information duty refers to all affairs of the association.[45] At times problematic is whether this includes information on the association's subsidiaries, especially given the widespread practice to hive down commercial activities of the association into subsidiaries.[46]

Thirdly, the board must render account *(Rechenschaftspflicht)*. This is normally fulfilled in the form of a simple compilation of earnings or expenses complimented by receipts (Sect. 259 BGB). Commercial accounting (Sects. 238 ff. Commercial Code (HGB)) generally is not required. According to the prevailing view, the duty to render account is to be fulfilled periodically (even if the wording of Sect. 666 suggests otherwise), because

41 For details, see U. HAAS/S. SCHOLL, Informationsansprüche und -pflichten im Idealverein, in: Häuser et al. (eds.), Festschrift für Walther Hadding zum 70. Geburtstag am 8. Mai 2004 (Berlin 2004) 365, 369 ff.

42 HAAS/SCHOLL, *supra* note 41, 369 ff.

43 ARNOLD, *supra* note 18, Sect. 27, n. 39; HAAS/SCHOLL, *supra* note 41, 371.

44 ARNOLD, *supra* note 18, Sect. 27, n. 39; HAAS/SCHOLL, *supra* note 41, 381.

45 ARNOLD, *supra* note 18, Sect. 27, n. 39; HAAS/SCHOLL, *supra* note 41, 381

46 Bundesgerichtshof, Neue Juristische Wochenschrift Rechtsprechungs-Report (NJW-RR) 2003, 830; HAAS/SCHOLL, *supra* note 41, 367 ff. For this practice, see *supra* at II.2.a.

rendering account only "after carrying out the mandate" would make it virtually impossible for the general meeting to exercise its rights.[47]

The question arises how these duties can be enforced. The general meeting can threaten to dismiss a board which does not answer an information request. In addition, some consider it possible that an individual member would be empowered to enforce the collective information right on behalf of the association *(actio pro socio)*.[48] Most commentators, however, take the view that the collective information right cannot be enforced in court. They consider the individual member sufficiently protected by the right to exit.[49]

b) Members' individual information right

In addition to the aforementioned information duty of the board vis-à-vis the association, which corresponds to a collective information right of the latter, each individual member has an individual information right resulting from his or her membership.[50] While it is widely recognized that each member must have the right to receive the information necessary to effectively exercise membership rights, no express statutory rule exists.[51] It is therefore based either on Sects. 27(3), 666 BGB[52] or – more convincingly – on a *mutatis mutandis* application of Sect. 131 AktG.[53] The members' information right may be extended but arguably not restricted in the articles of association.[54] This right is to be asserted against the association represented by the board.[55]

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47 HAAS/SCHOLL, *supra* note 41, 372; U. SEGNA, Rechnungslegung und Prüfung von Vereinen – Reformbedarf im deutschen Recht, Deutsches Steuerrecht (DStR) 2006, 1568, 1569 with further references.

48 K. SCHMIDT, Informationsrechte in Gesellschaften und Verbänden. Ein Beitrag zur gesellschaftsrechtlichen Institutionenbildung (Heidelberg 1984) 57 and 85.

49 B. GRUNEWALD, Auskunftserteilung und Haftung des Vorstandes im bürgerlichrechtlichen Verein, Zeitschrift für Wirtschaftsrecht (ZIP) 1989, 962, 963; HAAS/SCHOLL, *supra* note 41, 373.

50 This has been developed as a general principle of membership associations *(Verbände)* by SCHMIDT, *supra* note 48, 21 ff. Cf. also I. SAENGER, *in this volume*, p. 194.

51 By contrast, Sect. 51a GmbHG and Sect. 131 AktG expressly stipulate such rights for the shareholders of a GmbH or stock company. See I. SAENGER, *in this volume*, pp. 198 ff.

52 Bundesgerichtshof, Neue Juristische Wochenschrift Rechtsprechungs-Report (NJW-RR) 2003, 830.

53 SCHMIDT, *supra* note 48, 57; ARNOLD, *supra* note 18, Sect. 38, n. 32f.

54 M. SCHÖPFLIN, in: Beuthien/Gummert/Schöpflin (eds.), Münchener Handbuch des Gesellschaftsrechts Bd. 5, Verein. Stiftung bürgerlichen Rechts (4th ed., Munich 2016) § 34 Mitgliederrechte, n. 18 f.; ARNOLD, *supra* note 18, Sect. 38, n. 34.

55 HAAS/SCHOLL, *supra* note 41, 374.

The prevailing view, by applying Sect. 131 AktG *mutatis mutandis,* limits the individual information right to the general meeting. This means a member can demand information at least in principle only within the general meeting and to the extent such information is necessary to permit a proper evaluation of the relevant item on the agenda. This is justified with the argument that an association is designed for large organizations, and it would be impracticable to allow each individual member to request information at any time.[56] Independently from this, the Federal Supreme Court has recently confirmed that a member does have the right to inspect the books and records of the association, including the members list, if there is a legitimate reason and if the association's interests in keeping the data confidential do not outweigh such interest.[57]

A member can enforce his or her individual information right in court.[58] However, the board may (and must) refuse the request where interest of the association to keep the information confidential outweighs the interest of the individual member (cf. Sect. 51a(2) GmbHG, Sect. 131(3) AktG).[59]

c) Limited disclosure to the public through the registry of associations

Registered associations must register and keep up-to-date certain information with the registry of associations (*Vereinsregister*). This registry is today operated electronically (Sect. 55a BGB). It may be inspected by everyone (Sect. 79 BGB), resulting in a (limited) disclosure to the general public.

To register an association, the board has to file the articles of association *(Vereinssatzung),* which must fulfill the minimum requirements. Pursuant to Sect. 57 BGB, the articles must contain the associations purpose, the name and the seat of the association and indicate that the association is to be registered. In addition, copies of the documents recording the appointment of the board must be filed (Sect. 59). Finally, the application must state the name and the registered office of the association as well as the date of the adoption of the articles of association, the names of the members of the board and their power to represent the association (Sect. 64 BGB). The application for registration must be filed in the form of a public document (Sect. 77 BGB), usually produced by a notary public (Sect. 129 BGB).

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56 SCHMIDT, *supra* note 48, 56 f.; ARNOLD, *supra* note 18, Sect. 38, n. 33. For a more flexible approach see VON HIPPEL, Grundprobleme, *supra* note 5, 329; T. HEIDEL/D. LOCHNER, in: Heidel et al. *supra* note 23, Sec. 38, n. 11.

57 Bundesgerichtshof (BGH), Neue Zeitschrift für Gesellschaftsrecht (NZG) 2010, 1430.

58 HAAS/SCHOLL, *supra* note 41, 380; SCHÖPFLIN, *supra* note 54, § 34 Mitgliederrechte, n. 21.

59 ARNOLD, *supra* note 18, Sect. 38, n. 33; HAAS/SCHOLL, *supra* note 41, 381 ff.

If a change in the composition of the board has not been disclosed by registration, it cannot be asserted against a third party who did not know about such change (Sect. 68 BGB). Sect. 70 BGB extends this protection to restrictions on the scope of the board's power to represent the association as well as arrangements on the power to represent which diverge from the default rule in Sect. 26(2) BGB. While this mechanism is similar to the protection granted by Sect. 15(1) and (2) HGB with regard to the commercial registry *(negative Publizität),*[60] the scope of protection in the case of the registry of associations is limited to the power to represent the association. Also, different from Sect. 15(3) HGB, public confidence in information incorrectly registered with the registry of associations is not protected.[61]

d) No obligation to audit or file accounts

In principle, there is no obligation to audit or file accounts even for large non-profit associations.[62] This means that associations do not have to inform the public from where they receive their funds and how they use these funds. Some associations do so voluntarily. These associations are able to receive the DZI donation seal *(Spenden-Siegel)* which non-profit entities fulfilling certain conditions can earn to foster their reputation.

The rudimentary nature of financial disclosure as stipulated by the current law has been criticized as "archaic".[63] It is, of course, possible to stipulate an obligation to audit accounts in the articles of association (Sect. 40 BGB). Thus far calls for introducing a mandatory auditing of accounts[64] have not been followed by the legislature. The limited financial disclosure is problematic as it weakens governance of registered associations. Scandals not only tarnish the individual registered association but tend to undermine trust in the third sector in general. While characteristics of non-profit associations should be taken into account, in particular their non-profit purpose and the fact that members of the board often are not paid for their work, this hardly can mean that management is permitted to be less prudent.

60 Cf. I. SAENGER, *in this volume*, p. 192 f.

61 Arguing in favor of introducing such *positive Publiziät* NICOLAI/KUSZLIK, *supra* note 18, 50.

62 For exceptions in special cases see SEGNA, *supra* note 47, 1569; KRIMMER et al. *supra* note 2, 112 ff.

63 M. LUTTER, Zur Rechnungslegung und Publizität gemeinnütziger Spenden-Vereine, Betriebs-Berater (BB) 1988, 489, 490. For a similar view see SEGNA, *supra* note 47, 1569.

64 LUTTER, *supra* note 63, 492 ff.; SEGNA, *supra* note 47, 1571 ff.

2. *Information Duties in the Law of Foundations with Legal Personality*

A lack of transparency and disclosure is no less – if not even more – an issue with regard to foundations with legal personality.[65] The status quo is characterized by a mostly irrelevant information duty of the board vis-à-vis the foundation (a.), rather heterogeneous state supervision by the *Länder* (b.), very limited public disclosure through the directory of foundations (c.), and the absence of mandatory auditing and financial disclosure (d.).

a) Limited relevance of the board's information duties vis-à-vis the foundation

For foundations with legal personality, Sects. 86, 27(3), 666 BGB stipulate a similar information duty of the board as in the case of registered associations. The practical importance of this duty, however, is very limited. This is because by default there is no other organ (no general meeting or the like) which could request such information on behalf of the foundation. The board's information duty may have practical relevance where the charter provides for a supervisory board.[66]

b) Information duties as part of state supervision (Stiftungsaufsicht)

To make up for the lack of members or shareholders who could oversee the foundation, the law provides for state supervision by the *Länder (Stiftungsaufsicht),*[67] which in turn is based on certain information duties of the foundation vis-à-vis the supervisory authorities.[68] State supervision relates to the establishment of the foundation (Sects. 80, 81 BGB) as well as to its operations. It is, however, strictly limited to oversight of legality *(Rechtsaufsicht),* i.e., the supervisory authority aims at enforcing compliance with the foundation's charter and the relevant laws. Apart from this, they in principle do not exercise any oversight as to how the foundation is operated and how available funds are spent. Even where the charter stipulates that funds must be used "efficiently and economically", the supervisory authori-

65 For a comprehensive treatment see B. VOGT, Publizität im Stiftungsrecht (Hamburg 2013) 13 ff.

66 B. WEITEMEYER, in: Münchener Kommentar BGB, *supra* note 18, Sect. 86, n. 51.

67 V. HIPPEL/R. WALZ, Tax law as an instrument to strengthen the corporate governance of the nonprofit sector, in: HOPT/VON Hippel, *supra* note 5, 940, 946.

68 T. VON HIPPEL, Nonprofit Organizations, *supra* note 5, 216; H. HOF in: V. CAMPENHAUSEN/RICHTER (eds.), Stiftungsrechts-Handbuch (4th ed., Munich 2014) 147 ff.; KRIMMER et al. *supra* note 62, 80 ff.

ties may not simply use their own definition of what is efficient and economical.[69]

The foundation laws of the *Länder* are far from being homogeneous with regard to which information foundations have to provide to the supervisory authorities. All state laws stipulate that the foundation must annually provide simple accounts and reports on how the foundation has fulfilled its goals *(Jahresabrechnung mit Vermögensaufstellung und Geschäftsbericht)*. It should be noted that this information is not disclosed to the public.[70] In most of the *Länder* the supervision is occasioned supervision *(Anlassaufsicht),* while some state foundation laws grant the authorities the right to request information at any time.[71] Even in these states, limited resources of the state authorities hamper the effectiveness of state supervision, which therefore has been subject to reform discussions for many years.[72] With few exceptions a foundation no longer needs prior approval by the authorities to carry out certain transactions, but some state laws require prior notice to be given, *inter alia*, in cases involving the sale or encumbrance of immovable property.

c) Directory of foundations (Stiftungsverzeichnis)

Even though the existence of a foundation with legal personality does not depend on registration, nowadays a public directory of foundations *(Stiftungsverzeichnis)* exists in each *Land*. The contents of this directory, with few exceptions, can be inspected online by any individual without having to show a legitimate interest. However, state foundation laws provide for only limited information to be registered, including the name, the seat, and the purpose of the foundation. Some state foundation laws require the entry of additional information regarding, for example, the foundation's address, organs, year of establishment, or its initial assets.[73] State foundation laws also differ with regard to the extent that foundations are obliged to keep the information in the foundation directory up-to-date and, in particular, which sanctions are attached to such obligations in case of violations.[74]

Generally, it must be said that this key information is of rather limited use for third parties. This is because, as opposed to the commercial registry and the registry of associations, the directories of foundations cannot be

69 K.J. SCHIFFER/M. PRUNS, in: HEIDEL et al. *supra* note 23, Sect. 80, n. 111.

70 T. V. HIPPEL, Nonprofit Organizations, *supra* note 5, 220.

71 See WEITEMEYER, in: Münchener Kommentar BGB, *supra* note 18, Sect. 80, n. 52, who argues for a restrictive use of such rights.

72 WEITEMEYER, in: Münchener Kommentar BGB, *supra* note 18, Sect. 80, n. 65.

73 For details see C. MECKING, *supra* note 54, § 90 Publizität und Stiftungsverzeichnis, n. 11; VOGT, *supra* note 65, 27 ff.

74 KRIMMER et al. *supra* note 62, 83 ff.

relied upon by third parties with regard to any of their content (neither *negative* nor *positive Publizität*).[75] Proposals to establish a public registry upon which the public can rely have so far been rejected as too costly, but remain part of the ongoing reform discussions.[76] Where an organ must provide proof of its power to represent the foundation, under the current law, it can request a certificate issued by the supervisory authority *(Vertretungsbescheinigung).*[77]

d) No obligation to audit and disclose annual accounts to the public

Under the current law, it is only in exceptional cases that a foundation with legal personality has a legal obligation to have its annual accounts audited and to disclose them to the general public. As has been mentioned, all state foundation laws require rendering account annually in a simple form vis-à-vis the supervisory authority. In some states third parties are able to access these documents based on the freedom of information laws of the relevant state.[78] Public disclosure of these documents, by contrast, is not required.

Partly based on comparative studies, not having mandatory disclosure of annual accounts has been subject to criticism for many years.[79] It is broadly acknowledged that having information about the financial matters of the foundation is important for actual and potential creditors as well as for the general public, and last but not the least for potential donors.[80] Critics, furthermore, have emphasized that requiring the filing of accounts as well as disclosure of salaries of top employees or contracts with third parties is not only important to improve the governance of foundations, but also to strengthen the public's support for tax privileges.[81] It seems highly doubtful whether voluntary measures can be successful in this case. The Association of German Foundations *(Bundesverband Deutscher Stiftungen),* an umbrella organization for foundations in Germany, has issued non-binding Guiding Principles of Good Practice for Foundations *(Grundsätze guter Stiftungspraxis),* which include also some general recommendations on

75 *Cf. supra* at III.1.c).

76 MECKING, *supra* note 54, § 90 Publizität und Stiftungsverzeichnis, n. 6; Bericht der der Bund-Länder-Arbeitsgruppe, *supra* note 11, 93 ff.

77 VOGT, *supra* note 65, 47 ff.; WEITEMEYER, *supra* note 18, Sect. 80, n. 61 f.

78 VOGT, *supra* note 65, 76 ff.; WEITEMEYER, *supra* note 18, Sect. 80, n. 64.

79 WEITEMEYER, *supra* note 18, Sect. 80, n. 63 ff. with further references.

80 See Bericht der der Bund-Länder-Arbeitsgruppe, *supra* note 11, 93. The majority of the working group, however, rejected proposals to introduce mandatory auditing and financial disclosure rules for foundations only. *Id*. 10 ff.

81 WEITEMEYER, *supra* note 18, Sect. 80, n. 65 with further references.

financial reporting and public disclosure.[82] While the organization observes a positive trend, its own empirical survey also demonstrates that there is still considerable room for improvement.[83]

At least for those foundations aiming at tax-privileged status, the oversight exercised by the tax authorities in part fills the gap. An analysis of the information duties in the law of non-profit entities therefore would be incomplete without touching at least briefly upon the relevant rules under tax law.

IV. Information Duties Vis-à-Vis the Tax Authorities

How easily non-profit entities can acquire tax-privileged status is essential not only regarding the question of whether it is possible to build financially robust third sector organizations.[84] Rather, given the aforementioned weaknesses in the governance of non-profit entities under German law, supervision by tax authorities also indirectly fulfills an important ancillary role in relation to the prevention of abuses, at least for those non-profit entities which aim at tax-privileged status. This has led some to ask whether – in order to foster governance of non-profit entities – the most promising option might actually be to further develop tax rules on non-profit entities.[85]

While there is no uniform "tax law for non-profit entities", Sects. 51 to 68 of the Fiscal Code (*Abgabenordnung*, AO) regulate the recognition of a non-profit entity as pursuing public-benefit *(gemeinnützige)* purposes irrespective of the legal form. Such recognition constitutes the basis for the tax treatment, under the individual tax laws, of both the non-profit entity's activities and the donations made to it.[86] In particular, a public-benefit corporation is in principle exempt from corporate income tax (Sect. 5(1) no.9 Corporate Income Tax Act (KStG)), trade tax (Sect. 3 no.6 Trade Tax Act

82 Availabe also in English on the Association's homepage at *https://www.stiftungen.org/en/home/german-foundations/what-is-a-foundation.html*.

83 Bundesverband Deutscher Stiftungen, StiftungsStudie – Führung, Steuerung und Kontrolle in der Stiftungspraxis (Berlin 2010) 5.

84 See for Japan in a broader context also H. Holbig/M. Bälz, Strengthening the nation and protecting the weak: Shifting modes of state-society relations in Japan and China, in: Amelung/Bälz/Holbig/Schumann/Storz, Protecting the Weak in East Asia: Framing, Mobilisation and Institutionalisation (forthcoming Abington 2018).

85 See von Hippel/Walz, *supra* note 67, 948 ff.

86 For details on the taxation of registered associations see A.K. Gollan/C. Ortloff, §42 Besteuerung, in: Beuthien/Gummert/Schöpflin, *supra* note 54; regarding the taxation of foundations see A. Richter/C. Wörle-Himmel/C. Ortloff, *ibid.* § 98 Besteuerung.

(GewStG)) and inheritance and gift tax (Sect. 13(1) no.16b Inheritance and Gift Tax Act (ErbStG)).[87] For donors, donations and endowments to a public benefit corporation are, within certain limits, tax-deductible (Sect. 10b Income Tax Act (EStG).

The tax authorities grant tax-privileged status under the condition that the articles of association or the charter state that the corporation pursues, directly and exclusively, public-benefit, charitable or religious purposes (as defined in Sects. 52-68) and actual management conforms to this (Sect. 59 AO). According to Sect. 52 AO, a corporation pursues public-benefit purposes if its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. Sect. 52(2) AO stipulates a rather comprehensive list of activities recognized as advancement of the general public. "Altruistic" means in particular that a public-benefit corporation's income and other funds may not be used for anything other than public-benefit purposes (particularly that funds may not be distributed as profits) and that they must be used promptly for the public-benefit purposes as set out in the articles of association or the charter (Sec 55 AO). The tax authorities may revoke tax-privileged status with retrospective effect if the statute of the corporation or the actual management activity no longer fulfills these requirements.

Even prior to formation of the non-profit entity, an application can be filed with the tax authorities to have the draft articles of association or charter reviewed for compliance with the aforementioned requirements for public-benefit recognition (Sect. 60a AO). Once the non-profit entity is established, non-profit entities normally have to renew their tax-exempt status every three years. In addition, changes in the purpose of the non-profit entity have to be approved by the tax authorities. The regular review of tax-privileged status, alongside the obligation to file tax returns, entails a level of supervision of public-benefit corporations that often will have more of a disciplinary effect than the supervision by the supervisory authorities. Of course, this information is not disclosed to the public and thus does not amount to public disclosure.

V. Conclusion

The German law of non-profit entities shows a broad variety of information duties. In the case of registered associations, we primarily observe a combination of a collective information right of the association represented by the general assembly and an individual information right of each member,

87 Where a non-profit entity carries on commercial activities, the income so achieved is taxable, but this does not affect the tax-privileged status as such (Sect. 64(1) AO).

which are supplemented by limited public disclosure through the register of associations. In the case of foundations with legal personality, by contrast, given that a foundation by definition does not have members or owners, it is primarily state supervision by the *Länder*, which is supposed to ensure good governance. Information duties owed by foundations with legal personality vis-à-vis the relevant authorities again play a significant role here. However, the effectiveness of this state supervision often is doubtful, last but not the least due to limited resources. So far, no public register for foundations with legal personality exists which could be relied upon by the public. Furthermore, under current law, neither registered associations nor foundations with legal personality are obliged to audit and disclose financial statements, irrespective of their size. For those non-profit entities aiming to achieve and maintain tax-privileged status as public benefit corporations, supervision by the tax authorities in practice often constitutes the most effective supervision. While tax law thus fulfills a welcome ancillary function with regard to the governance of many non-profit entities in Germany, a lack of transparency of the third sector remains an issue. After all, the non-profit sector crucially depends on public trust. Only if, even in the future, sufficient people are willing to engage in, to donate to and to politically support non-profit entities will they be able to fulfill the increasingly important societal role attributed to them.