

# The social enterprise: a new form of the business enterprise?

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## I. Concept and appearance

### *1. The concept of a social enterprise in Germany*

In some countries, social enterprises are registered or organized in special legal forms, and thereby acquire a special status. This is not yet the case in Germany. Increasingly, however, entrepreneurs and foundations in Germany are looking for ways to translate commercial activities directly into social projects.<sup>1</sup> Therefore, scholars in Germany fall back on existing definitions.<sup>2</sup> The European Commission, through its Social Business Initiative (SBI), has defined a social enterprise as an undertaking “(i) whose primary objective is to achieve social impact rather than generating profit for owners and shareholders, (ii) which uses its surpluses mainly to achieve these social goals, [and] (iii) which is managed by social entrepreneurs in an accountable, transparent and innovative way, in particular by involving workers, customers and stakeholders affected by its business activity”.<sup>3</sup> Similarly, *Social Entrepreneurship Netzwerk Deutschland* defines the “primary goal of social entrepreneurship as solving social challenges. This is achieved through the sustained use of entrepreneurial means and results in new and innovative solutions. Steering and controlling mechanisms ensure that the social goals are being practised internally and externally”.<sup>4</sup>

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<sup>1</sup> *Fleischer*, ZIP 2021, 5; *Habersack*, in: FS für Christine Windbichler, 2020, 707; *Hager*, in: FS für Christine Windbichler, 2020, 731; *Kuntz*, in: FS für Klaus J. Hopt, 2020, 653; *Möslein/Sorensen*, *Columbia Journal of European Law* 24 (2018), 391 (393).

<sup>2</sup> The lack of definition was also pointed out in Parliament by members of parliament from the Green Party (small group question Bündnis 90/Die Grünen, BT-Drs. 19/6844).

<sup>3</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011–14 for Corporate Social Responsibility, KOM(2011) 681 final, 25.10.2011, 4; Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, L 115/18 of 25.4.2013.

<sup>4</sup> *Ryland*, Deutschland hat endlich eine Definition für Social Entrepreneurship!, 9.10.2019, <https://www.tbd.community/de/a/deutschland-hat-endlich-eine-definition-fuer-social-entrepreneurship>, last retrieved on 20.1.2022; *Osbelt*, Social Entrepreneurship – Entstehung und Bedeutung, *Social Entrepreneurship Netzwerk Deutschland (SEND e.V.)*, 2019, <https://www.send-ev.de/>

## 2. Characteristics and industries

In Germany, the most pragmatic characteristic is a non-profit legal form where there is no distribution of profits (non-distribution constraint) and a strong focus on social welfare. But even organisations that do not hold the status of a non-profit entity may (in part) pursue social and ecological goals that are not identified by applying this principle. Another criterion for distinguishing between social enterprises and traditional ventures is the degree of prominence of the business concept. Innovation can relate to products and services as well as to business models and organisational forms. Approaches that are more in line with economic principles often focus on providing capital and knowledge to promote self-help, or they apply strict ethical or ecological criteria in the production process (such as fair trade, alternative energies, and so on).<sup>5</sup> One example is social enterprises that offer goods or services on the open market to support their employees. Typical of this group of enterprises is Discovering Hands (early detection of breast cancer through palpation of the breasts by blind women). Social enterprises pursue similar goals as workshops for disabled people (WISE), with the aim of integrating people with disabilities into working life, although they are traditionally less innovative and tend to assign employees simple tasks.

A third distinguishing criterion is the generation of earned income. In Germany, this also applies if fixed rates are agreed for certain services, such as in the case of the health or care sectors.<sup>6</sup> The definition of a social enterprise does not apply to projects that are based exclusively on donations or subsidies. The distinction between social business (often referred to as the “social economy” or “third sector”) is not without ambiguity. In some cases, a social business is considered to be a special form of social enterprise.<sup>7</sup> Mostly, however, a social business is in the ownership of traditional charities and welfare organisations that generate revenues by charging for social services that they themselves or their subsidiaries generate and generally also operate in a less innovative manner.<sup>8</sup> Nevertheless, traditional welfare organizations are setting up social enterprises themselves with the help of subsidiaries.<sup>9</sup> Thus, the term “social economy” is used as an umbrella term for classic third-sector organizations and social entre-

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[www.send-ev.de/wp-content/uploads/2021/03/definition\\_socialentrepreneurship.pdf](http://www.send-ev.de/wp-content/uploads/2021/03/definition_socialentrepreneurship.pdf), last retrieved on 20.1.2022.

<sup>5</sup> Scheuerle/Glänzel/Knust/Then (CSI University of Heidelberg), *Social Entrepreneurship in Deutschland: Potentiale und Wachstumsproblematiken*, 2013, 10.

<sup>6</sup> Scheuerle/Glänzel/Knust/Then (CSI University of Heidelberg), *Social Entrepreneurship in Deutschland: Potentiale und Wachstumsproblematiken*, 2013, 11.

<sup>7</sup> Lorenz, *Social Entrepreneurs at the Base of the Pyramid*, 2012.

<sup>8</sup> Scheuerle/Glänzel/Knust/Then (CSI University of Heidelberg), *Social Entrepreneurship in Deutschland: Potentiale und Wachstumsproblematiken*, 2013, 21.

<sup>9</sup> Nock/Krlev/Mildenberger, *Soziale Innovationen in den Spitzenverbänden der Freien Wohlfahrtspflege – Strukturen, Prozesse und Zukunftsperspektiven*, 2013.

preneurs.<sup>10</sup> Socially responsible companies that primarily distribute their profits to shareholders are generally not classified as social enterprises.<sup>11</sup>

According to the third German Social Entrepreneurship Monitor, social enterprises are most frequently represented in the care and education sectors (21.5 %), as well as the health and social services areas of the economy (17.5 %). In this way, the non-profit GmbH *Teach First Deutschland* facilitates the opportunity for young people to get actively involved in education for two years.<sup>12</sup> In third place is information und communication (16.6 %).<sup>13</sup> The company *Co2Online GmbH*, for instance, advises individuals online on how they can save energy in their households.<sup>14</sup>

### 3. Facts and figures

The phenomenon of social enterprises as such is “nothing new”, but the underlying strategies of these enterprises have changed.<sup>15</sup> The founders of the co-operative movement, Friedrich Wilhelm Raiffeisen and Hermann Schulze-Delitzsch, or the Carl Zeiss Foundation, for example, were already acting as social entrepreneurs in the mid-19th century. However, due to the rapidly developing German social welfare state with government-subsidised welfare institutions, the idea of social enterprise spread much less quickly in Germany than in developing and emerging markets, as well as in the Anglo-Saxon industrialised countries, where social security systems are often based on inadequate or largely private provision of social services.

As there is no standard legal form for social enterprises in Germany, it is not possible to give an exact figure. The German development bank KfW collected the most recent data in 2018, indicating that 108,000 social enterprises were founded between 2012 and 2017.<sup>16</sup> The *Social Entrepreneurship Netzwerk Deutschland* (SEND e.V.) interest group has been active since 2017 and has

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<sup>10</sup> On the different definitions *Salamon/Anbeier*, In Search of the Non-Profit Sector I: The Question of Definitions, in: *Voluntas. International Journal of Voluntary and Nonprofit Organizations*, 1992, 125–161; *Scheuerle/Glänzel/Knust/Then* (CSI University of Heidelberg), *Social Entrepreneurship in Deutschland: Potentiale und Wachstumsproblematiken*, 2013, 9.

<sup>11</sup> *Achleitner/Heister/Stabl*, *Social Entrepreneurship: Ein Überblick*, 2007, 3 (7).

<sup>12</sup> <https://www.teachfirst.de/>, last retrieved on 20.1.2022.

<sup>13</sup> *Hoffmann/Scharpe/Wunsch*, 3. *Deutscher Social Entrepreneurship Monitor 2020/2021*, 18 et seq., <https://www.send-ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf>, last retrieved on 20.1.2022.

<sup>14</sup> <https://www.co2online.de/>, last retrieved on 20.1.2022.

<sup>15</sup> *Hackenberg/Empter*, *Social Entrepreneurship – Social Business: Für die Gesellschaft unternehmen*, 2011, 12 et seqq.

<sup>16</sup> *Mezger*, KfW Research Nr. 238, 2019, <https://www.kfw.de/PDF/Download-Center/Konzernthemen/Research/PDF-Dokumente-Fokus-Volkswirtschaft/Fokus-2019/Fokus-Nr.-238-Januar-2019-Sozialunternehmer.pdf>, last retrieved on 20.1.2022.

around 450 members (as at 2020).<sup>17</sup> Besides the co-operatives already mentioned, in an article on social entrepreneurship the Federal Agency for Civic Education identifies the following enterprises as “well-known”: *Ecosia* (an ecological search engine), *Discovering Hands and Kuchentratsch* (an enterprise for self-determination in old age by means of business activities involving the baking and distribution of cakes).<sup>18</sup> Plainly, there are no well-known social enterprises in Germany that stand out from the rest.

#### 4. Certifications and Metrics

According to German regulatory principles, recognition as a non-profit organisation under tax law acts as a special seal of approval for the pursuit of public welfare objectives. State supervision creates a special degree of public trust, even if it cannot guarantee the most effective use of funds because it is limited as such to mere legal control.<sup>19</sup>

The EU has meanwhile enacted the third version of the Eco Management and Audit Scheme (EMAS) of 2009,<sup>20</sup> which provides for a detailed certification procedure for environmentally sound production. The certification by the US organisation B Lab requires companies to meet 80 out of 200 criteria, ranging from labour concerns to environmental issues that are particularly oriented towards the common good, to attain the status of a Certified B Corporation.<sup>21</sup> This is also available in Germany and is used by some companies, such as *Innocent Säfte*. Furthermore, in Germany, there is certification for sustainable corporate governance issued by *TÜV Rheinland*, and the audit of the International Association, Economy for the Common Good (*Gemeinwohlökonomie e.V.*). *Phineo gAG*, founded by the Bertelsmann Foundation and other actors, is seeking to create greater transparency through a social marketplace whereby non-profit organisations are examined using an impact analysis.<sup>22</sup> Private organisations like *Betterplace.org*<sup>23</sup> bring together donors and individual social projects. In doing so, the non-profit organisations are made more visible to do-

<sup>17</sup> *Rabl*, Social Entrepreneurs: Zwischen den Stühlen, <https://www.diepresse.com/5614815/social-entrepreneurs-zwischen-den-stuehlen>, last retrieved on 20.1.2022.

<sup>18</sup> *Yahyaoui*, Social Entrepreneurship. Herausforderungen und Bedeutung für die Gesellschaft, 26.3.2021, <https://www.bpb.de/apuz/im-dienst-der-gesellschaft-2021/329330/social-entrepreneurship-herausforderungen-und-bedeutung-fuer-die-gesellschaft>, last retrieved on 20.1.2022.

<sup>19</sup> *Hüttemann*, NJW-Beilage 2018, 55 et seqq.; *Momberger*, Social Entrepreneurship, 2015, 207 et seq.; *Weitemeyer/Vogt*, NZG 2014, 12.

<sup>20</sup> *Schmidt-Räntsch*, EurUP 2010, 123.

<sup>21</sup> *Möslein/Mittwoch*, *RabelsZ* 80 (2016), 399 et seqq.; *Möslein*, in: *Burgi/Möslein* (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021, 3 (5 et seqq.).

<sup>22</sup> *Phineo* (ed.), *Engagement mit Wirkung*, 2010; *Epkenhans*, *Transparenz über die Wirkungen gemeinnütziger Aktivitäten*, in: *Bürokratieentlastung des Dritten Sektors und des bürgerschaftlichen Engagements: Notwendigkeit, Praxis und Perspektiven*, 2011, 271.

<sup>23</sup> <https://www.betterplace.org/de>, last retrieved on 20.1.2022.

nors by means of systematic recording, evaluations and comparisons related to the fields of work, modes of operation and performance. Private initiatives<sup>24</sup> such as *Transparency International Deutschland*, *DZI*<sup>25</sup> or *Deutscher Spendenrat*<sup>26</sup> monitor the spending of donations via their donation seals.

Social entrepreneurs are expected to demonstrate their success or their social impact – that is, the (positive) effects on their subject area – to investors and other stakeholders with the help of an impact analysis. The methods and standards of the private sector for measuring impact can hardly be used for social enterprises. There still exist no binding, uniform reporting standards for the reporting of social impact. The organisation *Asboka* has developed the Social Reporting Standard (SRS), which proposes a framework for reporting. The method helps to document and communicate the impact chain of programmes, projects and organisations. A distinction is made between output (for example, the number of unemployed young people who are trained) and outcome (the number of young people who actually get a job).<sup>27</sup> Alternatively, the Capacity Assessment Grid is often used to identify the performance of an organisation based on structural features, skills and other resources. The *Social Enterprise Scorecard*, an adaptation of the *Balanced Score Card*, also takes into account social long-term goals.<sup>28</sup> The fragmentation of these initiatives is largely considered to be an obstacle to a broader public response.<sup>29</sup>

Nevertheless, a study by the Heidelberg CSI concludes that the current accountability and transparency status in the third sector cannot be deemed visibly problematic. On the contrary, in Germany there is a greater reliance on state and regulatory monitoring and lesser reliance on the public interest.<sup>30</sup> According to German regulatory principles, the role of non-profit status for tax purposes is that of an overarching organisational statute providing for the recognition of eligible non-profit organisations. It acts like a state seal of approval, opens up access to public or private funding and other benefits, ranging from fee reductions, for instance, for the broadcasting contribution, to the requirement of cooperation between social enterprises under social law as an exception from antitrust law, in that many laws contain provisions that are linked to non-profit

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<sup>24</sup> *Krönes* compares the seals; *Krönes*, in: Gmür/Schauer/Theuvsen (eds.), *Performance Management in Nonprofit-Organisationen*, 2013, 377 et seqq.

<sup>25</sup> <https://www.dzi.de/>, last retrieved on 20.1.2022.

<sup>26</sup> <https://www.spendenrat.de/>, last retrieved on 20.1.2022.

<sup>27</sup> <https://www.wirkung-lernen.de/>, last retrieved on 20.1.2022.

<sup>28</sup> *Roder*, *Reporting im Social Entrepreneurship. Konzeption einer externen Unternehmensberichterstattung für soziale Unternehmer*, *Entrepreneurial and Financial Studies*, 2011, 125.

<sup>29</sup> *Anheier/Beller/Haß*, *FJSB* 2011, 96.

<sup>30</sup> *Anheier/Beller/Haß*, *FJSB* 2011, 96.

organisations or purposes.<sup>31</sup> Government grants are often made dependent on the non-profit status of an organisation.<sup>32</sup>

### 5. Funding and finance

A recent comparative study by the University of Heidelberg's Research Centre for Social Investment and Innovation (CSI) found that access to funding is the main challenge for social enterprises.<sup>33</sup> Due to the special financial status of social enterprises, their financing is very often a challenging task, because the return on investment for investors is often limited due to the income models of social enterprises.<sup>34</sup> Typically, the sources of income vary. Income is generated through the sale of products, via donations, or from private or public funding.<sup>35</sup> Some 23.2 % of social enterprises generate income exclusively through market activities, while 11.7 % obtain income exclusively through non-market activities (and may therefore not be defined as social enterprises from a strict point of view). The majority of market income is again generated from trade with commercial enterprises (37.6 %) and from private individuals (33.6 %). In the case of non-market activities, some 34.3 % of the funding comes from public funding sources and another 27.3 % from donations from private individuals.<sup>36</sup> When social enterprises are asked to identify types of funding that go beyond financing operations (for example, for substantial investments), they frequently cite their own savings (51.6 %), government funding (41.8 %) and internal funds from operating cash flow (39.7 %). EU funding is drawn on by only one in five *Deutsche Social Entrepreneurship Monitor* (DSEM) social enterprises.<sup>37</sup>

<sup>31</sup> Cremer, Steuerliche Gemeinnützigkeit und allgemeine Rechtsordnung, 2021.

<sup>32</sup> Schauhoff, in: Schauhoff (ed.), Handbuch der Gemeinnützigkeit, 3. Aufl. 2010, Grundle-  
gung recital 37.

<sup>33</sup> Krlev/Sauer/Scharpe/Mildenberger/Elsemann/Sauerhammer, Finanzierung von So-  
zialen Innovationen – Internationale Vergleichsstudie, Centrum für soziale Investitionen und  
Innovationen (CSI University of Heidelberg and SEND e.V.), 2021, 4, 11, [https://www.send-  
ev.de/wp-content/uploads/2021/10/Finanzierung\\_Sozialer\\_Innovationen.pdf](https://www.send-ev.de/wp-content/uploads/2021/10/Finanzierung_Sozialer_Innovationen.pdf), last retrieved  
on 20.1.2022.

<sup>34</sup> Scheuerle/Glänzel/Knust/Then, Social Entrepreneurship in Deutschland: Potentiale  
und Wachstumsproblematiken (CSI University of Heidelberg), 2013, 65 et seq., [https://  
www.kfw.de/PDF/Download-Center/Konzernthemen/Research/PDF-Dokumente-Stu-  
di-en-und-Materialien/Social-Entrepreneurship-in-Deutschland-LF.pdf](https://www.kfw.de/PDF/Download-Center/Konzernthemen/Research/PDF-Dokumente-Stu-<br/>di-en-und-Materialien/Social-Entrepreneurship-in-Deutschland-LF.pdf), last retrieved on  
20.1.2022.

<sup>35</sup> Hoffmann/Scharpe/Wunsch, 3. Deutscher Social Entrepreneurship Monitor 2020/2021,  
42, [https://www.send-  
ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf](https://www.send-ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf), last retrieved  
on 20.1.2022; 65,1 % of the companies have hybrid sources of income.

<sup>36</sup> For a detailed overview of the main sources of income of the organizations interviewed  
Hoffmann/Scharpe/Wunsch, 3. Deutscher Social Entrepreneurship Monitor 2020/2021, 43,  
[https://www.send-  
ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf](https://www.send-ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf), last retrieved on  
20.1.2022.

<sup>37</sup> Hoffmann/Scharpe/Wunsch, 3. Deutscher Social Entrepreneurship Monitor 2020/2021,

Public funding is a feature of almost all social enterprises in Europe.<sup>38</sup> In 2010, the federal government adopted the promotion of social entrepreneurship as part of the National Engagement Strategy. KfW has had a financing programme for social entrepreneurship since 2012.<sup>39</sup> State funding through KfW requires a business plan for the first two business years, must present their curriculum vitae and have to disclose their financial situation. The business model should not only focus on social involvement, but also on generating profits. The KfW therefore imposes requirements on the legal form: Only commercial enterprises can get a loan, non-profit companies are not supported.<sup>40</sup> In the meantime, social enterprises are more strongly addressed in the federal government's funding and advisory services. These include, for example, the loan, equity and mezzanine support (for example, ERP Start-up Loan – *StartGeld*, *EXIST*, *Micromezzanine Fund*, *ERP VC Fund Investments*), the KfW programme *IKU – Investment Loan for Municipal and Social Enterprises*, and the project *Generationsbrücke Deutschland* (2014 to 2019), in which more than 200 co-operation partners (such as elderly care facilities, day-care centres and schools) are currently involved.<sup>41</sup>

Since 2003, there have been venture capitalists for social enterprises (social venture) in Germany. Social venture capitalists do not expect a financial return (or only a small one), but they do expect a social return.<sup>42</sup> Furthermore, to provide social enterprises with the necessary equity capital, loan and donation communities can come together. Typically, funding is provided through awards and prizes. As the first investment company in German-speaking countries, the

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48, <https://www.send-ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf>, last retrieved on 20.1.2022.

<sup>38</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Social Business Initiative, Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation, KOM(2011) 682 final, 25.10.2011; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011–14 for Corporate Social Responsibility, KOM(2011) 681 final, 25.10.2011; funding program of KfW: <https://www.kfw.de/inlandsfoerderung/Unternehmen/Gr%C3%BCnden-Nachfolgen/Sozialunternehmen/>, last retrieved on 20.1.2022.

<sup>39</sup> Federal Ministry for Family Affairs and KfW present new instrument for financing the growth of social enterprises, 25.10.2011, <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/bundesfamilienministerium-und-kfw-stellen-neues-instrument-zur-wachstumsfinanzierung-von-sozialunternehmen-vor-97002>, last retrieved on 20.1.2022.

<sup>40</sup> [https://www.kfw.de/inlandsfoerderung/Zusatzcontent-und-Bilder/Nachfolge/Sozialunternehmen/0142\\_05\\_Infografik\\_Sozialunternehmen\\_V5\\_FINAL.pdf](https://www.kfw.de/inlandsfoerderung/Zusatzcontent-und-Bilder/Nachfolge/Sozialunternehmen/0142_05_Infografik_Sozialunternehmen_V5_FINAL.pdf), last retrieved on 20.1.2022.

<sup>41</sup> Answer of the Federal Government to the small group question of the parliamentary group Die Grünen, BT-Drs. 19/7293.

<sup>42</sup> *Kemnitzer/Schaarschmidt*, Stiftung & Sponsoring 1/2011, 34; regarding these middle organisations see also Bertelsmann Stiftung (ed.), *Grenzgänger, Pfadfinder, Arrangeure. Mittlerorganisationen zwischen Unternehmen und Gemeinwohlorganisationen*, 2008.

*BonVenture Group* has been supporting social entrepreneurs since 2003, providing them with venture capital as well as advice and networking contacts.<sup>43</sup> The Social Venture Fund finances social enterprises and invests in the areas of education, integration, life in old age, combating long-term unemployment and health. Financiers are mostly high-net worth individuals, such as BMW heiress Susanne Klatten.<sup>44</sup> In order to activate private investment capital to promote social entrepreneurship in the EU the *European Social Entrepreneurship Fund* (EuSEF) was created within the framework of the Social Entrepreneurship Initiative launched by the European Commission in 2011. The EuSEF is a label for private (investment) funds that must comply with certain uniform requirements that apply throughout the EU.<sup>45</sup> As in a normal fund, the diversification in the portfolio should help to reduce the overall risk of the social investment if an organisation or project proves not to be effective. As far as the investors generate profits, these are transferred to the non-profit fund limited liability company (GmbH) in the form of grants and donations.<sup>46</sup> As far as loan and donation communities are concerned, each member commits to donate a certain amount of money every month over a certain period of time (for example, five years). The donors sign a contract with the GLS Bank, a cooperative bank, which collects the donations. The total amount is made available to the social enterprise as a donation without any profit margin of its own.

Foundations support social enterprises without any repayment obligation, such as the *Siemens Foundation*, the *Vodafone Foundation*, the *Robert Bosch Foundation* or the *Haniel Foundation*.<sup>47</sup> The *Social Entrepreneurship Netzwerk Deutschland* as a network association, as well as the *Ashoka Foundation*, *ProjectTogether* and *Social Impact* offer practical help, advice and networking through various funding programmes.<sup>48</sup> Smaller initiatives also use this approach. For example, the *brandstiftung* finances the *Social Lab Cologne*, an association of 12 social enterprises in the education sector, who exchange information, know-how and contacts.<sup>49</sup>

<sup>43</sup> Bundesverband Deutscher Kapitalbeteiligungsgesellschaften e.V., [https://web.archive.org/web/20140103141935/http://www.bvkap.de/privatteequity.php/cat/137/aid/380/title/Beispiel:\\_BonVenture\\_-\\_Portrait](https://web.archive.org/web/20140103141935/http://www.bvkap.de/privatteequity.php/cat/137/aid/380/title/Beispiel:_BonVenture_-_Portrait), last retrieved on 20.1.2022.

<sup>44</sup> About impact investment for family offices: *Ege/Klaiber/Prügl*, FuS 2021, 192.

<sup>45</sup> Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.

<sup>46</sup> <https://bonventure.de/>, last retrieved on 20.1.2022.

<sup>47</sup> *Sahlmüller/Nazlier/Antes*, Mit Collective Impact und Social Entrepreneurship im Ökosystem wirken: 7 Impulse aus dem Projekt „Bildung als Chance“, in: Berndt/Kreutter/Stolte (eds.), *Zukunftsorientiertes Stiftungsmanagement*, 2018, 251.

<sup>48</sup> Bundesministerium für Wirtschaft und Energie (ed.), *GründerZeiten 22 – Existenzgründungen im sozialen Bereich*, 2020, 12, [https://www.bmwi.de/Redaktion/DE/Publikationen/Gruenderzeiten/infoletter-gruenderzeiten-nr-22-existensgruendung-im-sozialen-bereich.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmwi.de/Redaktion/DE/Publikationen/Gruenderzeiten/infoletter-gruenderzeiten-nr-22-existensgruendung-im-sozialen-bereich.pdf?__blob=publicationFile&v=3), last retrieved on 20.1.2022.

<sup>49</sup> *Aloui*, *Stiftung & Sponsoring* 1/2011, 16.



Numerous prizes and awards are given to support projects. The *Entrepreneurship – Entrepreneurial Impact International Summer School*, which has been held annually since 2008 under the motto “Billion Euro Projects to Foster Societal Change” at the Technical University of Munich, encourages entrepreneurial thinking with the aim of finding solutions to worldwide social problems. In 2011, the Social Entrepreneurship Academy was founded, a co-operation project of the four Munich universities.<sup>50</sup> The Social Entrepreneurship Academy awards annual prize money of €48,000 to the winners through the Act for Impact funding programme.<sup>51</sup> The Schwab Foundation for Social Entrepreneurship awards the international prize Social Entrepreneur of the Year.<sup>52</sup> Every year, the Startsocial competition honours 100 social organisations for their commitment.<sup>53</sup>

There is no mention of advantages under public procurement law for social enterprises. The criticism is that the effects of state strategic procurement are thus given away.<sup>54</sup> It is only in the case of protected workshops for persons with disabilities according to section 118 of the German Act Against Restraints of Competition (GWB), based on EU law,<sup>55</sup> that contracting authorities may reserve the right to participate in procurement procedures. A similar narrow exception exists under section 107 (1) no. 4 GWB for certain ambulance services, which have been expressly exempted from the obligation to award public contracts under European law, if they are skilled (risk) ambulance services provided by non-profit organisations or associations without the intention of making a profit.<sup>56</sup>

## II. Lack of specialised legal forms for social enterprises

### 1. Typically chosen legal forms

Since all corporations and co-operatives are allowed to waive by their articles of association their right to make a profit and pursue social, ecological or other

<sup>50</sup> <https://heldenrat.wordpress.com/2011/02/28/social-entrepreneurship-forschung-bildung/>, last retrieved on 20.1.2022.

<sup>51</sup> Wunsch, 15 Wettbewerbe für Deine Idee, 12.7.2017, <https://www.tbd.community/de/a/wettbewerbe-startup-social-nachhaltig>, last retrieved on 20.1.2022.

<sup>52</sup> Kasper-Claridge, The Schwab Foundation: 20 years of inspiring entrepreneurs, 24.9.2018, <https://www.dw.com/en/the-schwab-foundation-20-years-of-inspiring-entrepreneurs/a-45615739>, last retrieved on 20.1.2022.

<sup>53</sup> Eipert, Gründen? Unbedingt! – Der Social Start-Up Guide, 8.3.2019, <https://www.relaio.de/wissen/der-social-start-up-guide/>, last retrieved on 20.1.2022.

<sup>54</sup> Burgi/Rast, in: Burgi/Möslein (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021, 31 (37).

<sup>55</sup> EuGH, Urt. v. 6.10.2021 – C-598/19 – Conacee, NZBau 2021, 794.

<sup>56</sup> EuGH, Urt. v. 21.3.2019 – C-465/17 – Falck Rettungsdienste, recital 59; Braun/Zwetkowitz, NZBau 2020, 219; Bühs, EuZW 2020, 658; Jaeger, NZBau 2020, 223.

non-profit purposes, specific legal forms for social enterprises have not as yet been developed.<sup>57</sup> Non-profit corporations, especially the flexible *GmbH*, have proven to be an important legal form for social enterprises. This is in stark contrast with other legal systems.<sup>58</sup> While Swiss law has allowed the limited liability company to engage in non-commercial activities only since 2008,<sup>59</sup> the public limited company has been used there for non-profit activities for far longer.<sup>60</sup> In US corporate law, the corporation can be used for a variety of purposes,<sup>61</sup> but there the doctrine of shareholder value has contributed to legal uncertainty about the extent to which the “normal” for-profit corporation may be used for social or mixed purposes, and has thus also led to the development of new legal forms oriented towards the common good.<sup>62</sup>

Therefore, traditional legal forms for business enterprises serving as legal forms for social enterprises are limited liability company (*GmbH*), public limited company (*Aktiengesellschaft*, AG) and co-operative (*Genossenschaft*). Due to its prevalence among social enterprises, the primary legal form is the *GmbH*. The fact that in German law the limited liability company (sections 1, 4 (2) of the German Limited Liability Companies Act, *GmbHG*)<sup>63</sup> and the public limited company (section 3 (1) of the German Stock Corporation Act, *AktG*)<sup>64</sup> can be adopted for any legally permissible purpose, makes corporations attractive for socially oriented enterprises.<sup>65</sup> All permissible purposes – that is, those not prohibited by criminal law – may be chosen, whether non-profit, commercial or hybrid. It is estimated that there are around 25,300 non-profit *GmbH*s.<sup>66</sup> The new legal form “entrepreneurial company with limited liability” (*Unternehmergesellschaft haftungsbeschränkt*, UG), which was created in 2008<sup>67</sup> and is a sub-form of the *GmbH* according to section 5a *GmbHG*, is suitable for smaller

<sup>57</sup> *Möslein*, in: Burgi/Möslein (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021, 3 (21).

<sup>58</sup> *Momberger*, *Social Entrepreneurship*, 2015, 242 et seq.; regarding France: *Fleischer ZGR* 2018, 703 (728 et seq.); regarding section 172 (1) UK Companies Act 2006: *Fleischer ZGR* 2017, 411 (419 et seq.).

<sup>59</sup> Code of Obligations (law on limited liability companies as well as amendments to the law on shares, co-operatives, commercial register and company law), amendment of 16.12.2005, BBl. 2005, 7289.

<sup>60</sup> *Schönenberg*, *Venture Philanthropie – Zulässigkeit und haftungsrechtliche Konsequenzen für Schweizer Stiftungen und deren Organe*, 2011.

<sup>61</sup> *Fleischer/Mock*, *NZG* 2020, 161 (164).

<sup>62</sup> *Momberger*, *Social Entrepreneurship*, 2015, 104 et seq., 254 et seqq., 289; *Möslein/Mittwoch*, *RabelsZ* 80 (2016), 400 (401 et seqq.).

<sup>63</sup> *Ullrich*, *Gesellschaftsrecht und steuerliche Gemeinnützigkeit*, 2009, passim; *Cramer*, in: Scholz (ed.), *GmbHG*, 12. Aufl. 2018, § 1 recital 8 et seqq.

<sup>64</sup> *Momberger*, *Social Entrepreneurship*, 2015, 95 et seqq.; *Bayer/Hoffmann*, *AG* 2007, 347 et seqq.; *Weber*, *Die gemeinnützige Aktiengesellschaft*, 2014.

<sup>65</sup> *Momberger*, *Social Entrepreneurship*, 2015, 87 et seqq., 103.

<sup>66</sup> *Mecking*, *Stiftung & Sponsoring*, *Rote Seiten* 2/2020, 2.

<sup>67</sup> Gesetz zur Modernisierung des *GmbH*-Rechts und zur Bekämpfung von Missbräuchen (*MoMiG*) vom 23.10.2008, BGBl. I 2008, 2026.

social enterprises. Here, just as under English law with its limited company (Ltd), it is possible to set up the company without capital, or with a minimum capital of only one euro per shareholder. The German entrepreneurial company with limited liability (UG) may also be used for non-profit purposes.

Public limited companies (for example, the *Berlin Zoo AG*)<sup>68</sup> and co-operatives are used by large social enterprises and commercially active self-help organisations with co-operative structures.<sup>69</sup> *Regionalwert AG*, for example, pools money and the vested interests of minority shareholders for investments in ecological agriculture and provides its shareholders with a return in the form of both money and added ecological value.<sup>70</sup> In the course of the amendment of the German Co-operative Societies Act<sup>71</sup> in 2006 it was clarified that, in addition to promoting the economic interests of the co-operatives, their social or cultural interests can also be promoted (section 1 (1) of the German Co-operative Societies Act, GenG), which means that co-operatives can also be used as social enterprises. Village shops in the form of co-operatives guarantee local sustainability and create communal places to meet,<sup>72</sup> while energy co-operatives generate renewable energy.<sup>73</sup>

The advantage of the public limited company is that a large number of interested parties can participate in the organisation as shareholders. One reason for this is that the executive board of an AG, unlike the managing director of a GmbH, is not subject to shareholder instructions (section 76 AktG) and can therefore administer the company independently in day-to-day business according to entrepreneurial guidelines. Shareholders in a company (GmbH) are the owners of (at least) one share in the company. Shares in the company are in principle freely transferable (section 15 (1) GmbHG). Both the assignment of the shares and the transaction on which the assignment is based (for example, a purchase agreement) require notarial certification (section 15 (3) and (4) GmbHG). The articles of association may provide for restrictions on assignment (section 15 (5) GmbHG [*Vinkulierung*]). For example, the effectiveness of the assignment can be linked to the consent of all shareholders or an affirmative majority resolution of the shareholders' meeting.<sup>74</sup> In the case of a public limited

<sup>68</sup> *Bayer/Hoffmann*, AG 2007, 347; *Weber*, Die gemeinnützige Aktiengesellschaft, 2014.

<sup>69</sup> *Hoffmann/Scharpe/Wunsch*, 3. Deutscher Social Entrepreneurship Monitor 2020/2021, 20, <https://www.send-ev.de/wp-content/uploads/2021/03/DSEM-2020-21.pdf>, last retrieved on 20.1.2022; *Picker*, Genossenschaftsidee und Governance, 2019, 167.

<sup>70</sup> *Momberger*, Social Entrepreneurship, 2015, 95 et seq.

<sup>71</sup> Gesetz zur Einführung der Europäischen Genossenschaft und zur Änderung des Genossenschaftsrechts v. 18.8.2006, BGBl. I, 1911; *Momberger*, Social Entrepreneurship, 2015, 79.

<sup>72</sup> *Bösche*, npoR 2011, 82.

<sup>73</sup> *Momberger*, Social Entrepreneurship, 2015, 77 et seqq.

<sup>74</sup> *Seibt*, in: Scholz (ed.), GmbHG, 12. Aufl. 2018, § 15 recital 119 et seqq.

company, the transfer of membership can be made more simply and without a notary by merely handing over the share.

In the GmbH and AG, the investors as shareholders have all the normal shareholder rights. Their voting power is determined by the size of their shareholding. In a co-operative, the shares also generally grant only one vote to each shareholder (one person, one vote). Only members who particularly promote business operations can be granted more votes, but only up to three votes (section 43 (3) GenG).<sup>75</sup> In the co-operative, therefore, the participation of the co-operative members is guaranteed irrespective of their financial commitment; the entity is not structured in a capitalist way. In fact, co-operatives are the legal form most suitable for the commercial activities of social enterprises. Due to the disclosure and auditing obligations (sections 336 (2), 339 (3) of the German Commercial Code [HGB], section 53 GenG), which are also applicable, there is sufficient protection for legal transactions and section 1 GenG ensures that the co-operatives do not seek to maximise profits. However, the approximately €1,500–3,000 in auditing fees that a co-operative must pay for the compulsory audit at an auditing association are unaffordable for smaller social enterprises.<sup>76</sup> Proposals to simplify the compulsory audit have not yet gained acceptance.<sup>77</sup>

For tax and business administration reasons, as well as the lack of special legal forms for social enterprises, a hybrid double structure consisting of a for-profit limited liability company and a non-profit supporting association, a holding foundation or a sponsoring limited liability company is often chosen. In this way, for example, a variety of interests can be bundled together in an association, and it can act in a non-profit capacity, while the subsidiary is liable to tax, generates income for the association and can conclude contracts with the outside world in a legally sound manner (section 37 (2) GmbHG). In contrast to the standard association solution, additional costs are incurred due to the notarial certification requirements necessary of the limited liability company (GmbH), its obligatory entry in the commercial register, and the accounting obligation. One such example in Hamburg is *Dialog im Dunkeln* (Dialogue in the Dark). The commercial sponsor is *Consens Ausstellungs GmbH*, and there is also a non-profit support association, the *Förderverein Dialog im Dunkeln e.V.*<sup>78</sup> The company employs blind people in Hamburg, who introduce people who can see to sensory perceptions in a dark world in exhibition and restaurant rooms. The concept has spread to many countries around the world.

<sup>75</sup> Picker, *Genossenschaft und Governance*, 2019, 445 et seqq.

<sup>76</sup> Bösche, in: Bösche/Walz (eds.), *Wie viel Prüfung braucht der Verein – Wie viel Prüfung trägt die Genossenschaft?*, 2005, 103; Wolff, *Non Profit Law Yearbook 2013/2014*, 2014, 19, 22.

<sup>77</sup> Wolff, *Non Profit Law Yearbook 2013/2014*, 2014, 19.

<sup>78</sup> <http://www.dialog-im-dunkeln-verein.de/>, last retrieved on 20.1.2022.

## 2. Stakeholder interests, public benefit and enforcement

The extent to which the interests of stakeholders may be taken into account in standard commercial businesses has been the subject of debate for 200 years.<sup>79</sup> Today, it is recognised that managers of German public limited companies are not primarily bound by shareholder value but must serve a broader corporate interest. They therefore enjoy greater discretion to take into account the interests of stakeholders.<sup>80</sup> In the case of the limited liability company (GmbH), the shareholders directly determine the company's objectives, which can range from pure profit maximisation to total non-profit. Co-operatives are not aimed at profit maximisation from the outset, but rather promote the business activities of their members or their social or cultural interests through joint business operations.

But in Germany, typically all legal forms are open for non-profit organisations – that is, all corporations and co-operatives may by statute forego profit-making and pursue social, ecological or other non-profit purposes. To this end, both for-profit firms (corporations and co-operatives) may have their claims to profits and to the distribution of liquidation proceeds expressly excluded in whole or in part by the articles of association.<sup>81</sup> Insofar as corporations are not-for-profit organisations, for tax purposes they must stipulate these requirements in the articles of association. Shareholders may then not receive in return more than the paid-in capital shares (cash contributions) plus the fair value of their contributions in kind, not even in the event of their withdrawal from the corporation or the dissolution of the corporation. The tax law on non-profit organisations is also neutral with regard to legal form.<sup>82</sup> The only requirement is that the legal entity benefiting is a corporation within the meaning of the German Corporate Tax Act (KStG) (section 51 (1)(1, 2) of the German Fiscal Code, AO). This is the only way to ensure the separation for tax purposes of the charitable sphere of the corporation and the private persons acting on its behalf.

According to German regulation principles, non-profit status for tax purposes serves the function of an overarching organisational status for non-profit organisations that are eligible for funding. It functions like a seal of approval from the state.<sup>83</sup> At its core, this particular status is based on the non-distribution constraint. Public trust in non-profit organisations is also strengthened by the

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<sup>79</sup> *Habersack*, AcP 220 (2020), 594.

<sup>80</sup> *Mittwoch*, in: Burgi/Möslein (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021, 51 (67–69).

<sup>81</sup> *Ullrich*, *Gesellschaftsrecht und steuerliche Gemeinnützigkeit*, 2009, 45 et seqq.

<sup>82</sup> *Musil*, in: Hübschmann/Hepp/Spitaler (eds.), *AO/FGO*, 266. Lfg., § 51 AO recital 20.

<sup>83</sup> *Schauhoff*, in: *Schauhoff* (ed.), *Handbuch der Gemeinnützigkeit*, 3. Aufl. 2010, *Grundlegung* recital 37.

fact that the establishment of the non-profit purposes in the articles of association, as required by section 60 AO, documents the organisation's "eligibility for promotion" to a certain extent to the outside world, and the tax authorities monitor whether the non-profit status in the statutes also corresponds with the actual management of the organisation. This is in line with the hypothesis of the US economist and legal scholar *Henry Hansmann*, who ascribes the existence of non-profit organisations to a contractual failure as a result of a deficiency of information.<sup>84</sup>

Accordingly, the enforcement is undertaken solely by means of tax law. Should the articles of association comply with the legal requirements, but later it transpires that the management failed to comply with the provisions of the articles of association, this results in the non-profit enterprise not being tax-exempt for the entire past assessment period, and therefore liable for the payment of taxes in the ordinary way. Any tax savings from these periods must be refunded to the tax authorities. However, the constitutional principle of proportionality must also be observed when this legal consequence is ordered (see section 60 (2) AO).<sup>85</sup> The most severe contravention is when a non-profit corporation does not comply with the principle of asset retention – that is, for instance, by distributing profits to the executive board or members on account of excessive salaries, which violates section 55 (1)(1) AO. In such cases, the tax benefit should be forfeited not only for the assessment period in which the violation occurred, but also for periods prior to that (section 61 (3) AO).<sup>86</sup> The objective of this harsh penalty is to prevent organisations from collecting tax-privileged funds in one year and deciding to "give up" their non-profit status the next year and distribute the state-subsidised funds to the board or members. The obligation to pay back taxes extends not only to the taxes that would have been incurred by the non-profit organisation itself (such as, in particular, corporate income tax and trade tax),<sup>87</sup> but also, where applicable, to taxes that its donors would otherwise have been obliged to pay, but which were exempted due to their donation to the supposedly non-profit organisation, pursuant to section 10b (4) of the German Income Tax Act (EStG). This is because the donor should be able to rely on a donation receipt once he has received it and can therefore

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<sup>84</sup> *Hansmann*, The Role of Nonprofit Enterprise, The Yale Law Journal 1989, Bd. 89, 835; *Steinberg*, Economic Theories of Nonprofit Organizations, in: Powell/Steinberg (eds.), The Nonprofit Sector – A Research Handbook, 2006, 117.

<sup>85</sup> *Gersch*, in: Klein (ed.), AO, 15. Aufl. 2020, § 63 AO recital 2; *Koenig*, in: Koenig (ed.), AO, 4. Aufl. 2021, § 59 AO recital 8; *Bott*, in: Schauhoff (ed.), Handbuch der Gemeinnützigkeit, 3. Aufl., 2010, § 10 recital 51 et seq., 80, 84.

<sup>86</sup> *Gersch*, in: Klein (ed.), AO, 15. Aufl. 2020, § 63 AO recital 2; *Koenig*, in: Koenig (ed.), AO, 4. Aufl. 2021, § 61 AO recital 7, § 63 AO recital 7; *Bott*, in: Schauhoff (ed.), Handbuch der Gemeinnützigkeit, 3. Aufl. 2010, § 10 recital 53, 120 et seqq.

<sup>87</sup> Differentiated to the specific taxes *Bott*, in: Schauhoff (ed.), Handbuch der Gemeinnützigkeit, 3. Aufl. 2010, § 10 recital 90 et seqq.

claim his donation as income-reducing in any case without having to fear an obligation to pay tax arrears.<sup>88</sup> In addition, managers may be held personally liable for the payment of the tax arrears pursuant to section 10b (4)(2–4) EStG.

### 3. The debate about disclosure and reporting

GmbHs and public limited companies are obliged to keep accounts in accordance with section 13 (3) GmbHG, section 3 (1) AktG, section 6 (1), section 238 (1) HGB. According to section 325 HGB, the annual financial statements must be submitted to the electronic Federal Gazette and published. The company name and registered office, a domestic business address, the object of the company, the amount of the share capital, the date of conclusion of the memorandum and articles of association, and the identities of the managing directors must be made public by entry in the commercial register (section 10 (1) GmbHG, section 37 AktG, section 8 et seqq. HGB). Anyone is permitted to inspect the commercial register (section 9 HGB). In addition, the beneficial owners must be entered in the transparency register. Legislators and standard-setting professional bodies have also created framework concepts for non-financial reporting, through which companies must disclose their corporate social responsibility (CSR) measures according to section 289b, 289c or section 315b, 315c HGB.<sup>89</sup>

For a non-commercial association (*Idealverein*) there are only the somewhat simplified provisions of sections 27 (3), 666, 259, 260 of the German Civil Code (BGB), which only oblige associations to draw up an orderly list of their income and expenditure. As a rule, there is no obligation to publish the annual financial statements. Section 325 HGB only applies to corporations; for non-profit associations,<sup>90</sup> an obligation to publish can only arise from the Publicity Act if the very stringent thresholds of section 1 of the Publicity Act (PublG)<sup>91</sup> are exceed-

<sup>88</sup> Sections 10b (4) sentence 1 EStG, 9 (3) sentence 1 KStG, 9 no.5 sentence 13 of the German Trade Tax Act, GewStG.

<sup>89</sup> Corporate Social Responsibility Directive of the EU, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, L 330/1; European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 21.04.2021, COM(2021)189; *Lanfermann/Scheid*, DB 2021, 1213 et seqq.; *Ekkenga/Schirmacher/Schneider*, NJW 2021, 1509; *Möslein*, Offenlegung nichtfinanzieller Unternehmensinformationen, in: Burgi/Möslein (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021, 343. There are also private standard-setters, e.g. the Global Reporting Initiative and the International Integrated Reporting Council (IIRC), which merged on 9.6.2021 with SASB to form the Value Reporting Foundation. The International Accounting Standards Board (IASB) plans to establish a new International Sustainability Standards Board; *Paefgen*, in: FS für Karsten Schmidt, 2019, 105; *Schön*, in: FS für Karsten Schmidt, 2019, 391.

<sup>90</sup> Section 3 (1) no. 3 PublG.

<sup>91</sup> At least two of the following three criteria must be met: (1) balance sheet total exceeds 65 million euros, (2) sales in the twelve months prior to the reporting date exceed 130 million

ed. It is only when non-commercial associations operate a commercial enterprise within the meaning of section 1 HGB (for example, where a football club has a commercial league division that is not outsourced to subsidiaries) are they to be entered in the commercial register as traders pursuant to section 33 HGB. They are required to comply with the regulations for traders such as the preparation of a commercial balance sheet pursuant to section 242 HGB.<sup>92</sup> It is unclear when an economic activity of an association constitutes a commercial enterprise within the meaning of section 1 HGB, and a large number of associations are not registered under section 33 HGB despite meeting the requirements. Anyone is permitted to inspect the commercial register (section 9 HGB). The non-profit GmbH (gGmbH) (or AG and co-operative) is already a formal trader according to its legal form, irrespective of its non-profit status, and is therefore obliged to register and keep accounts.

Non-profit organisations benefit from tax advantages. For this purpose, they are accountable to the tax authorities, which examine the financial reporting of the non-profit organisations according to the requirements of the non-profit tax law under sections 51 and following AO. However, due to tax confidentiality (section 30 AO), the financial authorities are required to maintain secrecy *vis-à-vis* the public. The existing external control of non-profit organisations in the legal forms of associations and foundations by the tax authorities is therefore widely considered to be insufficient, even by international standards.<sup>93</sup> As of the 1 January 2024, a register of beneficiaries will be introduced in which the status of the organisation as a non-profit organisation can be inspected.<sup>94</sup>

#### 4. Tax exemption and limitation on trading

The German state supports corporations whose activities are considered to be of particular value to society by granting them tax advantages. Non-profit corporations are exempt from income taxes provided they do not maintain a commercial business operation. Specifically, this includes exemption from the 15 % corporate income tax (section 5 (1) no. 9 KStG) and from around 14 to 15 % trade tax (section 3 no. 6 GewStG). In addition, there are tax exemptions for property tax (section 3 (1) no. 3 lit. b of the German Property Tax Act, GrStG)<sup>95</sup>

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euros, (3) the company has employed an average of more than five thousand employees in the twelve months prior to the reporting date.

<sup>92</sup> *Hüttemann*, in: FS für Wulf Henning Roth, 2015, 241 et seqq.

<sup>93</sup> *Vogt*, *Publizität im Stiftungsrecht. Analyse der geltenden Rechtslage und Vorschläge für eine umfassende Reform der stiftungsrechtlichen Publizität*, 2013; *Weitemeyer/Vogt*, NZG 2014, 12 et seqq.

<sup>94</sup> Article 28 of the Annual Tax Act (JStG) 2020, section 60b AO-new.

<sup>95</sup> Real estate of a non-profit corporation is exempt from property tax if it is used for beneficial purposes, *Kühnold*, in: Lippross/Seibel (eds.), *Basiskommentar Steuerrecht*, 129. Lfg., 2022, § 3 GrStG recital 27.



and the VAT rate for services provided by non-profit corporations<sup>96</sup> is reduced from 19 % to 7 % (section 12 (2) no. 8 lit. a of the German Value Added Tax Act, UStG).<sup>97</sup> In addition, VAT law contains several special tax exemptions that are linked to non-profit status. For smaller non-profit corporations, VAT law facilitates the possibility of a flat rate for input taxes according to an average rate (section 23a UStG). Finally, charitable donations to non-profit entities can be received tax-free as non-taxable increases in assets (section 13 (1) no. 16 lit. b, c, no. 17 of the German Inheritance and Gift Tax Act, ErbStG).

Insofar as the corporation is engaged in commercial activities, the tax concession depends on the type and scope of the commercial activity. Pure asset management – that is, the use of assets, for example, through capital investment or leasing (section 14 (3) AO) – is allowed as long as the funds are not withdrawn from the corporation's actual purpose in the long term.<sup>98</sup> If the activities of a non-profit corporation are limited to asset management, this area remains tax-exempt. This holds true also for spin-off for-profit GmbHs as subsidiaries of non-profit organisations. The collection of profits does not constitute a commercial business operation at the level of the non-profit organisation if the holding of the participation is limited to the usual exercise of shareholder rights.<sup>99</sup>

If, on the other hand, the corporation pursues an independent consistent activity through which income or other economic benefits are generated and which goes beyond the scope of asset management, then it maintains a (partially) taxable commercial business operation within the meaning of section 14 sentence 1 AO.<sup>100</sup> Due to the exclusivity requirement of section 56 AO, the commercial operation must at least indirectly serve the purpose of fulfilling the tax-privileged objectives, by regularly raising funds.<sup>101</sup> The partial tax liability results from the fact that the non-profit corporation on the one hand promotes the tax-privileged purpose, but on the other hand is in competition with taxable businesses of the same or an analogous kind. For reasons of competition impar-

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<sup>96</sup> These are usually sales from special-purpose operations or asset management.

<sup>97</sup> A non-profit status does not automatically lead to exemption from VAT. The differentiation between VAT and non-profit law results from the fact that non-profit law is national law, whereas VAT law is strongly influenced by European law; *Kohlhepp*, DStR 2019, 129 (136) and comprehensively *Weitemeyer/Achatz/Schauhoff* (eds.), *Umsatzsteuer für den Nonprofit-Sektor*, 2019.

<sup>98</sup> In this respect, the requirement of timely application of funds is particularly relevant, section 55 (1) no. 5 sentence 3 AO, *Hüttemann*, *Gemeinnützigkeits- und Spendenrecht*, 5. Aufl. 2021, recital 6.40.

<sup>99</sup> BFH, Urt. v. 25.8.2010 – I R 97/09, BFH/NV 2010, 312; BFH, Urt. v. 27.3.2001, I R 78/99, BFHE 195, 239, BStBl. II 2001, 449; BFH, Beschl. v. 19.8.2002, II B 122/01, BFH/NV 2003, 64.

<sup>100</sup> *Hüttemann*, *Gemeinnützigkeits- und Spendenrecht*, 5. Aufl. 2021, recital 6.100.

<sup>101</sup> *Hüttemann*, *Gemeinnützigkeits- und Spendenrecht*, 5. Aufl. 2021, recital 6.50.

tiality, the corporation is taxable (in other words, partially taxed) on the business operation but remains tax-exempt in all other respects.<sup>102</sup>

According to section 21 BGB, the non-commercial association pursues charitable purposes, but may also engage in commercial activities, provided these do not result in profits being distributed to individual members and are secondary to the main charitable purpose. However, even a primary purpose that involves exchanges for payment has been deemed permissible by the most recent so-called Kita-case (childcare provider case) of the Federal Supreme Court<sup>103</sup>, provided it can be assumed that this activity serves only charitable purposes and is tax exempt. When commercial activities are further developed, associations often outsource these activities to wholly owned subsidiaries for business reasons (liability, governance, independence, and gaining managing directors). However, if the association is not supposed to operate exclusively on a non-profit basis, the scope of the permitted commercial activities is still not conclusively clarified.<sup>104</sup>

The gGmbH, on the other hand, can pursue any legally permitted purpose (section 1 GmbHG). Unlike as is the case with an association, it is irrelevant as to whether a commercial purpose or a non-profit purpose is pursued.<sup>105</sup> In practice, the distinction between a non-commercial and a commercial association is difficult to discern because social enterprises as associations are also commercially active and thus pursue both charitable and commercial purposes. However, it has been recognised that running a commercial business does not per se prevent an association from being recognised as a non-profit organisation. The prerequisite for its recognition as a non-commercial organisation is that the main purpose of the organisation is of a philanthropic nature, and that the commercial business operation is “secondary and ancillary to the non-profit organisation’s purpose and aids in achieving it”.<sup>106</sup> This is the position if the non-commercial purpose of the association is realised precisely through the business (“purpose realisation business”), or if the business is maintained in order to raise the funds necessary for the pursuit of the non-profit purpose (“fundraising business”).<sup>107</sup> According to the more recent so-called Kita-case of the Federal Supreme Court, an important indication for assessing whether the commercial business operation is secondary and subordinate to the main non-profit purpose and auxiliary to its pursuit is the recognition of the association as a non-profit organisation for tax purposes.<sup>108</sup> The altruism requirement ensures

<sup>102</sup> *Blesinger*, in: Kühn/von Wedelstädt (eds.), AO/FGO, 22. Aufl. 2018, § 64 AO recital 2.

<sup>103</sup> BGH, Beschl. v. 16.5.2017 – II ZB 7/16, nPoR 2017, 156.

<sup>104</sup> *Leuschner*, in: MüKo-BGB, 9. Aufl. 2021, § 22 recital 43 et seqq.

<sup>105</sup> *Cramer*, in: Scholz (ed.), GmbHG, 12. Aufl. 2018, § 1 recital 9 et seqq.

<sup>106</sup> BGH, Beschl. v. 16.05.2017 – II ZB 7/16, NJW 2017, 1943 recital 21 et seqq.; *Leuschner*, in: MüKo-BGB, 9. Aufl. 2021, § 22 recital 51 et seqq.

<sup>107</sup> Terminology by *Leuschner*, *Leuschner*, in: MüKo-BGB, 9. Aufl. 2021, § 22 recital 53 et seqq.

<sup>108</sup> BGH, Beschl. v. 16.05.2017 – II ZB 7/16, NJW 2017, 1943 recital 22 et seqq.

that the association does not primarily pursue its own commercial goals.<sup>109</sup> Since the right to freedom of association guaranteed under Article 9(1) of the German Constitution (GG) grants persons the right to form associations, it is not necessary to use alternative corporate forms if the protection of creditors does not require this (in view of the *Unternehmergeellschaft* without liable capital and the low risk of insolvency of associations).<sup>110</sup> The Federal Supreme Court considers it irrelevant to what extent the commercial business operation is carried out and whether it has a non-profit purpose, as in the *Kita*-case.<sup>111</sup> Following this judgment, non-profit associations are allowed to engage in commercial activities to a considerable extent, so that there is no longer any need to use a corporation as an alternative under the law on associations. Rather, the non-profit status for tax purposes determines the association's status of commercially active social enterprises.<sup>112</sup>

If, however, social enterprises provide for even partial profit distribution, or profit distribution from the association's activities in a concealed manner by way of excessive salaries or other benefits, not only is the non-profit status at risk, but the indirect effect for the civil law right of association is also jeopardised. However, appropriate remuneration of members or board members on the basis of an employment relationship does not prevent the association from being registered as a non-profit organisation.<sup>113</sup> Nevertheless, if one wants to avoid uncertainty with regard to appropriate salary payments, hybrid models are the better option.<sup>114</sup> Even in the context of charitable non-profit organisations (such as the German Automobile Association ADAC), the Federal Supreme Court assumes that the purpose of the organisation "is not directed towards a commercial business operation", provided that no distribution of profits actually takes place.<sup>115</sup> This is relevant also for social enterprises that do not pursue a charitable, philanthropic or religious purpose within the meaning of sections 52–54 AO, but nevertheless refrain from distributing profits.

Provided, however, that the social enterprise predominantly serves the commercial purposes of its members – say, through the joint operation of a village shop, the procurement of energy, or the purchase of ecologically produced food at reduced prices – the current case law on associations is of no assistance. The limited liability company is not suited to structures with a large number of committed members because of its notarial foundation and the time-consuming process associated with changing members. Some state administrations have

<sup>109</sup> BGH, Beschl. v. 16.5.2017 – II ZB 7/16, nPoR 2017, 156 recital 25.

<sup>110</sup> BGH, Beschl. v. 16.5.2017 – II ZB 7/16, nPoR 2017, 156 recital 26, 32.

<sup>111</sup> BGH, Beschl. v. 16.5.2017 – II ZB 7/16, nPoR 2017, 156 recital 28 et seqq., recital 30, 32.

<sup>112</sup> *Leuschner*, NJW 2017, 1919 (1921); *Schöpflin*, ZStV 2018, 9 et seqq.

<sup>113</sup> *Echtermann/Hofmann/Lüken/Noll/Ortmann*, nPoR 2018, 133 (135).

<sup>114</sup> *Momberger*, Social Entrepreneurship, 2015, 224 et seq.

<sup>115</sup> *Leuschner*, NJW 2017, 1919 (1921).

started to revive the legal form of the commercial association (section 22 BGB) for village shops.<sup>116</sup> After the legislator gave up its intention to revive the commercial association in the course of the Kita-case, however, the responsible authorities are probably also prevented from doing so administratively.<sup>117</sup> Co-operatives are also not a viable alternative, especially for organisations in the low-profit sector, due to their considerable auditing costs.<sup>118</sup> The small co-operative with simplified organisational requirements is limited to a maximum of 20 members, according to section 24 GenG, which is again too few for a village shop or a citizens' energy co-operative.

The restrictions described for commercial operations do not apply to special-purpose operations within the meaning of section 64 (1) and section 65 AO. A special-purpose business is deemed to exist if the commercial business operation in its entirety serves to realise the charitable purpose of the corporation (for example, if it provides advice and networking to other non-profit organisations for a small fee). This tax concession results from the fact that the special-purpose business serves not only to raise funds but also to directly realise the statutory purposes.<sup>119</sup> Examples are non-profit enterprises in nursing or geriatric care, as well as the operation of educational institutions or youth hostels. These conditions are met, for example, in the case of consulting or the provision of co-operation services through social franchising, because the costs of professional consulting by a consulting company are usually much higher and cannot be borne by the non-profit actors. Moreover, such persons lack the special expertise required in that context. The Federal Fiscal Court (*Bundesfinanzhof*, BFH) did not consider a catering business that served a non-profit corporation for the training of disadvantaged youths or disabled persons to be a special-purpose business. This was because the business had competed with other competitors more than was necessary. The decision is part of a larger context of several decisions through which the court has gained a reputation for being a "competition guardian".<sup>120</sup> Since the regulations on special-purpose operations, and specifically section 65 no. 3 AO, are intended to protect potential competition, so that no barriers to market entry can be erected by existing non-profit special-purpose operations,<sup>121</sup> the requirements for special-purpose operations are increasingly coming under scrutiny. This is because, technically,

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<sup>116</sup> *Bösche*, npoR 2011, 82 et seqq.

<sup>117</sup> *Wolff*, Non Profit Law Yearbook 2017, 2018, 99 et seqq.

<sup>118</sup> *Bösche*, in: *Bösche/Walz* (eds.), *Wie viel Prüfung braucht der Verein – Wie viel Prüfung trägt die Genossenschaft?*, 2005, 103; *Wolff*, Non Profit Law Yearbook 2013/2014, 2014, 19, 22.

<sup>119</sup> *Hüttemann*, *Gemeinnützigkeits- und Spendenrecht*, 5. Aufl. 2021, recital 6.2, 6.3.

<sup>120</sup> *Hüttemann/Schauhoff*, DB 2011, 319.

<sup>121</sup> BFH, Beschl. v. 19.7.2010 – I B 203/09, BFH/NV 2011, 1; BFH, Urt. v. 18.8.2011 – V R 64/09, HFR 2012, 784.

almost all the activities of social enterprises could also be offered by commercial providers, but they often do not do so because the profit margins are too low.

In addition, the legislator offers incentives for private individuals or organisations to donate money or material resources to charitable corporations. In this way, the state indirectly contributes to an increase in the assets of the beneficiary corporation.<sup>122</sup> As donations are made and sponsoring is done by companies within the framework of their CSR guidelines, they will predominantly only engage in this activity in respect of non-profit organisations.

##### *5. Limitations on profit distributions to owners*

According to section 55 (1)(2) AO, the principle of altruism requires that the funds of the corporation be used only for objectives consistent with the statutes, and that the members, while holding membership, may not receive any benefits from the funds of the corporation (no. 1), and that the corporation may not favour any person by means of expenditure that is incompatible with the purpose of the corporation or by means of disproportionately high remuneration (no. 3). The importance of the principle of altruism is seen in “protecting the resources of the non-profit corporation from [being accessed by] its decision-makers contrary to the statutes[,] and ensuring the most efficient possible use of resources for the tax-privileged statutory objectives of the corporation”.<sup>123</sup> This establishes a substantive link between the pursuit of charitable purposes by excluding investors from the distribution of profits,<sup>124</sup> thereby preventing “a non-profit corporation from being misused by its members in the pursuit of their own commercial objectives”.<sup>125</sup>

In the everyday work of public benefit corporations, there are many potential points of contact with the (commercial) interests of members or third parties. A particular challenge for the assessment of the altruism of a corporation arises from the fact that the promotion of members is not infrequently a “necessary by-product” of the non-profit activity, because the members also belong to the group of persons promoted.<sup>126</sup> The prime example in this respect is that of a sports club that promotes sport for the benefit of the general public, and thus pursues a recognised charitable purpose (section 52 (2) no. 21 AO) that regularly benefits its members.<sup>127</sup> Other examples are self-help groups or co-operative structures. In these settings, in which the members benefit directly from the

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<sup>122</sup> *Hüttemann*, *Gemeinnützigkeits- und Spendenrecht*, 5. Aufl. 2021, recital 1.25 et seqq., 1.41 et seqq.

<sup>123</sup> *Von Holt*, in: *Winheller/Geibel/Jachmann-Michel* (eds.), *Gesamtes Gemeinnützigkeitsrecht*, 2. Aufl. 2020, § 55 AO recital 2.

<sup>124</sup> *Walz*, *JZ* 2002, 268 (270 et seq.).

<sup>125</sup> *Seer*, in: *Tipke/Kruse* (eds.), *AO/FGO*, 168. Lfg., 2021, § 55 AO recital 1.

<sup>126</sup> *BFHE* 244, 194 recital 28; *BFH DStRE* 2005, 957; *BFHE* 127, 330.

<sup>127</sup> *BFHE* 127, 330.

charitable, philanthropic or religious purpose of the corporation, purely immaterial interests are initially irrelevant within the framework of the commercially oriented section 55 AO (in other words, insofar as the members are promoted solely in a non-commercial manner, this is irrelevant for the assessment of altruism).<sup>128</sup>

However, there is a problem in cases where the subsidies also have an (indirect) commercial relevance (for example, because the members save on expenses to an extent that is not in proportion to the membership fee and other member benefits).<sup>129</sup> Such benefits may also consist of interest-free/low-interest loans in favour of the members, or high-interest loans by the members in favour of the corporation,<sup>130</sup> as well as discounts granted specifically to members without these being covered by the charitable purposes of the corporation's statutes (cf. section 53 AO).<sup>131</sup> However, due to the wording "in their capacity as members", the law also makes it clear that not every commercial benefit in favour of persons who are (also) members of the corporation is excluded. If these persons deal with the corporation in general commercial dealings – that is, as third parties providing services, and not specifically in their capacity as members – a corresponding payment is not detrimental to the tax-exempt status.<sup>132</sup> Members may therefore sell goods, provide services or grant loans to the corporation and demand consideration in return.<sup>133</sup>

Recently, courts have questioned what constitutes reasonable remuneration for the employees of a charitable organisation. According to the Federal Fiscal Court, the salaries of persons in comparable positions in the industry, and not only the usually lower salaries of non-profit organisations, are to be used to examine the appropriateness of remuneration under non-profit law.<sup>134</sup> This is because, while non-profit organisations may not place their employees in a better position than managing directors with the same position and qualifications in commercial enterprises, they are not required to place them in a worse position. However, overstepping the limits set out in this provision triggers a hidden distribution of profits (section 55 (1) no. 3 AO), which can lead to the loss of the organisation's non-profit status on account of misappropriation of funds (section 59 half-sentence 2 AO, section 63 AO).<sup>135</sup> Nevertheless, some margin of

<sup>128</sup> *Seer*, in: Tipke/Kruse (eds.), AO/FGO, 168. Lfg., 2021, § 55 AO recital 3.

<sup>129</sup> *Kümpel*, DStR 2001, 152 (154); *Reimer/Waldhoff*, FR 2002, 318 (325 et seq.).

<sup>130</sup> *Unger*, in: Gosch (ed.), AO/FGO, 165. Lfg., 2/2016, § 55 AO recital 67, 70, 80; *Musil*, in: Hübschmann/Hepp/Spitaler (eds.), AO/FGO, 266. Lfg., 2021, § 55 AO recital 181.

<sup>131</sup> *Von Holt*, in: Winheller/Geibel/Jachmann (eds.), Gesamtes Gemeinnützigkeitsrecht, 2. Aufl. 2020, § 55 AO recital 29, 31; BFHE 62, 462.

<sup>132</sup> *Leisner-Egensperger*, DStZ 2008, 292 (299).

<sup>133</sup> *Leisner-Egensperger*, DStZ 2008, 292 (299).

<sup>134</sup> BFH, Urt. v. 12.3.2020 – V R 5/17, npoR 2020, 303 m. Anm. *Kirchbain/Kampermann; Jansen/Fein*, StuW 2019, 241 (249).

<sup>135</sup> BFH, Urt. v. 12.3.2020 – V R 5/17, npoR 2020, 303 m. Anm. *Kirchbain/Kampermann; Kampermann*, Organvergütung in gemeinnützigen Körperschaften, 2018, 254.

appropriate remuneration conditions exists. In addition, there is a safety margin of up to 20 %, which if exceeded does not lead to the loss of non-profit status for the entity in question. For reasons of proportionality, there is also a *de minimis* provision which in the case in question was assumed to be €3,000.<sup>136</sup> However, there is a considerable restriction in relation to non-charitable limited liability companies, as they are only allowed to pay reasonable salaries to shareholder-directors and related persons, but are allowed to pay even outstanding salaries to outside directors.

In contrast to traditional non-profit organisations, which are not allowed to distribute profits, social enterprises, like non-profits, pursue public welfare goals, but they also want to be able to distribute profits to their shareholders or investors, even if profit maximisation is not the primary objective. In terms of their articles of association, corporations may also only partially refrain from distributing profits, but then they will not be non-profit entities. According to section 56 AO, as well as section 5 (1)(8)(1) KStG and section 12 (2)(8) UStG, non-profit status requires the exclusive pursuit of non-profit objectives. There is no partial non-profit status.<sup>137</sup> The principle of exclusivity is intended to promote an organisational focus and to avoid conflicts of interest and misappropriation of funds.<sup>138</sup> It thus prohibits arrangements under company law in which profit distribution is only partially waived, and founders and shareholders opt to have a minimum return distributed to them.

For example, the Hamburg-based company *viva con agua* intends to retain 40 % of the profits from the sale of mineral water in the for-profit limited company in the long term and distribute 60 % to its supporting association and a foundation, which will then use the profits and additional donations to improve the water supply in developing countries.<sup>139</sup> With reference to international models which, like the US low-profit limited liability company, in principle also permit profit distribution in full or,<sup>140</sup> as in the case of the UK legal form of the community interest company introduced in 2004, merely partially,<sup>141</sup> a relaxation of the ban on profit distribution is also called for in Germany.<sup>142</sup> The possibility provided for in the former German law of still assuming the non-profit status of an entity at returns of 5 % (KStG 1925) or 4 % (KStDV 1935<sup>143</sup>), and therefore below the interest rate prevailing in the market at the time, has also

<sup>136</sup> BFH, Urt. v. 12.3.2020 – V R 5/17, npoR 2020, 303 m. Anm. *Kirchhain/Kampermann*.

<sup>137</sup> *Hüttemann*, Gemeinnützigkeits- und Spendenrecht, 5. Aufl. 2021, recital 4.3. Legal exceptions can be found in section 58 no. 2–8 AO.

<sup>138</sup> *Hüttemann*, NJW-Beilage zum 72. Deutschen Juristentag 2018, 55 (56).

<sup>139</sup> <https://www.vivaconagua.org/>, last retrieved on 20.1.2022.

<sup>140</sup> *Möslein/Mittwoch*, *RabelsZ* 80 (2016), 399 (411 et seqq.).

<sup>141</sup> *Momberger*, *Social Entrepreneurship*, 2015, 254 et seqq.

<sup>142</sup> [www.goodimpact.org](http://www.goodimpact.org), Start Mitte Mai 2012, quoted according to *Spiegel*, *Stiftung & Sponsoring* 2/2012, 30.

<sup>143</sup> German Corporate Tax Executive Order 1935.

been raised.<sup>144</sup> A further possibility is the former non-profit housing association, which also allowed a return on equity of 4 % (of the shareholders or co-operators).<sup>145</sup> However, in the case of the international models, the granting of a partial profit distribution is not usually accompanied by any tax relief.<sup>146</sup>

Hybrid structures are also somewhat challenging, as commercial enterprises are often accused of making hidden profit distributions if they make donations to charitable organisations within the maximum limits of section 9 (1) no.2 KStG. The consequence is that the donation deduction is not recognised and the amount is added to the company's profit off-balance sheet.<sup>147</sup> In addition to the considerable uncertainty that therefore accompanies every act of corporate citizenship, the fact that every altruistic donation is motivated by idealism, which is influenced by the personal preferences of the entrepreneurs, at least in the small and medium-sized companies speaks against the classification of the donation as a hidden profit distribution. Therefore, a hidden profit distribution should at most be assumed if a for-profit company donates to its own charitable or public-law supporting organisation.<sup>148</sup> Nevertheless, no benefit would be gained, especially in the case of hybrid structures of interconnected non-profit and commercially active organisations. *Hüttemann* therefore consequently proposes that the legislature delete the proviso of section 8 (3) sentence 2 KStG in section 9 (1) no.2 KStG, as in Austria, if necessary in conjunction with the introduction of an absolute maximum donation limit, or limit the tax promotion of altruism entirely to natural persons.<sup>149</sup> In this context, the recognition of a benefit corporation in Germany could send a signal that it is already inherent in such companies by virtue of their corporate purpose to make substantial donations for the benefit of the general public, and that this should therefore also be recognised for tax purposes.

## 6. Exit

The principle of altruism does not prohibit the realisation of profits as such, but according to section 55 (1) no. 2 AO it does prohibit the distribution of current or liquidation profits to non-charitable members or third parties. Members may therefore not receive back more than their paid-in capital shares and the fair market value of their contributions in kind when they leave the corporation or

<sup>144</sup> *Momberger*, Social Entrepreneurship, 2015, 317 et seqq.; *Momberger*, Non Profit Law Yearbook 2016/2017, 2017, 113 (148 et seqq.).

<sup>145</sup> *Kubnert/Leps*, Neue Wohnungsgemeinnützigkeit, 2017.

<sup>146</sup> *Möslein/Mittwoch*, *RabelsZ* 80 (2016), 399 (427 et seqq.).

<sup>147</sup> BFH/NV 2008, 988; BFH/NV 2008, 1704: donations to a foundation; BFH, Beschl. v. 13.7.2021 – I R 16/18: donations in kind of art works to a foundation; FG Rheinland-Pfalz, Urt. v. 7.10.2020 – 1 K 1264/19, Rev. filed BFH I R 52/20.

<sup>148</sup> *Weitemeyer*, in: FS für Dieter Reuter, 2010, 1201 et seqq.

<sup>149</sup> *Hüttemann*, *Gemeinnützigkeits- und Spendenrecht*, 5. Aufl. 2021, recital 8.92.



when the corporation is dissolved. This provision widens the general prohibition of profit distribution under section 55 (1) no. 1 sentence 2 AO to include the liquidation of the corporation and the withdrawal of a member to preclude the tax-privileged assets from being removed from the tax-privileged sphere.<sup>150</sup> For social enterprises, therefore, contributions may be made to the nominal capital and may also be repaid in the event of the dissolution of the company or the withdrawal of a member. However, the amount is limited to the nominal amount, so that any increases in value remain in the company. Pursuant to section 55 (1) no. 4 AO, the assets remaining after the return of capital shares and contributions in kind must continue to be used for charitable purposes after the termination of the charitable activity. Practically, this is achieved by including a clause in the articles of association stating that the funds fall to a specific beneficiary or to the public purse. The identity of the tax-privileged purposes is not required.<sup>151</sup> Therefore, an exit from non-profit status while retaining the assets is not possible unless all tax benefits of at least the last ten years are refunded according to section 61 AO.<sup>152</sup>

### III. Conclusion and prospective changes in law

The lack of specialized legal forms for social enterprises has been often criticised. The existing legal structures for social entrepreneurs and other sustainably operating enterprises between the market and the third sector, as well as the current non-profit law, are not sufficiently oriented towards their needs.<sup>153</sup> There is a demand for greater flexibility pursuing dual purposes (for-profit and not-for-profit), the possibility of partial profit distribution, as well as the measurability and visibility of their own social successes in relation to the public through further certifications and special legal structures.<sup>154</sup> Therefore, the current government coalition consisting of SPD, FDP and the Greens has undertaken to improve the legal basis for social enterprises.<sup>155</sup>

For similar reasons, the *Stiftung Verantwortungseigentum* proposes a new alternative to the limited liability company (GmbH),<sup>156</sup> the *Gesellschaft mit ge-*

<sup>150</sup> *Seer*, in: Tipke/Kruse (eds.), AO/FGO, 168. Lfg., 2021, § 55 AO recital 21.

<sup>151</sup> *Koenig*, in: Koenig (ed.), AO, 4. Aufl. 2021, § 55 AO recital 27.

<sup>152</sup> *Fischer*, Ausstieg aus dem Dritten Sektor, 2005.

<sup>153</sup> Motion of the parliamentary group Bündnis 90/Die Grünen „Strategische Förderung und Unterstützung von Social Entrepreneurship in Deutschland“, BT-Drs. 19/8567; *Momberger*, Social Entrepreneurship, 2015, 61 et seqq.; *Weitemeyer*, Non Profit Law Yearbook 2011/2012, 2012, 91 et seqq.

<sup>154</sup> *Momberger*, Social Entrepreneurship, 2015, 43 et seqq., 60.

<sup>155</sup> Coalition Agreement 2021 between SPD, Bündnis 90/Die Grünen and FDP, 30, <https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1>, last retrieved on 20.1.2022.

<sup>156</sup> *Sanders/Kempny/Dauner-Lieb/von Freeden/Kempny/Möslein/Veil*, Entwurf eines

*bundenem Vermögen mbH* (limited liability company with locked assets – GmbH-gebV).<sup>157</sup> In this legal structure, the assets and profits of the GmbH-gebV should permanently benefit the company alone. In addition, profit distributions to shareholders are excluded, as is the participation of shareholders in the increase in value of the company in the event of withdrawal from the company or in the event of liquidation (also known as the asset lock).<sup>158</sup> In the course of business, the shareholders should at most receive (reasonable) remuneration under separate legal relationships, such as a salary, interest on a loan, licence fees, rent or lease.<sup>159</sup> The proposal has generated significant response.<sup>160</sup> The general criticism is that the GmbH-gebV is neither suitable nor necessary for the intended goals.<sup>161</sup> In contrast to social enterprises as the US benefit corporation or the community interest company introduced in Great Britain in 2005 the GmbH-gebV does not require any social purpose.

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Gesetzes für die Gesellschaft mit beschränkter Haftung in Verantwortungseigentum mit steuerlichen Begleitänderungen, in: Stiftung Verantwortungseigentum, 2020; *Sanders*, ZRP 2020, 140 et seqq.

<sup>157</sup> *Sanders/Kempny/von Freeden/Möslein/Veil*, Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen, 2021, 7, 11 et seq., 24, <https://www.gesellschaft-in-verantwortungseigentum.de/der-gesetzesentwurf>, last retrieved on 20.1.2022.

<sup>158</sup> Sections 77b, 77c, 77e, 77f (2), 77g, 77i, 77j, 77k, 77l (2) GmbHG-gebV(E).

<sup>159</sup> *Sanders/Kempny/von Freeden/Möslein/Veil*, Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen, 2021, 8, <https://www.gesellschaft-in-verantwortungseigentum.de/der-gesetzesentwurf>, last retrieved on 20.1.2022.

<sup>160</sup> *Beise*, Das Ende der Patriarchen, SZ 5.5.2021, 15; *Gehm*, Zeiss als Vorbild, Die Welt, 30.11.2019, 16; *Tönnemann*, Glücklich enteignet, DIE ZEIT, 6.8.2020; *Winkelmann*, Gier? Nein, Danke, stern 28.3.2019, 59 et seqq.; *Budras/Freytag/Preuß*, Start-ups für Rechtsform-Revolution, FAZ 7.10.2020, 15; Kapitalismus in gut, Spiegel 2.10.2020, 75; Neuer Anlauf für eine Gründer-Revolution FAZ 22.2.2021, 15.

<sup>161</sup> *Arnold/Burgard/Roth/Weitemeyer*, NZG 2020, 1321 et seqq.; *Habersack*, GmbHR 2020, 992 et seqq.; *Grunewald/Henrichs*, NZG 2020, 1201 et seqq.; *Hüttemann/Rawert/Weitemeyer*, npoR 2020, 288 et seqq.