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# Benefit Corporations in Germany

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## A. Introduction

- **growing interest** for the implementation of social responsibility in company law
- general (historical) importance of **certain aspects of social responsibility** in German corporate law
  - Workers-Codetermination (*Mitbestimmung*) → representation of workers in the supervisory board of certain large corporations
  - gender equality → e.g. mandatory number of women (30%) in the supervisory board of certain large corporations
- implementation of the **Corporate-Social-Responsibility-Reporting-Directive** (2014/95/EU) in March 2017 with an intense discussion about an extension of its scope of application in German law
- **however:** so far traditional focus on the non-profit sector (third sector)

## B. The Traditional System of Non-Profit-Organizations

- generally **no recognition** of a specific benefit corporation in Germany
- only option for the recognition of traditional **non-profit organizations** (third sector) in tax law for basically each corporate form
- traditionally use of **closed corporations** (*GmbH*), **foundations** (*Stiftung*) and **associations** (*Verein*) as non-profit organizations
- requirement of **recognition by tax authorities** → fulfilment of certain requirements set out by tax law (§§ 51 ff. Abgabenordnung)

## C. Missing Features of the Current System

- Operation of a "regular" corporation
  - o closed corporation (e.g. *GmbH*) → possibility to bind managers by including the social responsibility approach in the charter - deviation from the general standard for the business judgment rule - but: possibility to change the charter with a  $\frac{3}{4}$ -majority anytime
  - o stock corporation (e.g. *Aktiengesellschaft*) → no possibility to include a deviation from the general standard for the business judgment rule in the charter (but maybe via the purpose of the corporation)
  - o general problem of legal certainty



**no equivalent for the benefit corporation**

## C. Missing Features of the Current System

- Operation of a "regular" non-profit organization
  - o no distributions to shareholders pursuant to tax law → theoretical possibility to circumvent this requirement with hidden distributions
  - o no combination of profits and social responsibility possible
  - o problems to attract investors with a focus on profit and social responsibility



no equivalent for the benefit corporation

## D. Options for Founding Benefit Corporations in Germany

- founding of a Benefit Corporation in the United States and transfer of the real seat to Germany under Article XXV subs. 5 German-American Friendship Treaty of 1956 → recognition of the incorporation theory of international company law
- founding of a Benefit Corporation in another European Member States (e.g. Italy or Denmark) and transfer of the real seat to Germany protected by the Freedom of Establishment (Articles 56 ff. TFEU) → recognition of the incorporation theory of international company law



Development of (yet) another  
Competition in European  
Company Law

## E. Summary

- no existence of a specific benefit corporation in Germany
- dominance of "real" profit-orientated corporations and (traditional) non-profit organizations (third sector)
- increasing discussion in German corporate law about the introduction of a benefit corporation due to the growing importance of social responsibility
- So far: founding of foreign benefit corporation and transfer of the real seat to Germany as the only available option