
BEITEN BURKHARDT

Special Newsletter
Charitable Foundations -
Considerations on the Occasion of
the Corona Crisis

30 April 2020



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The corona crisis and its social and economic repercussions have a massive impact on all our daily lives. This also applies to charitable foundations from various points of view, namely their internal organisation, the realisation of their purpose, the use and procurement of funds, and the payment of taxes. In view of the recent changes in legislation and official announcements, the following is an outline of some key issues that should be noted:

1. PROCESSES AND INTERNAL ORGANISATION

1.1. Resolutions of the Executive Board and Board of Trustees

In the vast majority of cases, the respective foundation statutes consider meetings of the Board of Trustees and/or the Executive Board to be face-to-face events. In times of corona, these may and should only take place to a limited extent and in compliance with precautionary measures for reasons of health protection.

Alternatives are the written circulation procedure, if necessary also by fax or e-mail (as far as the statutes allow this). From a practical point of view, it should be remembered that a purely written procedure often unfortunately becomes "cumbersome". Not everyone has the time to formulate reflections, ideas and arguments in writing. There is a lack of direct and immediate exchange, of a common dialogue as it would be possible within the framework of a meeting. Teleconferences by telephone or even video can be a suitable vehicle for decision-making in individual cases and, as a rule, only with the agreement of all those involved. With reference to the self-administration and autonomy of foundations, the legislator has not planned any significant simplifications in this respect - in contrast to general meetings of stock corporations or other public companies.

If a meeting can be held in person, but individual members do not wish or are unable to attend for health reasons and the quorum is therefore endangered, the appointment of representatives - if necessary also with concrete or bound voting requirements - is a suitable means. In this case, though, the provisions of the statutes must of course also be observed. If the statutes do not contain any provisions on representation, the possibility of representation is excluded for mandates on the Executive Board or Board of Trustees in cases of doubt.

1.2. Prohibition of meetings - no special regulations for honorary activities

Although existing restrictions on assemblies, meetings and joint votes have been relaxed in many federal states since 20 April, nobody knows at present whether such restrictions will be applied again in the upcoming weeks, depending on how the pandemic develops. Even if the regulations do not apply completely uniformly throughout Germany, there are generally no privileges for honorary activities;

honorary activities are principally affected by bans on meetings just like any other activity.¹

1.3. Short-time work allowance, increase in short-time work allowance, continued payment of training supervisors' and volunteer flat rates

In order to secure jobs on the one hand and reduce personnel costs on the other hand, the option of short-time work is available which is naturally also available to non-profit employers as a structuring instrument. Short-time work need not affect the entire operation of the foundation; it can also be applied for separate work units. For the period until at least 31 December 2020, the conditions for short-time work are relaxed by law. It can currently be applied for if 10 percent of the employees are already affected by the loss of working hours (previously 1/3 of the staff). Social security contributions for the lost working time are reimbursed 100 percent by the Federal Employment Agency. A specific aspect for non-profit organisations is that if tax-privileged organisations increase the short-time allowance from their own funds by up to 80 percent of the former remuneration, neither the use of funds in accordance with the statutes nor the market conformity and appropriateness are examined, provided that the increase is uniform for all employees (cf. Federal Ministry of Finance (BMF) communication of 9 April 2020 (ref.: IV C 4 - S 2223/19/10003:003)).

Moreover, according to the same BMF communication, no objections are raised if the flat rates for voluntary work and training supervisors continue to be paid even though it is no longer possible (at least temporarily) to carry out the activity due to the corona crisis.

- 1.4. If the employees are not affected by a loss of working hours but continue to carry out their work despite the corona pandemic, this will in most cases involve risks, difficulties or at least inconvenience for the employees. According to the BMF communication of 9 April 2020 (ref.: IV C 5 - S 2342/20/10009:001), employers can therefore grant their employees a tax-free bonus of up to EUR 1,500 in the period from 1 March 2020 to 31 December 2020. A prerequisite for this is that this amount is paid in addition to the remuneration already owed. The BMF communication does not contain any restrictions with regard to the employer's industry or the employee's profession, which means that this option is also open to foundations that wish to reward the special performance of their employees during this difficult period. The special benefits can be granted in the form of bonuses and benefits in kind. It is essential that this is an expression of recognition of the special and indispensable performance of employees during the corona crisis. In the case of employees for whom it is less obvious, due to the nature and circumstances of their work, that it was made more difficult due to the corona pandemic, the foundation should, as a

¹ At least in Baden-Wuerttemberg, North Rhine-Westphalia and Bavaria.

precaution, make sure to document in the letter with which the bonus is granted what the special performance consisted of. In addition, the benefits should be recorded in the payroll account.

Bonuses paid by the employer in addition to the short-time work allowance and supplements paid by the employer as compensation for short-time work due to exceeding the income threshold are not subject to this tax exemption.

2. TAX ASPECTS IN PARTICULAR

2.1. Deferral of tax claims, surcharges for late payment etc.

According to the BMF communication of 19 March 2020, taxpayers affected by the corona pandemic can submit applications for tax deferral and adjustment of advance tax payments payable up to that date until 31 December 2020, stating their circumstances. The impact and damage of the corona pandemic need not be proven in detail by the taxpayer in terms of value. According to the Federal Ministry of Finance, no "... strict requirements" need to be imposed on the review, and interest on deferral payments can be dispensed with " in a straightforward, uncomplicated manner". Also tax default surcharges or tax enforcement measures in the case of taxes in arrears are to be waived if the default is due to the repercussions of the coronavirus.

In the case of charitable foundations, the tax relief is particularly relevant for *commercial businesses* that are affected by the repercussions of the coronavirus. However, current tax deductions (especially wage tax or also capital gains tax) are excluded from the privileges.

2.2. Value-added tax

Relief and options to extend the time periods for levying tax on foundations affected by the corona crisis apply in particular in the densely populated states of North Rhine-Westphalia, Bavaria, Baden-Wuerttemberg, Saxony and Lower Saxony. As a precaution, this should be examined separately for the other federal states.

2.3. Simplified donation certificate for payments

All special accounts set up by domestic legal entities under public law or officially recognised domestic associations of the non-statutory welfare services in connection with measures to promote aid for victims of the corona crisis are subject to simplified donation certificates - without any limitation as to the amount. According to section 50 (4) German Income Tax Implementing Regulation (EStDV), in particular the booking confirmation of the bank (account statement, direct debit voucher, PC printout for online banking) is sufficient as evidence in these cases.

2.4. Principles for the application of funds - here: Loss compensation in the case of taxable commercial business operations or asset management

The compensation of losses which tax-privileged foundations can prove to have incurred in a taxable business operation or in asset management up to 31 December 2020 due to the effects of the corona crisis with funds from the non-material sector, profits from special purpose operations, income from asset management or profits from business operations is not detrimental to the tax privileges of the respective corporation.

2.5. Application of funds for victims of corona - here: Assistance in overcoming the corona crisis

2.5.1. Charitable foundations may in principle use their funds only for tax-privileged statutory purposes. In extension of this requirement, according to the BMF communication of 9 April 2020 (IV C 4 -S 2223/19/10003 :003, DOK 2020/0308754; DStR 2020, 795), it is now harmless for the tax privilege if the corporation (here: foundation), which according to its statutes does not pursue any purposes that come into consideration here, uses the funds that it has received within the scope of a special campaign for the assistance of victims of the corona crisis for the stated purpose without corresponding amendment of its statutes. This also applies in particular to de facto real services such as the provision of premises free of charge or simple assistance and services (shopping or messenger services for fellow citizens in quarantine).

However, the foundation must itself check and document proof of actual need.

2.5.2. Remunerated services of tax-privileged corporations - detached from their actual, statutory purpose - that are necessary to cope with the effects of the corona crisis can be assigned to a special-purpose enterprise (section 65 German Fiscal Code (AO)) for income tax or VAT purposes. Under the preconditions of section 4 no. 14, 16, 18, 23 and 25 German Turnover Tax Act (UStG), such services are also exempt from turnover tax as closely related transactions between tax-privileged institutions, particularly, if the services in the areas of social welfare or social security serve to support and care for victims of the corona crisis.

2.5.3. Where funds are applied to facilities that are "indispensable" for coping with the corona crisis (in particular hospitals, senior citizens' and nursing homes, and corresponding social facilities), taxation of the gratuitous transfer is generally waived for reasons of fairness. This applies regardless of their legal form or their qualification as a tax-privileged corporation within the meaning of sections 51 et seq. AO.

3. EARMARKED SUBSIDIES AND PROJECTS; RECOVERY OF SUBSIDIES

What is the procedure if grant-making foundations have already committed and paid out funds for a project but the project is cancelled due to the corona crisis? As a rule, arrangements between grant-making foundations and the receiving corporation constitute a legally binding contract. If the receiver is unable to carry out a project that has been agreed, this is ultimately a case of impaired performance, i.e. funds already disbursed would have to be reimbursed or would not have to be paid at all.

In individual cases, the grant-making foundation may consider reallocating funds already allocated to the recipient for alternative charitable purposes to be pursued by the recipient, if necessary retrospectively, or to subsequently revoke a commitment to a specific purpose. Within the foundation, the reallocation of funds always requires the approval of the respective bodies. Apart from that, the new purpose of the funds reallocated must always be within the tax-privileged purposes of the grant-making foundations.

Caution and restraint is advisable in the case of a blanket "waiver" of the reclaim. Due to the relevance of the corona crisis, both the foundation supervisory body and the tax authorities will at present presumably overlook "minor violations" with a certain tolerance but under no circumstances should the legal or statutory requirements for capital maintenance be neglected.

4. IMPLICATIONS FOR OPERATIONAL BUSINESS RELATIONSHIPS AND ASSET MANAGEMENT

The corona crisis is expected to result in changes in general economic business transactions. Within the framework of prudent and also cautious liquidity and financial planning, the foundation's Executive Board should prepare itself for the following, among other things:

- 4.1. **Micro-enterprises** - i.e. companies with up to 9 employees and up to EUR 2 million annual turnover - have a transitional right to refuse to provide services until 30 September 2020 if their business cannot provide the service due to corona-related reasons or if the company would not be able to provide the service without endangering the economic basis of its business. This may result in delays and also in performance failures. The precise requirements for corresponding proof etc. are not yet clear.
- 4.2. Not least from the media it could be learned that many lessees are using the corona crisis as an opportunity to suspend or reduce **rental payments** or even to ask lessors to waive the rent. At the moment there is no legal basis for this. In the Act on Mitigation of the Consequences of the Covid-19 Pandemic and in the Civil, Insolvency and Criminal Proceedings Law of 27 March 2020, rents and lease payments were expressly excluded from any deferral regulations. According to the legal regulation, the lessee's obligation to pay the contractually agreed rent and ancillary costs

remains unchanged. In the event of non-payment of the contractually owed rent, a lessee is consequently in default of payment with the result that interest on the amount of rent due is incurred for the period of default. In view of this, non-profit organisations as lessors should not agree to a deferral of payment and certainly not to a waiver of the rent (or interest on arrears). On the one hand, this could be seen as a violation of the prohibition of preferential treatment (section 55 (1) no. 3 AO), so that even the status as a tax-privileged corporation would be jeopardised. On the other hand, claims which have been waived can naturally no longer be asserted in the event of insolvency, so that a waiver puts one in a worse position than other creditors of one's lessee for insolvency proceedings.

On the contrary, if rental or lease defaults occur in individual cases due to corona, the previously applicable statutory rights of termination are significantly restricted. According to section 2 of the Act on Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings Law, the following applies: The lessor may not terminate a lease on land solely on the grounds that the lessee fails to pay the rent in the period from 1 April 2020 to 30 June 2020 despite the rent being due. However, this only applies if the non-payment is due to the repercussions of the COVID-19 pandemic. A connection between non-payment and the corona pandemic must, in any case, be made "credible" by the lessee.

- 4.3. The obligation to **file for insolvency** (sections 42 (2) German Civil Code (BGB), 15a German Insolvency Code (InsO)) is suspended until 30 September 2020 if the factual insolvency is based on the consequences of the spread of the SARS-CoV-2 virus and prospects of eliminating an existing insolvency are substantiated. If an obligor was not insolvent on 31 December 2019, it is a general assumption on the part of the law that the factual insolvency is based on the repercussions of the COVID-19 pandemic and that there are prospects of eliminating an existing insolvency.

If a foundation is a creditor of such companies, the possibilities of a creditor insolvency application are hence limited; the prerequisite is that a reason for opening insolvency proceedings already existed on 1 March 2020 which, as a rule, will be difficult for the foundation as creditor to prove.

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