Homo donator: Geben zwischen Hierarchie und Solidarität

FRANK ADLOFF

Abstract: The article discusses the contribution of *Marcel Mauss* to a gift theory. People help each other, give each other objects, recognition, and encouragement. Beyond these everyday actions, there are also greater gifts: people forgive each other, or perhaps they give something unusual in the form of extraordinary help or philanthropic gifts. Both forms of giving are constitutive of society, for without gifts no society can exist. Yet almost all social theories have woefully neglected this dimension of human action. Typically, gifts are accounted for in two ways: either they are reduced to the fact that people do what norms expect of them; or they are attributed to motives of self-interest. Firstly, this article aims to offer a theoretical alternative. There is a human tendency to the gift that cannot be explained in a normativistic and utilitarian manner – gifts embody moments of surplus and unconditionality, which are constitutive for the creation of sociality. Secondly, the paper discusses the question if philanthropic foundations embody the solidary spirit of the gift or – to the contrary – if they tend to hierarchical forms of giving and social relations. It is argued that most foundations as part of elite philanthropy show rather hierarchical concepts of giving that contradict the horizontal and democratic idea of civil society.

Stiftungsunternehmen als hybride Organisationen: Auswirkungen auf die Unternehmensperformance

JÖRN BLOCK / FLORIAN HOSSEINI

Abstract: Foundation-owned firms are firms that are partially or fully owned by private or charitable foundations. They are a growing phenomenon in recent years. Foundation-owned firms can be regarded as hybrid organizations where economic and non-economic goals meet and interact with each other. This is particularly the case when a foundation is a charitable foundation that, by its charter, distributes its earnings to charitable causes. The organizational hybridity inherent in foundation-owned firms can constitute an important challenge for foundation-owned firms and can have significant negative effects on firm performance. In this short article, we discuss the hybridity in foundation-owned firms and how it can influence their performance. Based on empirical evidence drawn from the literature, we conclude that despite its hybridity and the enormous challenges resulting from it, foundation-owned firms perform not worse and – in some cases – even better than comparable firms which are not owned by foundations. We shall argue that foundation-owned firms are able to overcome the problems associated with the organizational hybridity and benefit from highly intrinsically motivated employees and managers. Moreover, we argue that foundation-owned firms and the foundations as owner have a strong long term focus and have developed the know-how necessary for dealing with the organizational hybridity and are able to effectively control the firm's management.

Since little (empirical) research exists on foundation-owned firms, many exciting and important questions remain unanswered and constitute an attractive agenda for future

research. It would, for example, be interesting to identify the reasons why – despite the disadvantages and challenges resulting from organizational hybridity – the financial performance of foundations is not worse compared to other firms. In a first step, one might investigate the performance of various types of foundation-owned firms.[1] Another direction of further research could be to investigate how foundation-owned firms deal with equity and bond markets.[2] Finally, an international comparison could be made comparing the performance of foundation-owned firms across different countries with different corporate governance and legal systems.

Zum Bericht der Bund-Länder-Arbeitsgruppe „Stiftungsrecht" betreffend die Zulegung und Zusammenlegung von rechtsfähigen Stiftungen

DIRK SCHAUER

Abstract: A merger is an institute that is highly promising precisely for dealing with the large number of ailing foundations. It is therefore important and good that the working group's report is devoted to the reform of mergers. The report addresses major aspects of a pertinent reform of merger law; in particular the report comes out in favour of having a uniform regulation throughout Germany for all four types of merger and for universal succession. In addition, appropriate regulations have been established for the competence of the authorities.

Several proposals made in the report must nonetheless be subject to critical review. The factual requirements for a merger, especially in the form of an amalgamation [*Zulegung*], must be questioned and so far no clear specifications have been made as to the procedure for the merger. The legal consequences of the merger have not yet been taken into detailed consideration either. As a result, there are no regulations on appropriate protection for creditors, no effective legal protection of the foundations involved, of the members of the executive bodies or of the recipients with a legal entitlement to foundation benefits. The planned adjustments to inheritance and gift tax law relating to a merger are inappropriate, and additional problematical areas of tax law have still been left untouched.

Nevertheless the introductory statement must be explicitly endorsed, namely that the working group's report provides an extremely valuable basis for discussion. The report is an important step in the right direction. The task now is to continue the discussion on this basis in order to create a coherent overall regulatory system.

[1] Foundation-owned firms can be broken down into four different types. See *Hosseini/ Jarchow* (2017).

[2] *Achleitner/Bazhutov/Betzer/Block* and *Hosseini* (2017) use an event-study method to investigate the (short-term) stock market valuation-effects of foundation ownership.

Perspektiven und Grenzen von Stiftungskooperationen aus rechtlicher Sicht

MATTHIAS UHL

Abstract: Foundations have a protection deficit deriving from their legal form. In cooperative relationships foundations would need special protection as there they can be exposed not only to the particular interests of the participants in the foundations but also to the very same interests on the part of cooperation partners and other third parties. For this reason it is necessary for a legal framework of institutional control and protective instruments to be evolved for cooperation by foundations.

There is no legal dogmatic concept of (foundation) cooperation. The concept of cooperation is not able to achieve any more than merely paraphrasing specific circumstances. In the context of cooperation, it is therefore well-known contractual and legal forms that are encountered from a legal point of view which have to be reconciled with the dogmatics of foundation law.

With a view to their ability to cooperate, diverse types of foundation are identifiable which can be categorized into three groups. Foundations with an affinity for cooperation have a cooperative element in the description of their foundation purpose or in other essential components of their statutes, so that cooperation with other parties is required in the context of realizing the foundation purpose. In their purpose and other content of their statutes, foundations with a neutral stance on cooperation refrain from including any reference to cooperation; the decision on whether and how cooperative action is undertaken by the foundation is a question for each individual case where the admissibility of such action has to be decided by interpreting the statutes and by means of a proper decision by the managing directors. Foundations averse to cooperation make this fact clear in their statutes by stating that they wish to achieve their objects autonomously; cooperation is prohibited in principle.

Due to the joint commitment of assets it is particularly the participation in joint ownership that can prove to be problematic under foundation law. Subject to specific stipulations by the founder, which can also derive from a special economic designation for the foundation assets, it can be assumed that the foundation board is permitted to incorporate a quantity of the foundation assets in a joint ownership structure to the extent that the foundation board is still in a position to manage the foundation autonomously despite the commitment of assets this entails.

If the foundation board should conclude, based on a proper discretionary decision, that it wishes to realize the purpose of the foundation in an economically meaningful manner within a GbR partnership organized under the German Civil Code, resulting in accessory liability of the partners, then it is at liberty to select precisely this option from the several equally as effective measures available to achieve the purpose. The asset preservation requirement is unable to make any fundamental contribution to this topic.

As an exception, the protection of the foundation is acknowledged as having a higher-ranking individual interest in accordance with the principles of a defective partnership. If the participation of a foundation in a partnership is defective, the foundation does not become a partner. A (possibly defective) partnership exists between the other partners insofar as there are at least two remaining partners.

A foundation partner owes its co-partners and the GbR partnership a loyalty that is characterized by the legal form. If it applies that an individual partner is obliged to take the interests of the partnership as the unlimited principle for guiding its conduct only to the extent that it has promised to do so in the partnership agreement and if, due to foundation law, it is only possible for the foundation to commit itself in a partnership agreement whilst taking the will of the founder into consideration and preserving its autonomy, then from the perspective of a loyalty commitment under the partnership agreement, a foundation cannot be required to perform an act which it is not capable of performing in accordance with its own principles of conduct.

Neue rechtliche Rahmenbedingungen für Social Entrepreneurs erforderlich?

BENJAMIN MOMBERGER

Abstract: In legal entities that are member-based (the association and the co-operative society), compelling legal reasons exist in this jurisdiction for reforming corporate law to allow for the creation of social enterprises. From the perspective of shareholder-based legal forms (GmbH and AG), optional considerations of legal policy support reform. If the legislature should decide to promote social enterprises, the creation of a single legal framework, i.e. a specific legal form as a social enterprise – such as the social company (Sozialgesellschaft) proposed – promises to attract the greatest possible attention and create a clear nexus to any future regulatory and/or promotional measures.

From the perspective of charity law, no compelling legal arguments exist for reform. Of course, the ban on distributing profits in particular and the requirement to attain purposes in a timely manner do inhibit the activity of a social enterprise. De lege ferenda the former obstacle could be eliminated by introducing an appropriate rate of interest on capital. To promote the capital funding of the non-charitable social company, one could also consider extending the favourable treatment of donations to capital contributed to such companies.

Kooperationen zwischen Non-Profit-Organisationen und der öffentlichen Hand im ländlichen Raum und zur Aufnahme und Integration von Flüchtlingen und die Bedeutung des § 2b UStG

HARALD BOTT

Abstract: The reception and integration of refugees addresses questions of *common good*; in humanitarian action and elementary human needs, the vital basis of the community is broached which is the task not only of the state but also of its citizens.

Cooperation between non-profit organizations and the public sector in the context of *interaction between state and society*, also in local projects for the reception and integration

of refugees and for preserving cohesion in society within the population, does justice to the overall societal task of the common good.

The initiation and scope of civic commitment is also shaped by the fiscal environment. *Non-profit law* offers copious possibilities for relief and tax incentives to encourage people to make their own contribution to supplement and enhance the resolution of overall societal tasks and to grasp them as being their own.

The measures additionally taken by the *tax administration* which have enabled pragmatic, solution-oriented support for the reception and integration of refugees within the administrative process over and above standardized tax exemption, constitute an appropriate additional governmental impulse for activating civic commitment which also encourages the willingness of non-profit organizations and the public sector to cooperate.

From the perspective of *profit taxes*, tax-privileged institutions – and also the persons and enterprises supporting them – are given tax relief. It is systemic that the relief effects of *value added tax* do not apply to an entrepreneur supplying the goods but to the specific turnover and to the recipient of the goods supplied. This also applies – notwithstanding sec. 2b of the German Turnover Tax Act (UStG) – to cases of cooperation on refugee assistance between non-profit organizations and the public sector.

Spenden und Sponsoring im Mehrwertsteuerrecht

CAROLINE HEBER

Abstract: There are no strict rules on how to decide whether a donation has to be characterised as a consideration for a supply of goods or services. This is true both for the distinction between taxable sponsoring services and a pure donation, and the distinction between third party consideration for a supply of goods or services to shareholders, to members or to a third party and a pure donation. Such strict rules are desirable since they were to be applied to any scenario and thus the line would be clear between scenarios which are subject to VAT and those which are not taxed. However, the EU VAT system applies a subjective requirement – the direct link – to decide whether or not a supply of goods or services is for consideration. Accordingly, the EU VAT system requires to look at the facts of each case and analyse whether the subjective criteria are met for the supply of goods or services for consideration.

Foundations in the Netherlands: present and proposed legislation and their role in the economy

NIEK ZAMAN / CEES DE GROOT / MARTIJN VAN STEENSEL

Abstract: The Dutch law governed foundation is characterized by its very flexible nature. This is mainly due to the fact that Dutch law only provides for a very limited number of

statutory provisions on foundations. As a result of this flexible nature the Dutch law governed foundation is used for various different purposes, e.g. charitable, social, scientific, private wealth planning, privacy and asset protection purposes.

This Article outlines the main aspects of this versatile legal form, starting with an overview of the general legal characteristics of the foundation. In view of the fact that the foundation is mainly characterized by its objects as well as the fact that the foundation only has one (mandatory) corporate body (being the management board), particular attention is paid to the objects clause of and the governance within the foundation. As the number of statutory provisions on foundations is very limited, the foundation is very flexible in (for instance) structuring its objectives and the desired composition, appointment and internal governance of the management board. Additionally, the first section discussed the procedure of incorporation, amendment of the articles of association, dissolution as well as the reporting / filing requirements for foundations.

The second section of this Article focuses on the use of the foundation in the semi-public sector, as the foundation is the predominant legal form used in those sectors. For these specific sectors additional branch related regulations apply, imposing specific requirements as to e.g. governance, co-determination and co-participation. This contribution elaborates on the main sector specific regulations and their impact on the governance within the foundation.

The third section of this Article sets out current legislative developments, more in particular the pending Act on Management and Supervision of Legal Entities (*Wetsvoorstel Bestuur & Toezicht Rechtspersonen*). The Act focuses particularly on improving and harmonizing the legislative framework in place for associations, cooperatives, mutual insurance societies and foundations. This section entails an overview of the main changes introduced by said Act. In this respect specific attention is paid to e.g. the introduction of (i) a statutory basis for the establishment of a supervision board or one tier board in foundations and (ii) a statutory provision on conflicts of interest.

This Article is concluded with a few examples of the way the Dutch foundation is used in practice, more in particular for fiduciary purposes. The first example outlines the use of the foundation as civil law equivalent to the common law trust, which is created by combining interesting longstanding concepts of Dutch law (e.g. the donation). The second example sets out the (tested and generally accepted) use of the foundation for the purpose of protecting Dutch listed companies against hostile takeover bids. The final example describes the role that the Dutch foundation can play in protecting the continuity of family owned business by separating the control over shares from the financial rights attributable to such shares.