

# The Board of Nonprofit Organizations: Some Corporate Governance Thoughts from Europe

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## Abstract

Nonprofit organizations have been called the “neglected stepchildren of modern organization law”. Deficits of control in nonprofit organizations are widespread. This is due to the absence of shareholders who could monitor and of the discipline by takeover markets. This article focuses on the board of nonprofit organizations as the center of nonprofit governance and tries to see what can be learned from the corporate governance discussion. The differences between the United States and Europe as to the board of nonprofit organizations is discussed at the outset. Then the organization and functioning of the board of nonprofit organizations and board responsibility are analyzed. Key problems of organization and functioning are the board structure (one-tier/two-tier), composition and size, committees, remuneration and audit. As to responsibility the duties of the board and its liability must be distinguished. At the end much can be learned from the corporate governance movement, but everything depends on enforcement, legal or non-legal.

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Keywords: Audit, board, business judgment rule, Comparative nonprofit law, corporate governance, deficit of control, independence of directors, labor codetermination, monitoring, nonprofit organization, one-tier/two-tier board, professionalization, remuneration, standard of conduct.

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## The Board of Nonprofit Organizations: Some Corporate Governance Thoughts from Europe

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### I. Nonprofit Organizations and Corporate Governance: An Introduction from a European Perspective

#### A. The State of the Discussion in Europe

The preface to Volume 1 of the Non Profit Law Yearbook 2001 starts as follows: “Attention to the non-profit sector by legal scholars is still in its infancy in Germany. Although there has been a substantial increase in recent years in the number of

publications by legal authors concerning the law dealing with associations and foundations, and also concerning the special provisions of tax law relating to institutions with charitable purposes, non-profit related research not focussed specifically on any particular legal form . . . is quite rare.”<sup>1</sup> As far as can be seen, this diagnosis is true for many other European countries as well. Even less developed is the scientific dialogue on the regulatory problems of nonprofit organizations between the different disciplines, as shown, for example, by a conference at the Max Planck Institute for Private Law in Hamburg in 2003. This conference brought together academics and practitioners from law, economics, sociology, political science, history and psychology and was a kind of primer for the lawyers as well as others.<sup>2</sup> For the comparative corporate governance discussion, the lacuna is even greater; this is hardly surprising since this discussion is relatively new for corporate law as well.<sup>3</sup>

As in the past for antitrust, securities regulation, corporate law<sup>4</sup> and many other new regulatory challenges, European scholars tend to look to the United States. Due to its history, society and larger economy, modern economic and societal developments usually start in the US and pose regulatory problems earlier than in Europe. And indeed, the discussion on nonprofit organizations and their regulation is much more developed there than in Europe as many of the contributions in this volume illustrate. The charitable trust has a century-old tradition and the charitable corporation, the forerunner of the modern US nonprofit corporation, had already been introduced at the end of the 18<sup>th</sup> century. Today the nonprofit corporation is the typical form of nonprofit organization in the US, and the Model Nonprofit Corporation Act 1952 set standards for its regulation.<sup>5</sup> While even in the United States nonprofit corporations have been described as “corporate Cinderellas” and the “neglected stepchildren of modern organization laws”, *Harvey J. Goldschmid* maintains that borrowing from corporate law with a number of modifications may render Cinderella ready for the ball.<sup>6</sup>

The need for more attention to the regulatory problems of nonprofit organizations is readily understandable in view of their rapidly growing role in the modern society and economy. This role has been documented by the multi-country John Hopkins Comparative Nonprofit Sector Project at the University of Baltimore, and most recently for the member states of the European Union in comparison with the United States, by the Feasibility Study on a European Foundation Statute for the European Commission of December 2008.<sup>7</sup> Nonprofit organizations make up on average around 6 per cent of the gross national product of developed market societies, and they create more jobs than most of the other sectors.<sup>8</sup> Their focus is on the sectors of education, social services and health. But nonprofit organizations have attracted the attention of politics and society for another reason as well. There are well-founded doubts that the traditional European welfare state will still be able to cope with the ever-increasing welfare, environmental and development problems of modern society in the future. Nonprofit organizations may step in and create a rapidly growing zone between the state and the market. There they can take over tasks that the state can no longer fulfil because of scarcity of financial resources, and that for-profit organizations in the market will not be able and willing to take over because these tasks do not yield enough or at the necessary profits. This development goes along with an increased focus on the subsidiarity principle, which happens to be a legal principle in the EC treaty.

#### B. Deficits of Control in Nonprofit Organizations and Ways Out

The modern corporate governance discussion began mainly as a reaction to corporate failures and scandals and to a perceived lack of governance and control in large

corporations, as did corporate law and securities regulation in general.<sup>9</sup> The Enron case that came later gave additional worldwide momentum to this discussion.<sup>10</sup> A similar development, though fortunately in a state of infancy, can be observed for the nonprofit sector. The cases of not-so-good governance in the nonprofit sector are many and significant as reported in this book by *John A. Edie* for the United States,<sup>11</sup> and *Christoph Mecking* for Germany.<sup>12</sup> The \$200,000 Wedding, The Personal Chef's Trips to Europe, The Luxurious Game Lodge and Using Tax-Exempt Organizations for Political Purposes are the keywords for the United States. Siphoning off enterprise foundation money and proceeds to the founder family, excessive remuneration to board members, transactions carried out between the foundation and the board not at arm's length and lack of transparency are similar complaints from Germany. Such cases of misappropriation and abuse are also reported from other countries – for example, from France concerning the Fondation Vasarély in Aix-en-Provence in 1993, or the cancer research society ARC where millions of francs were siphoned away, as well as from other countries.<sup>13</sup> While it is rare for the nonprofit organization to be ruined by abuses with such dire consequences for third parties and the market and even the economy – and this is an important difference from the corporate sector – the embezzled sums may still be considerable.<sup>14</sup> The abuses in the nonprofit sector appear particularly offensive because the financial basis of the organization or the foundation is given for free for a good cause; however, this cause may be defined by the founder. Most of these abuses concern the management and the board of the foundation and consist in disloyal behaviour or, even more commonly, in mismanagement and carelessness towards the entrusted assets. The latter has been described as the nonprofit law's single greatest problem, namely the "sleeping or nonfunctioning dead board".<sup>15</sup> An empirical study from 2005 on the management of public welfare foundations in Germany came to the conclusion that many management tasks are not considered relevant by the organs of the foundation, and many tasks that are considered relevant are delegated to external asset managers, banks or investment companies. Foundation management, therefore, compares badly with for-profit management and the requirements of modern management science.<sup>16</sup> Enterprise foundations or nonprofit organizations directly or indirectly running or controlling enterprises may do very well – like some Dutch, Scandinavian and Austrian foundations – but because of their legal form as a foundation they lack the discipline of corporate law rules regarding creditors and market participants. A German example of this is the Allgemeiner Deutscher Automobil Club (ADAC), Germany's largest association with more than a million members.<sup>17</sup>

If one reviews these examples of not-so-good governance in the nonprofit sector, the reasons for this particular control deficit compared with the control situation for for-profit corporations become quickly obvious. There are typically no shareholders who could monitor the board in their own profit interest, let alone institutional investors; nor are there markets that could exercise external control on the management and the board. Even in the United States, where the corporate form is common for nonprofit organizations, most charities and social welfare organizations have no members or have members only in the ceremonial sense with the consequence of self-perpetuating boards of directors.<sup>18</sup> Peer pressure among outside directors is usually lacking.<sup>19</sup> With the exception of enterprise foundations, there are no product markets where competition with other producers presses for efficiency, nor is there a takeover market that could discipline managers of the target in case of poor performance. Last but not least, there is no financial press to constantly observe the organizations and their performance and act as a public watchdog.

This boils down to what has been called the “central paradox of nonprofit corporate governance”, i.e. “the fact that nonprofit institutions receive so much in public and private largess, but are subject to so few accountability constraints”.<sup>20</sup> In a way, this control deficit in nonprofit organizations is even more relevant than in for-profit organizations, because of more direct state interest in nonprofits and greater enforcement difficulties. The way out for enhancing control in nonprofit organizations is difficult, not only because of the lack of constraints that have just been reviewed, but also because the “third sector” (besides the public sector and the market sector) comprises an enormous factual variety of nonprofit organizations.<sup>21</sup> The proposal to distinguish between corporate governance, philanthropic governance and hybrid governance in welfare nonprofit organizations is an interesting factual distinction, but has only limited value for regulatory purposes and rulemaking.<sup>22</sup> Concentrating just on foundations<sup>23</sup> may lead to a partial answer, but the approach is too narrow, in particular in a comparative perspective concerning Europe and the United States. The more difficult – but also more challenging – problem of better control of nonprofit organizations more generally has been tackled most recently by two comprehensive books written by *Susanne Hartnick*<sup>24</sup> and *Thomas von Hippel*<sup>25</sup> at the Hamburg Max Planck Institute as part of a larger project on Corporate Governance of Nonprofit Organizations funded by the VolkswagenFoundation. The proposal of a genuinely *European Foundation* elaborated as a Bertelsmann Foundation project under the direction of *Klaus J. Hopt*<sup>26</sup> relies less on state supervision, but complements it by meaningful private control and responsibility. This means more responsibility for the board, but enforced by rights of the founder, the beneficiaries and third parties and by public accountability, disclosure and audit.

The following contribution concentrates on the *board of the nonprofit organization*<sup>27</sup> and asks what can be learned from the corporate governance discussion. This focus may be helpful for two reasons. First, the board is in the middle of the huge international and interdisciplinary corporate governance discussion, despite fundamental differences in the shareholder constituencies in the United States and the United Kingdom on the one side and continental Europe on the other.<sup>28</sup> Second, the above-described abuses in the nonprofit sector concern primarily the management and the board. The key challenge for enhancing control over the management and the board of nonprofit organizations lies, of course, in the fact that the typical principal-agent problems for corporations, i.e. between the shareholders and the management/board and between the controlling shareholder and the minority, typically do not exist as such in the nonprofit organization as we have already seen. This must always be kept in mind when one tries to transplant experiences and regulatory concepts from corporate governance to foundation or nonprofit governance.

## II. The Board of Nonprofit Organizations: What Can Be Learned from the Corporate Governance Discussion?

### A. The Board of Nonprofit Organizations: Differences Between the United States and Europe

#### *1. The Nonprofit Corporation as the Typical Form of an American Nonprofit Organization*

From an American perspective, the point of departure of the discussion is clear: the typical American nonprofit organization today is a nonprofit corporation (with the distinction between public benefit nonprofit corporation and mutual benefit nonprofit

corporation). Traditionally, charities were established in the form of a charitable trust, and only later did the form of the charitable corporation come up. Today, however, the vast majority of charities are nonprofit corporations. The modern nonprofit corporation can be used for any lawful purpose, whether charitable or not. It differs from the business corporation in its non-distribution restraint, but in most other respects it is similar to it. This means that the rules for the board of the nonprofit corporation are legal rules that are basically the same as those for the board of the business corporation. The reality, of course, is very different, since in the nonprofit sector law plays little role other than aspirational.<sup>29</sup> The problem then is whether these rules and the wealth of case law and doctrine concerning the corporate board are also fully applicable to the board of the nonprofit organization, or to what extent they need to be modified.

## *2. Non-corporate Legal Forms for Nonprofit Organizations in Europe*

In many European countries, the legal situation is the opposite. In practice, the corporate form is not the typical vehicle for a charitable institution or another nonprofit corporation. Due to a legal institutional history that dates back to Roman law, nonprofit organizations tend to be associations that have members or foundations that do not. There are fundamental differences between both of these legal forms, and both may or may not be formed as juridical persons. Of course, there is always somebody who is the director or manager or otherwise responsible for the nonprofit organization. Insofar that person might be, or might be treated as, a management board. An additional controlling board is not mandatory, apart from certain exceptions. Therefore the departing point is fundamentally different. The argument that would have to be made – whether it holds or not is left open at this point – is twofold: functionally, that organizational requirements, duties, liabilities, and enforcement rules for the board according to corporate law would also fit nonprofit organizations and their board or quasi-board; and, if so, doctrinally, that there is a basis in statutory or case law to apply them – by interpretation, analogy, or legal reform – to nonprofit organizations as well. This is one of the main reasons why the European discussion on the “corporate” governance of nonprofit organizations lags far behind the American discussion and has begun only relatively recently. Of course, once the parallel problems of the corporate governance and the governance of nonprofit organizations are realized – a realization that is due especially to comparative nonprofit organization law studies and to disciplines other than law – the discussions on both sides of the Atlantic will take on common ground.

## **B. The Board of Nonprofit Organizations in Europe**

### *1. Differences Between Corporate Boards and Boards of Nonprofit Organizations*

The lack of a standard legal corporate form for nonprofit organizations in many European countries leads to the question of what role a board of such an organization should have, and whether this role and the regulatory conclusion to be drawn from it should be defined by law or by a voluntary code. The basic role of the board is management and control, also for nonprofit organizations. Both roles reveal key differences between nonprofit corporations and other corporations.

The main management difference from corporate boards is that nonprofit boards, at least those of charitable organizations,<sup>30</sup> are often composed of volunteer directors who do not have the same expertise that corporate directors are required to have by law. In the case of charitable organizations, they are quite often not even remunerated and devote only a limited amount of time to their task.

The main difference from corporate boards in terms of control is that adequate control is often underdeveloped. This is obvious for nonprofit organizations without members who could hold the board accountable. State supervisory bodies, whether public law institutions or tax authorities, cannot replace the control wielded by shareholders. But even in nonprofit organizations that have members, a sufficiently strong incentive for those members to see that the board acts at least in their long-term profit interest is lacking. So is the discipline exercised on the board by capital market and takeover markets. It follows that even control of nonprofit organizations by members is generally loose.

## *2. Law or Codes and the Transplant Problem*

The consequence of this is twofold: First, as long as there are no detailed legal provisions for the board of a nonprofit organization as in American nonprofit corporation law, a more flexible and more readily accepted way may often be to start with voluntary codes. An example of this is the Swiss Foundation Code of 2005.<sup>31</sup> This Code was compiled at the initiative of SwissFoundations, the Association of the Grant-making Foundations in Switzerland. Its 22 recommendations are clearly influenced by the Swiss Code of Best Practice for Corporate Governance.<sup>32</sup> The Code begins with three key principles that govern the recommendations: effective realization of the foundation mission, checks and balances, and transparency. The second reads: “The foundation ensures that a balanced relationship exists between management and monitoring in all important decisions and dealings, using appropriate organization and administrative procedures.” This principle is then spread out in no less than 11 of the 22 recommendations concerning the management of the foundations and in particular the foundation board, the management board, the auditing body, and other foundation bodies. The experience with this Code is still limited and there has also been a critical evaluation of the Code from a legal perspective.<sup>33</sup> Critical aspects, for example, are the character of mere recommendations without any attempt to have a more binding nature, such as the principles of “comply or disclose” or, somewhat stronger, “comply or explain”.<sup>34</sup> Furthermore, it is sometimes unclear to what degree such a code simply replicates legal principles and provisions or actually contains new code-specific rules and recommendations. But this is normal for a stage in which rulemaking starts on a voluntary basis and has the positive aspect of flexibility and room for experimentation and consensus building.

The Swiss Foundation Code is one of many other codes with more or less normative force in various countries. On a European level, the Code of Best Practice established by the European Foundation Centre (EFC) in Brussels should be mentioned.<sup>35</sup> It contains principles of good practice such as transparency and intends to set guidelines both for the founders and for foundation management as a code of conduct. Some of these codes evaluate the grant-seeking institutions and set certain minimum standards for attributing them quality certificates.<sup>36</sup> Among such minimum standards are also requirements for internal control of the management by an independent supervisory organ in these institutions.<sup>37</sup> To be sure, voluntary codes and recommendations may just be a first step, as we can see in the European Union. There the European Commission first merely recommended the formation of audit committees for listed companies in its Recommendation of 15 February 2005, but it went further in the revised audit directive adopted in April 2006, which makes them mandatory from 2008 on at the latest. It remains to be seen whether in the future some of the principles and rules contained in such codes for foundations or nonprofit organizations will move over to fall-back or even binding state law.

The second consequence is that, whether by law or by code, one should be careful when transferring organizational requirements, duties, liabilities and enforcement rules for corporate law boards to boards of nonprofit organizations, a consequence that will be kept in mind in the following parts of the article. Transplanting is always a problematic venture.<sup>38</sup> In the case here it must be particularly well thought over because the nonprofit sector is highly inhomogeneous and includes fundamental differences between foundations and various nonprofit organizations and within the foundation sector itself, with some huge and a host of tiny organizations. Unrealistically high demands on behaviour and formalization of requirements tend to deter the voluntary engagement that is indispensable in the nonprofit sector. The considerable stiffening of legal rules on board members during the last decades in Germany and many other European countries has had the unwelcome side effect that it has become much more difficult to attract good candidates to become board members. This unintended consequence is even more probable in the nonprofit sector.

### III. Organization and Functioning of the Board of Nonprofit Organizations

#### A. One-Tier/Two-Tier Boards

##### *1. Experiences from the Corporate Governance Discussion*

For the organization and functioning of the boards, there is broad experience from corporation law in many countries that can also be used for nonprofit organizations, either by legislators or, if there is no statutory law, by the nonprofit organization itself in its statutes and articles or bylaws. As said before, control in nonprofit organizations is as important as in corporations. For the reasons mentioned, i.e. the particular control deficit, it may be even more important.

As to organization, the first issue concerns the choice between the one-tier and the two-tier board model. The traditional controversy has been over whether the one-tier system or the unitary board – as, for example, in the United States and the United Kingdom and with modifications in Switzerland and other countries – or the two-tier system of a management board controlled by a supervisory board – as in Germany – is preferable. Modern corporate governance experience with the board has shown that this debate has lost momentum.<sup>39</sup> There is a clear tendency towards convergence of the two models. In the one-tier board, the modern corporate governance movement recommends the separation of the functions of the CEO and the chair of the board and asks for independent non-executive directors. In the two-tier system, the separation of management and control is the essence; however, contrary to what is sometimes maintained, it does not function satisfactorily with only formal but not enough actual independence. But even if actual independence of a sufficient number of the supervisory board members exists in a corporation, the information flow from the management board to the supervisory board is decisive. Whether such a flow is guaranteed by requiring the chairman of the managing board to provide this information, or whether the supervisory board should have a direct interrogation right to the senior personnel of the corporation without first asking the chairman of the managing board, is hotly debated. The better view is the latter, at least as far as the risk management and internal control sections of the corporation are concerned. The draft statute of the European Foundation gives the members of the supervisory board the right of access to all books, records, and information concerning the foundation's functioning, the investment of its funds and its activities and affairs generally.<sup>40</sup>

## *2. Lessons for the Nonprofit Governance Discussion*

Both board types can be found in the boards of nonprofit corporations, as some examples show, but a one-tier board is the more common practice.<sup>41</sup> The U.S. Revised Model Nonprofit Corporation Act of 1988, which is under renewed revision, provides for a one-tier board but recommends in an optional section that no more than 49 percent of the individuals serving on the board of any public benefit corporation may be financially interested persons; it goes on to define what is meant by this.<sup>42</sup> By this subdivision within the one-tier board, the control function is enhanced without formal separation as in the two-tier board model. The Austrian Private Foundations Statute of 1993 provides for a management board, an auditor and, as a non-mandatory provision, a supervisory board of the foundation. In two cases a supervisory board is mandatory, i.e. if there are more than 300 employees in the foundation itself or, if the foundation controls a domestic corporation or has a direct participation of more than 50 per cent in it, more than 300 employees in the controlled enterprises.<sup>43</sup> The above-mentioned Swiss Foundation Code recommends that the foundation board manage the foundation and that the management board be entrusted with the operational control of the foundation. If the foundation is small, the management may be in the hands of one member of the foundation board, but then the foundation board must lay down control mechanisms.<sup>44</sup> A mandatory two-tier board system can be found in Israel and in Portugal.<sup>45</sup> The draft statute of the European Foundation provides for an option between both systems, but makes a supervisory board mandatory if the European Foundation has annual gross revenues in excess of a certain amount and/or gross assets in excess of a certain value.<sup>46</sup> This supervisory board of the European Foundation has, as was already mentioned, far-reaching information rights and responsibilities, including the responsibility to inform the auditors and/or the state supervisory authority in case of serious irregularities which, after reasonable written notice, the management board does not correct or prevent.<sup>47</sup>

As for the nonprofit organizations, the conclusion is that generally neither of the two models – the one-tier or the two-tier – is inherently better. While in larger nonprofit organizations a two-tier system may divide management and control more clearly, this in itself is no guarantee for effective control, and the requirement of a two-tier board may just be too heavy for smaller nonprofit corporations. The control problem can be solved more effectively either by independence requirements or by means that we shall deal with later on.<sup>48</sup>

## B. Composition and Size of the Board

### *1. Labour Codetermination*

The composition and size of the board matter more than a separate supervisory board. With composition, the highly controversial problem of labour codetermination that exists with variations in many European states<sup>49</sup> may arise if the nonprofit organization has a certain number of workers. But for the nonprofit sector as a whole, these cases are rather exceptional, namely if the nonprofit organization itself operates an enterprise. If it functions only as a holding that controls a subsidiary corporation, the codetermination problem comes up in a similar way as for a group of normal corporations. One aspect of nonprofit group law comes up, for example, with spin-offs of nonprofit corporations and special rules for conversion transactions and similar sensitive transactions.<sup>50</sup> The experience made with German quasi-parity boardroom codetermination is rather sobering. The representatives of the workers and the trade unions are usually more interested in benefits for labour than in corporate governance in general or the interest

of other stakeholders. This can be seen in the famous Mannesmann/Vodafone case in Germany.<sup>51</sup> Labour representation in nonprofit corporations apart from the particular forms just mentioned may be even less recommendable in view of the observation that nonprofit organizations are often “captured” by their staff and tend to evolve towards “worker cooperatives”.<sup>52</sup>

## *2. The Independent Board Monitoring Model*

Better control may be provided by an independent board monitoring model as provided for in US corporate law and cautiously recommended as an option by the Revised Model Nonprofit Corporation Act of 1987, but no longer contained in the Exposure Draft of the Proposed Model Nonprofit Corporation Act, Third Edition.<sup>53</sup> Yet in the aftermath of Sarbanes-Oxley in California, nonprofit corporations with more than \$2 million in gross annual revenues must have an audit committee composed of independent members who may not be employees of the corporation or receive additional compensation for service on the audit committee.<sup>54</sup>

In the European Union, the issue of having independent directors is not so much discussed in relation to the corporate board in general as to specific board committees. The Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board<sup>55</sup> states that the nomination, remuneration and audit committees should be composed exclusively of non-executive or supervisory directors, and that at least a majority of their members should be independent. The profile of independent directors is described in much detail in Annex II of the document and is highly controversial, at least in continental European countries. In particular, the independence recommended for the directors from the controlling shareholder seems too far-reaching in a system where the shareholder structure is not dispersed, as is traditionally the case in the US and the UK, but where family corporations and corporations belonging to a group prevail.<sup>56</sup> If the corporation is even codetermined, this independence rule would split the shareholder representatives’ bench (10 shareholders to 10 labour representatives in large enterprises) with the consequence of labour having the say.

For nonprofit corporations, the same problem comes up. If the board of the nonprofit corporation contains only one or two or a few members, it will be difficult to have a majority of independent members in it or in its key committees. In foundations in particular, the founder has a great interest in either sitting on the board himself or having relatives, friends or others he trusts in the board. If this is rendered too difficult, founders may be discouraged from engaging themselves. This is different in the case of enterprise foundations or even nonprofit corporations<sup>57</sup> and foundations that are tapping the capital market,<sup>58</sup> since all enterprises should be subject to the key shareholder (if they have any), creditor and market protection rules of the securities regulation. These observations concerning independent directors boil down to the conclusion that, rather than having mandatory provisions, apart from the enterprise nonprofit sector, concrete and individual conflicts need to be governed by appropriate rules.<sup>59</sup> The draft statute of the European Foundation is more demanding and stipulates that the board of directors be composed of at least three competent, independent and unrelated natural persons, though without defining independence.<sup>60</sup> But the European Foundation signals by this to the supervisory authorities and the public that it is living up to a particularly high standard as compared to many national foundations. This does not preclude having additional non-independent members of the board.

### *3. The Size of the Board*

The size of the board is a particular problem. While in large corporations in Germany the board must have 20 or more directors – mostly due to labour codetermination – the practice is different in many other countries and the wisdom from management science, group theory and international practice is that a group of more or less 10 persons is the best size. There are also rules for minimum size – usually three directors in order to avoid a deadlock<sup>61</sup> – but limited liability companies can have one managing director and no supervisory board at all, in which case the assembly of associates governs.

For nonprofit organizations one must be careful not to fall into the trap of one-size-fits-all. The nonprofit organizations are manifold, and many of them are small. The three-person rule of corporate law is usually used for nonprofit organizations as well. The U.S. Revised Model Nonprofit Corporation Act requires three board members as a minimum. So does the Austrian Foundation Statute of 1993.<sup>62</sup> But Delaware and some other states allow nonprofit corporations to have one single director. In practice, the size of the board of nonprofit corporations varies considerably from small boards, sometimes with just one director, to relatively large boards in which many honorary members and potential cofounders are represented.

Of course, the latter raises the questions of what can be expected from such members and whether all should be subject to the same standard of care.<sup>63</sup> Some years ago, in view of patent difficulties in private banking, the legislature reformed bank supervision law by a provision requiring the so-called four-eyes principle, i.e. asking for a minimum of two directors. This changed a century-old tradition in private banking, but there is some truth in it which should also be considered for nonprofit corporations. However, I would not even insist on this as a mandatory rule for all nonprofit organizations. The size of the board is not a guarantee for good management and control. Everything depends on whether there are other control mechanisms.

## C. Board Committees

### *1. Experiences from the Corporate Governance Discussion*

Over the years, corporate law reform and corporate governance were very much concerned with the functioning of the board. Very often the board just did not fulfil its tasks because of mere passivity, insufficient information or other inefficiencies of procedure. Much has been done in the meantime, usually not by legal provisions but instead by corporate governance codes and other non-binding, self-regulatory means. One of the most important points is committee work. Modern minimum standards for good corporate governance of the board of listed companies consist of three committees: a nomination committee, a remuneration committee and an auditing committee. The auditing committee is particularly important, provided of course that it includes members who are knowledgeable and independent, both from management and otherwise. Rules and recommendations on these key committees, their tasks, and their procedures can be found in many laws, stock exchange listing requirements, codes, and recommendations. A recent example is the already-mentioned Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.<sup>64</sup>

### *2. Lessons for the Nonprofit Governance Discussion*

There are lessons here for nonprofit organizations, but once more one size does not fit all. For large nonprofit corporations the board committee system idea is certainly useful,

and a variety of board commissions can be found there in addition to the three key committees mentioned before, for example, fundraising committees, program committees and investment committees.<sup>65</sup> But for the many small and medium nonprofit corporations with a small board, committee work, let alone in three key committees, just does not make sense. Even for small listed companies, the above-mentioned European Recommendation makes allowances for flexibility.<sup>66</sup> What really counts, therefore, is that the board itself does the job and does it well. If such a board needs help, adding non-board members to a board committee or using the expertise of advisory bodies can be useful, to the extent the law allows this.<sup>67</sup>

#### D. Remuneration and Audit in Particular

##### *1. The Appropriate Remuneration Problem*

The aforementioned key functions for committee work for corporations are of different importance for nonprofit corporations, the nomination and remuneration problems being less important than the audit problem. For nonprofit corporations and foundations, the nomination problem comes up in another way since there are usually no shareholders to appoint the board members, and the succession problem – which can be pivotal even in small corporations – is different. In foundations the founder has an interest to nominate the director(s); the law respects this and provides for a nomination by the court or a foundation trustee only if necessary. But the law takes care that the board is not manned by the spouse or other relatives of the founder, nor by beneficiaries as prescribed, for example, by the Austrian Private Foundation Statute of 1993.<sup>68</sup>

There is a remuneration problem, but it is not as important as for corporations, both in law and practice,<sup>69</sup> since the leverage by stock options and similar devices typically does not exist here. In practice the board members often act on an honorary basis. In England this was what the Charity Commission required, without even allowing for exceptions until 1994. German association law also provides as the general rule that the managing director of an association receives only reimbursement of his expenses, unless the bylaws provide differently. If remuneration is provided for, the question of what is adequate remuneration arises. Unless decided otherwise by the founder in the bylaws or the members of the nonprofit corporation, the directors are to be remunerated for their service with an adequate remuneration that takes into consideration their tasks and the situation of the foundation.<sup>70</sup> In the Austrian Private Foundation Statute of 1993, the amount of remuneration is fixed by the court upon application of a foundation organ or one member of it. In other countries the foundation supervisory agency decides. This is different from the US where the director or trustee of the nonprofit corporation is remunerated if the bylaws do not provide for honorary activity. The amount of the remuneration is fixed by the organ itself, but must stay within the limits of fairness. Tax provisions in the US and Germany also contain a fairness rule, and in the UK the Charity Commission and tax authorities see to it that nothing higher than market salaries is paid. For public benefit corporations, the Revised Model Nonprofit Corporation Act of 1987 contains an optional section that provides for decision making by a financially disinterested majority.<sup>71</sup> The draft statute of the European Foundation states that the European Foundation may provide reasonable financial compensation to the members of the board, and may reimburse all reasonable expenses.<sup>72</sup>

## *2. Audit Committee and Auditor*

The main problem for nonprofit organizations as well as foundations is adequate auditing; as we have seen, there is a lack of inside control by shareholders as well as external control by capital markets and the threat of takeovers. Theoretically, the auditing function can be fulfilled by an audit committee of the board or by an external auditor. If we look to normal corporations, we see that in the above-mentioned revised European audit directive adopted in April 2006, audit committees are made mandatory from 2008 only for listed companies, other capital market-oriented companies, and banks and insurance companies. The Commission Recommendation of 15 February 2005 also aims only at listed companies. This calls for prudence in demanding a board audit committee for nonprofit organizations in general, though in practice large nonprofits quite often do have an audit committee; according to a recent US survey, this includes 58 percent of nonprofits with over \$40 million.<sup>73</sup> On the other side, even a two-member audit committee – as envisaged by the Commission Recommendations by way of an exception for companies with small boards<sup>74</sup> – can still fulfil their function; they are not too expensive and they can provide a considerable increase in control value for both the management and the full board itself. In my view, the latter tips the scale, since, as has been said before, important control mechanisms for companies – including the profit goal, the existence of shareholders, and in certain cases the constraints of the market of corporate control – are lacking for nonprofit organizations. In the United States the same proposal for an industry-wide adoption of audit committees was made recently.<sup>75</sup>

If the nonprofit organization does not have an audit committee, the audit by an auditor becomes even more important. Post-Sarbanes-Oxley reforms of nonprofit corporation law in a number of US states such as California and others require audited financial statements if the nonprofit meets minimum annual revenues; according to a California Nonprofit Integrity Act of 2004, this threshold is \$2 million.<sup>76</sup> In Switzerland each normal foundation must have a “normal” foundation revisor, unless an exception is granted by the supervisory agency. This is allowed under two conditions: if the balance of the foundation in two consecutive years is less than 200,000 Swiss francs, and if the foundation does not call publicly for donations or similar contributions.<sup>77</sup> The Austrian Private Foundation Statute of 1993 provides for such a foundation auditor as a non-mandatory provision of the foundation deed. The foundation auditor is then appointed by the court or the board as an organ<sup>78</sup> of the foundation and the auditor’s tasks are set out in the foundation statute.<sup>79</sup> In many other European countries including Germany, neither the law of associations nor the more specific statutes on foundations provide for mandatory auditing of the accounts of the nonprofit organization. Only enterprise foundations of a certain size are subject to mandatory auditing, and the state agency that supervises foundations has the right to impose an audit by an external auditor if there is specific cause. But regular auditing is the practice with large associations and foundations and certainly with enterprise foundations, and the German Institute of Auditors has set up specific rules for the auditing of foundations and of grant-seeking organizations.<sup>80</sup> This is clearly insufficient and needs reform.<sup>81</sup>

### E. Education, Professionalization and Evaluation

As we have seen, appropriate organization and functioning of the board are the most important contributions to corporate governance in the nonprofit organization. Yet this is difficult to establish by legal rules, though codes of conduct may provide a more flexible route towards this aim. What could be done is improving education and

evaluation. Learning the craft is important.<sup>82</sup> As far as education is concerned, this is also a continuous challenge for corporate boards generally. For nonprofit organizations this is even more acute. This has been recognized and numerous efforts have been made with guidelines, information systems, compliance and education programs, etc.<sup>83</sup> For larger nonprofit organizations and foundations there is even a clear trend towards professionalization of the management and the board.<sup>84</sup>

Evaluation as a task for the board is even more recent. As far as can be seen, this is not yet a legal rule, but self-regulatory efforts and voluntary codes have started initiatives in this respect. The German Corporate Governance Code, for example, mentions this task: "The supervisory board shall regularly evaluate the efficiency of its activities."<sup>85</sup> Major European boards already engage in this regularly, though the way this evaluation is done varies greatly. Most of the boards that do this at all limit themselves to self-evaluation. Only some use expert advisers from outside. Similar recommendations are made in the social science literature and by practical observers for the board of nonprofit organizations.<sup>86</sup> But one should be aware that evaluation of the board, in particular if it relates to the individual contribution and performance of board members and even if it is not passed on to anyone other than the member concerned, is already tricky for corporate boards. Volunteers for unpaid nonprofit board work may even be more deterred from engaging themselves if they are to be evaluated. Nevertheless, it is important to convey the message to them that evaluation is useful for the work done and, if it is made known to the public, for better public relations and grant-making.

#### IV. Responsibility of the Board of Nonprofit Organizations

##### A. Duties of the Board of a Nonprofit Organization

###### *1. The Functions of the Board of a Nonprofit Organization*

The principles and rules on the responsibility of the board, in particular on the various duties of the board, are rather well developed in the United States. In the ALI Nonprofit Principles project, one finds not only a list of no less than eight functions of the governing board of a typical charity enumerated and spelled out in detail, but it is made clear that this list is not conclusive.<sup>87</sup> As mentioned before, this is not surprising in view of the fact that American nonprofit organizations are typically nonprofit corporations. But also in the more recent European discussion on the board and corporate governance of nonprofit organizations, the duties of the board are the focus of the attention, such as in the draft statute of the European Foundation.<sup>88</sup> One reason for this is that the discussion is primarily a legal one, and many of the contributors to it are specialists or are familiar with corporate or organizational law. Many of these duties concern the organization and functioning of the board of the nonprofit organization. More generally the duty of obedience, the duty of loyalty, the duty of care, the duty of proper use and administration of the assets and the duty of correct accounting and reporting can be distinguished.<sup>89</sup> These duties shall not be described here in detail, but some of the more relevant issues shall be highlighted.

###### *2. Five Principal Duties (Obedience, Loyalty, Care, Proper Use and Administration of the Assets and Correct Accounting and Reporting)*

a) The duty of obedience is particularly relevant for possible changes of the aim of the nonprofit organization and the foundation.<sup>90</sup> In the US, the aim of a charitable trust may be changed only according to the *cy-près* doctrine; this originally was very severe, but it

has been liberalized. In Germany the change of the aim of a foundation is possible only if the founder or the founder's heirs agree, apart from certain very limited exceptions. This must be considered too narrow.

b) The duty of loyalty is primordial, not only for the corporate board but also for the board of the nonprofit organization and foundation, including the proposed European Foundation.<sup>91</sup> The two main principles in US law are the prohibition of self-dealing, which stems from trust law, and the rule of fairness, which is fundamental for the nonprofit corporation. The trust rules on the self-dealing prohibition are stricter than for business corporations and subject only to limited exceptions. For nonprofit corporations this rule has been considered too severe and has been replaced in most of the US states by a fairness rule, unless disinterested directors approve the transaction. But it must be kept in mind that the onus of proof lies with the director. Some go so far as recommending a flat prohibition against all self-dealing transactions involving controlling persons in nonprofit organizations, while others consider such a rule too inflexible, impractical and even counterproductive in the nonprofit sector.<sup>92</sup> Under federal tax law, apart from payment of compensation, transactions of private foundations with insiders are generally prohibited. The Revised Model Act for Nonprofit Corporations of 1987 contains a detailed provision on directors' conflict of interest.<sup>93</sup> It basically allows conflicted transactions if the material fact of the transaction and the director's interest are fully disclosed and the transaction is approved by the board or a committee of the board whose members have no direct or indirect interest in the transaction. The German civil law applicable in this respect is old, formalistic and full of loopholes.<sup>94</sup> More interesting are the three basic rules on conflict of interest in the Swiss Foundation Code.<sup>95</sup> Conflicts of interest and personal intertwinings must be disclosed to the foundation board and in the annual report if they cannot be avoided. In case of permanent personal or institutional conflicts of interest, the person may not be a member of the management and the foundation board. The conflicted director must abstain from voting, in particular if that director has a special relationship to possible beneficiaries. Material transactions of the foundation with members of the management or the board or persons close to them must be concluded under arm's-length conditions and are to be disclosed and explained in the annual report.

c) The duty of care concerns both the actual duty as well as the liability in case of violation of the duty. As to the latter, the standard of conduct including the business judgment rule and possible modifications of the standard for volunteers are key problems for nonprofit organizations. These will be treated *infra* under liability. Delegation of the duty of care of directors is possible within certain limits, both within the board to board committees and to third persons.<sup>96</sup> This is also what the draft statute of the European Foundation provides for.<sup>97</sup> But trust law is traditionally very restrictive in this respect, and also for nonprofit organizations in general no full "abdication" of responsibilities and no delegation of core activities are possible.<sup>98</sup> A current problem in the practice of nonprofit corporations seems to be "sleeping boards".<sup>99</sup>

d) The duty of proper use and administration of the assets follows from the statutes of the association or the deed of the founder and is a duty towards the settlor, founder or grantmaker who have decided for what aim and how the money they have given should be spent.<sup>100</sup> Under American tax law, the private foundation is obliged to pay out at least 5 per cent of the value of the invested capital (minimum investment return). A similar rule exists under German tax law, which limits the possibility of laying aside reserves by the rule that the money must be spent in a not-too-distant time, though the calculation method in the two jurisdictions differs considerably.<sup>101</sup> The reason for this

rule in the United States and, according to a recent view, also in Germany, is corporate governance concerns. The management shall not accumulate assets just as it likes without being under the control of shareholders.<sup>102</sup> As to the administration of assets that are not spent, the law generally is rather conservative and oriented towards maintaining the capital rather than obtaining a return on investment.<sup>103</sup> This amounts to restricting the investment possibilities and results in low returns. Modern views tend to apply general principles of investment theory that do not preclude particular investment options but concentrate on diversification and risk management, of course depending on the kind and size of the foundation.<sup>104</sup>

e) The duty of correct accounting and reporting<sup>105</sup> is in accordance with the modern trend in corporation law and corporate governance to rely extensively on disclosure and transparency. In general it can be said, at least for continental Europe, that adequate accounting, disclosure and transparency is underdeveloped in the nonprofit organization field. Yet this is not so much a problem of duties of the board, but rather of a general control and enforcement mechanism.

## B. Liability of the Board of a Nonprofit Organization

### *1. The Standard of Conduct and the Business Judgment Rule*

For the standard of conduct, the general rule is spelled out in the Revised Model Act for Nonprofit Corporations of 1987: "A director shall discharge his or her duties as a director, including his or her duties as member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interest of the corporation".<sup>106</sup> In European countries the duties of the director of an association or a foundation are more or less comparable. But there are controversies, in particular whether the business judgment rule is applicable.

The first concerns the business judgment rule that was developed in American corporate case law but is also acknowledged in European corporate law. This recognition is most often de facto but sometimes also de iure in the corporation acts, for example recently in the German Stock Corporation Act.<sup>107</sup> In American trust law the business judgment rule is not applicable, but it is applicable for nonprofit corporations in most of the states, as the Revised Model Act for Nonprofit Corporation makes clear.<sup>108</sup> This should also be the general rule for European countries, certainly for asset administration and entrepreneurial activities, but not for the duty of obedience and of course not for the duty of loyalty.

### *2. A Lower Standard of Conduct for Volunteer Directors?*

Another question is whether those of the directors who are volunteers without being remunerated should be subject to a milder standard of conduct, such as gross negligence or culpa quam in suis or even, as in some US states, up to a cap. The legal situation in the US varies, as does the situation in Germany and other European states.<sup>109</sup> Apart from explicit rules in some German state foundation laws, the general tendency is to consider directors' liability mandatory as in general corporation law, i.e. without mitigation for volunteer directors. But in contrast to corporation law, the statutes of an association and the deed of the founder may provide for a mitigation of the general negligence standard up to gross negligence. The Austrian Foundation Statute denies both the mitigation for volunteer directors by law as well as by the foundations statute.<sup>110</sup> The same is true for Swiss foundation law.<sup>111</sup> The draft statute of the

European Foundation does not provide for a mitigation either, but makes clear that the directors are personally liable to the foundation (and e contrario not normally to third parties).<sup>112</sup>

### *3. General Liability Questions*

Thorny liability questions arise in the context of violations of codes of conduct, rules of self-regulation, declarations to the public and similar actions by the board of nonprofit organizations, and, if liability is answered in the affirmative, whether there is a claim only by the nonprofit organization or exceptionally even a claim by third parties. As a general rule beneficiaries do not have claims. If liability of nonprofit board members increases, D & O insurance becomes an issue as in general corporate law.<sup>113</sup> Yet these questions are not specific to nonprofit organizations, but arise more generally for corporate boards and their directors also, and shall not be dealt with in this article.<sup>114</sup>

#### C. Enforcement, Legal and Non-legal

Enforcement is sometimes more important than rules. Law in the books may be interesting academically, but what really counts and what the rule maker and legislator intend with the rules is the effect in legal practice, economy and society. This has also been recognized in the corporate governance discussion, where enforcement is receiving more and more attention. Yet as important as enforcement is, also for regulating the nonprofit sector and more specifically for enhancing control on the board of the nonprofit organization,<sup>115</sup> the problem and its ramifications lead far beyond what can be covered in this contribution. Therefore, some brief remarks for further thought and research must suffice. In a very general way, four main groups of enforcement mechanisms can be distinguished, also for the regulation of the board of the nonprofit organization: enforcement by state supervision, by private persons, by transparency and by markets. The first two are legal, the third is in between legal and non-legal and the last is non-legal, though there are many interplays between all four of them.

Legal enforcement in the nonprofit sector, and particularly in Europe, is mostly entrusted to state supervision. It is well known that state supervision has many limits as to the quality, number, experience and independence of the staff of these supervisory agencies. Asking for improvements in this respect<sup>116</sup> is certainly appropriate, but it may not be very realistic in view of the scarce resources of the state. And even if there are improvements, they may be insufficient for solving the control problem. In the corporate sector, the state had already given up its monopoly of control and enforcement in the second half of the 19<sup>th</sup> century with the change from the system of concession to the system of normative corporate rules. In view of the development of the nonprofit sector as described in the introduction, it may be expected that a development – though not a full change – may start in the same direction.

Enforcement by private persons is an old topic in antitrust, securities regulation and corporate law, but rather new for foundations and nonprofit organizations, at least in Europe.<sup>117</sup> Traditionally, at least in Europe, enforcement by the founder or donor is limited and by the beneficiaries is nonexistent. In nonprofit organizations with members, the rights of these members to get information from the board, to have a general assembly called, to get standing – for example, by an *actio pro socio* – or to have board members removed<sup>118</sup> could be introduced or improved. Such rights of the founder or the members may also be provided for, if the law allows, in the statutes of the nonprofit organization or foundation, while a particular problem is whether an individual statute that is silent may be interpreted in this way.<sup>119</sup> The draft statute of the

European Foundation goes far in giving enforcement rights or allowing enforcement suggestions to the founder,<sup>120</sup> the beneficiaries<sup>121</sup> and even third parties,<sup>122</sup> but it must be remembered that the European Foundation must live up to a particularly high standard in comparison with national foundations. In general, it is controversial whether the beneficiaries should get standing to sue unless they have a special interest.<sup>123</sup> The danger of abuses and a multiplication of suits by whoever feels like suing is not far fetched. However, this danger could be mitigated by the English solution of accepting the standing of beneficiaries, but the filing of a suit must be accepted by the Charity Commission or the court. In all these cases the cost problem must not be forgotten, at least under the American rule that each party pays its own cost even if the suit is successful. An alternative to enforcement by private persons, such as enforcement by an attorney general or an ombudsman, could be envisaged.<sup>124</sup>

Transparency is a very useful tool that has been amply used in corporate law and securities regulation and in many other fields, both in the US and in Europe. Yet the focus is on listed or public corporations, while unlisted and private corporations that do not tap the capital markets are usually shielded from transparency unless their size or number of employees brings them to the attention of the legislators. As to foundations, associations and nonprofit organizations, however, transparency is less developed, but in the US and the UK it is still much better than in continental European countries.<sup>125</sup> Even there, though, the tendency is clearly moving towards better accounting and reporting, as for example according to the Austrian Association Act of 2002 for economically active associations.<sup>126</sup> The draft statute of the European Foundation goes particularly far in reporting, transparency and disclosure and requires European Foundations of a certain importance to have an auditor.<sup>127</sup> The annual report and annual accounts of the European Foundation are required to show a true and fair view. Everyone can inspect the last three annual reports and accounts (and where applicable, audit reports) of a European Foundation filed with the state supervisory authority without having to prove any specific interest. The auditor must inform the state supervisory authority promptly in writing about any serious irregularities that come to notice in the course of acting in that capacity. Normal foundations, in particular medium and smaller ones, can of course not be required to live up to the same standards as a European Foundation.<sup>128</sup>

Enforcement by capital or takeover markets, which is an important control device of external corporate governance, is lacking for nonprofit organizations. More recently, thought has been given to whether market pressures may be relevant, also for better control of nonprofit organizations.<sup>129</sup> Market pressures may play a role for nonprofit organizations that are active in product or services markets, such as nonprofit hospitals or other health service institutions. If the nonprofit organization has members, there is also competition for members. Competition is particularly relevant in the market for donations,<sup>130</sup> though there are also clear signs of abuses. Voluntary certification<sup>131</sup> may enhance the visibility of the nonprofit organization and thereby allow better control of the board and also have indirect effects on other nonprofit organizations and their boards in the same field.

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<sup>1</sup> Bucerius Law School, Institute for Foundation Law, NON PROFIT LAW YEARBOOK 2001, Cologne 2002, p. VII.

<sup>2</sup> K. J. Hopt/T. von Hippel/W. Rainer Walz, eds., NONPROFIT-ORGANISATIONEN IN RECHT, WIRTSCHAFT UND GESELLSCHAFT, Tübingen 2005.

<sup>3</sup> Cf. K. J. Hopt/H. Kanda/M. J. Roe/E. Wymeersch/S. Prigge, eds., COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH, Oxford 1998.

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- <sup>4</sup> K. J. Hopt, *Comparative Company Law*, in: M. Reimann/R. Zimmermann, eds., THE OXFORD HANDBOOK OF COMPARATIVE LAW, Oxford 2006, rev. paperback ed. 2008, p. 1161 et seq.
- <sup>5</sup> For a short history in German, see T. von Hippel, GRUNDPROBLEME VON NONPROFIT-ORGANISATIONEN, Tübingen 2007, p. 14 et seq.
- <sup>6</sup> H. J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, JOURNAL OF CORPORATION LAW 1998, 631 at 638.
- <sup>7</sup> See L. M. Salamon et al., eds., GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR, Baltimore 1999; Feasibility Study see infra note 26.
- <sup>8</sup> H. Anheier/S. Toepler, *Definition und Phänomenologie der Nonprofit-Organisation*, in: Hopt/von Hippel/Walz, loc. cit. note 2, p. 17 at p. 22.
- <sup>9</sup> See K. J. Hopt, DER KAPITALANLEGERSCHUTZ IM RECHT DER BANKEN, Munich 1975, p. 15 et seq.; idem, *Ideelle und wirtschaftliche Grundlagen der Aktien-, Bank- und Börsenrechtsentwicklung im 19. Jahrhundert*, in: H. Coing/W. Wilhelm, eds., WISSENSCHAFT UND KODIFIKATION DES PRIVATRECHTS IM 19. JAHRHUNDERT, vol. V, GELD UND BANKEN, Frankfurt 1980, p. 128 et seq.
- <sup>10</sup> K. J. Hopt, *Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron*, JOURNAL OF CORPORATE LAW STUDIES 3 (2003) 221.
- <sup>11</sup> John A. Edie, *Good and Not so Good Governance of Nonprofit Organizations: Factual Observations from the USA*, in this book infra p. #; H. J. Goldschmid, loc. cit. note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 633 et seq.
- <sup>12</sup> Christoph Mecking, *Good and Not so Good Governance of Nonprofit Organizations: Factual Observations from Foundations in Germany*, in this book infra p. #
- <sup>13</sup> F. Hondius, *Trends and Developments of Foundation Law in Europe*, in: K. J. Hopt/D. Reuter, eds., STIFTUNGSRECHT IN EUROPA, Cologne 2001, p. 573 at p. 578, 586.
- <sup>14</sup> See K. R. Vanderwarren, *Financial Accountability in Charitable Organizations: Mandating an Audit Committee Function*, 77 CHICAGO-KENT LAW REVIEW 963 (2002) at 983 et seq.: \$600,000 tax fraud in the United Way Scandal; \$7.9 Million Embezzled by American Cancer Society Executive. News articles from 1995 to 2002 reported a total loss of \$1.28 billion due to nonprofit scandals during that period, J. Mead, *Confidence in the Nonprofit Sector Through Sarbanes-Oxley-Style Reforms*, Note, 106 MICHIGAN LAW REVIEW 881 (2008) at 884 et seq.
- <sup>15</sup> See E. Brody, *The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice*, in this book, infra p. # < manuscript p. 35 >
- <sup>16</sup> E. Steuber, *Corporate Governance bei Stiftungen – eine Frage der Kontrolle oder der Moral?* DEUTSCHES STEUERRECHT 2006, 1182.
- <sup>17</sup> As to the legal situation of the ADAC, see H. Henze, *Ein neuer Blick auf das ADAC-Urteil*, NON PROFIT LAW YEARBOOK 2004, 17.
- <sup>18</sup> E. Brody, *The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice*, in this book, infra p. # < manuscript p. 29 >
- <sup>19</sup> H. J. Goldschmid, loc. cit. note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 636.
- <sup>20</sup> Idem at 653.
- <sup>21</sup> Cf. A. Schuhen, *Kontrollprobleme in Nonprofit-Organisationen und Lösungsansätze – Überlegungen auf Basis der Theorie und Praxis der Nonprofit Governance*, in: K. J. Hopt/T. von Hippel/W. R. Walz, loc. cit. note 2, p. 221 at 223 et seq., 235 et seq. See also H. Hansmann, *A Reform Agenda for the Law of Nonprofit Organizations*, in: K. J. Hopt/D. Reuter, loc. cit. note 13, p. 241 at 243 et seq.
- <sup>22</sup> K. J. Hopt, *Corporate Governance in Nonprofit-Organisationen*, in: K. J. Hopt/T. von Hippel/W. R. Walz, loc. cit. note 2, p. 243 at 248.
- <sup>23</sup> For example, A. Schlüter, STIFTUNGSRECHT ZWISCHEN PRIVATAUTONOMIE UND GEMEINWOHLBINDUNG, Munich 2004, p. 371 et seq. For Switzerland, A. Fischer, *Corporate Governance bei Stiftungen – von der Selbstverständlichkeit des Guten*, in: FESTSCHRIFT FÜR PETER BÖCKLI, Zurich 2006, p. 645.
- <sup>24</sup> S. Hartnick, KONTROLLPROBLEME BEI SPENDENORGANISATIONEN, Tuebingen 2007, 956 p., presented as doctoral thesis at Hamburg University in 2006.
- <sup>25</sup> T. von Hippel, GRUNDPROBLEME VON NONPROFIT-ORGANISATIONEN, Tuebingen 2007, 689 p., presented as Habilitation (professor thesis) to the Hamburg University Law Faculty in 2005/2006.
- <sup>26</sup> K. J. Hopt/W. R. Walz/T. von Hippel/V. Then, eds., THE EUROPEAN FOUNDATION, A NEW LEGAL APPROACH, Cambridge UK 2006. The European Commission mandated a feasibility study that was delivered in December 2008; see K. J. Hopt/T. von Hippel/H. K. Anheier/V. Then/T. Vahlpahl/W. Ebke/E. Reimer, Feasibility Study on a European Foundation Statute, European Commission, Brussels 2008.

<sup>27</sup> There is a growing number of documents and articles on the board of nonprofit organizations. For example, in English, ABA, Revised Model Nonprofit Corporation Act, Chicago 1988; ABA Coordinating Committee on Nonprofit Governance, Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley, 2005; ABA Section of Business Law, Model Nonprofit Corporation Act 3d ed., Feb. 2006 Exposure Draft; American Law Institute, Principles of the Law of Nonprofit Organizations - Discussion Draft April 6, 2006; H. J. Goldschmid, loc. cit. note 6; A. Hough/M. McGregor-Lowndes/C. Ryan, *Theorizing About Board Governance of Nonprofit Organizations: Surveying the Landscape*, Paper presented at the 34<sup>th</sup> Annual Conference of the Association for Research on Nonprofit Organizations and Voluntary Action, Washington DC, Nov. 17-19, 2005; M. Klausner/J. Small, *Failing to Govern? The Disconnect Between Theory and Reality in Nonprofit Boards, and How to Fix it*, 3 STANFORD SOCIAL INNOVATION REVIEW 2005, 42; M. Useem/A. Zelicke, *Oversight and Delegation in Corporate Governance: Deciding What the Board Should Decide*, CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 14(1) 1; K. R. Vanderwarren, loc. cit. note 14, 77 CHICAGO-KENT LAW REVIEW 963 (2002).

For further references, see the extensive list by E. Brody in this book, infra p. # For references in German, see the notes in this article.

<sup>28</sup> See K. J. Hopt, *Company Law Modernization: Transatlantic Perspectives*, RIVISTA DELLE SOCIETÀ 51 (2006) 906.

<sup>29</sup> H. J. Goldschmid, loc. cit. note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 632.

<sup>30</sup> K. R. Vanderwarren, loc. cit. note 26, 77 CHICAGO-KENT LAW REVIEW 963 (2002) at 966.

<sup>31</sup> K. Hofstetter, T. Sprecher, eds., SWISS FOUNDATION CODE, Basel et al. 2005; P. Egger, *Der Swiss Foundation Code – ein Beitrag zur Selbstregulierung von Stiftungen*, in: A. Richter/T. Wachter, eds., HANDBUCH DES INTERNATIONALEN STIFTUNGSRECHTS, Angelbachtal/Baden-Baden/Basle/Vienna 2007, § 4 p. 53 et seq. See also T. Sprecher in this book, infra p. #

A similar code for nonprofit organizations, the Swiss NPO Code of 31 March 2006, is directed at the bodies managing large nonprofit organizations registered in Switzerland, whether organized as foundations or as associations. See T. Sprecher in this book, infra p. #; A. Fischer, loc. cit. note 23, at 650 n. 27.

<sup>32</sup> Swiss Code of Best Practice for Corporate Governance of 25 March 2002. Cf. A. Fischer, loc. cit. note 23, at p. 650.

<sup>33</sup> H. M. Riemer, *Corporate Governance-Richtlinien für Vereine und Stiftungen aus juristischer Sicht*, SCHWEIZER JURISTENZEITUNG 102 (2006) 513 at 515.

<sup>34</sup> The Swiss NPO Code follows this principle.

<sup>35</sup> V. Then, *Non-profit Corporate Governance in Europe*, NON PROFIT YEARBOOK 2006, 123 at 133 et seq. More generally H. Kohl, *Ein "Foundation Governance Kodex" – ein Gebot der Zeit?* in: J. Kohl et al., eds., ZWISCHEN MARKT UND STAAT, GEDÄCHTNISSCHRIFT FÜR RAINER WALZ, Cologne 2008, 339.

<sup>36</sup> For example, the Swiss Foundation ZEW0, which attributes the ZEW0-Gütesiegel for charitable organizations, Rules of 1 July 2003, see A. Fischer, loc. cit. note 23, at p. 650 n. 23-.

<sup>37</sup> A. Schluhen, loc. cit. note 21, at p. 238.

<sup>38</sup> Cf. J. von Hein, DIE REZEPTION DES US-AMERIKANISCHEN GESELLSCHAFTSRECHTS IN DEUTSCHLAND, Tübingen 2008.

<sup>39</sup> K. Hopt/P. C. Leyens, *Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 2004, 134 at 139 et seq.

<sup>40</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 4.2 subsection 3.

<sup>41</sup> See, for foundations, A. Schlüter, loc. cit. note 23, p. 360 et s.

<sup>42</sup> U.S. Revised Model Nonprofit Corporation Act of 1988 Ch. 8. Directors and Officers, Subchapter A. Board of Directors; Section 8.13. Financially Disinterested Majority - Public Benefit Corporations. Optional section. Reprinted in K. J. Hopt/D. Reuter, loc. cit. note 13, p. 913 et seq. As to conflicts of interest, see infra under duty of loyalty, IV A 2 b.

<sup>43</sup> Sections 9, 14 and 22 et seq. of the Austrian Foundations Statute of 1993, reprinted in K. J. Hopt/D. Reuter, loc. cit. note 13, p. 786 et seq.

<sup>44</sup> Swiss Foundation Code, loc. cit. note 31, Recommendations 4 and 12.

<sup>45</sup> See A. Schlüter, loc. cit. note 23, p. 360 and K. J. Hopt/D. Reuter, loc. cit. note 13, p. 446.

<sup>46</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 4.2.

<sup>47</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 4.2 subsection 4.

<sup>48</sup> Infra III B 2. See also R. Rhinow, *Corporate Governance bei Nonprofit-Organisationen - ein dringendes Desideratum*, in: R. C. Voggensperger/H. J. Bienek/J. Schneider/G. O. Thaler, eds., GUTES BESSER TUN, CORPORATE GOVERNANCE IN NONPROFIT-ORGANISATIONEN, Bern et al.

2004, p. 11 at 13: If there is no two-tier board, it is all the more necessary to spell out the will of the founder in an unequivocal way since it provides the only checks and balances for the board. See also *infra* IV C at to enforcement rights of the founder and other persons.

<sup>49</sup> T. Baums/P. Ulmer, eds., UNTERNEHMENS-MITBESTIMMUNG DER ARBEITNEHMER IM RECHT DER EU-MITGLIEDSTAATEN/EMPLOYEES' CO-DETERMINATION IN THE MEMBER STATES OF THE EUROPEAN UNION, Heidelberg 2004; C. Schubert, *The National Implementation of Employee Participation in the Administrative Board of the SE in the One-tier Model*, EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 2008, 422.

<sup>50</sup> H. J. Goldschmid, *loc. cit.* note 6, JOURNAL OF CORPORATION LAW 1998, 632 at 651 et seq.

<sup>51</sup> This case is well described in C. J. Milhaupt/K. Pistor, LAW & CAPITALISM, Chicago and London 2008, p. 69 et seq.

<sup>52</sup> L. N. Mulligan, *What's Good for the Goose is not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICHIGAN LAW REVIEW 1981 (2007) at 1987 et seq.

<sup>53</sup> See Brody in this book < manuscript p. 8 et seq. >

<sup>54</sup> L. N. Mulligan, *loc. cit.* note 52, 105 MICHIGAN LAW REVIEW 1981 (2007) at 1994. See also Brody in this book < manuscript p. 9 >

<sup>55</sup> OFFICIAL JOURNAL OF THE EUROPEAN UNION 25.2.2005 L 52/51.

<sup>56</sup> This is the position taken, for example, by the German Corporate Governance Code Commission regarding the European Commission recommendation.

<sup>57</sup> As to enterprise foundations after the German foundation reform, see A. Richter/S. Sturm, *Die Unternehmensstiftung nach der Stiftungsreform*, ZEITSCHRIFT FÜR ERBRECHT 3/2006, 75.

<sup>58</sup> As to foundations tapping the capital market, see G. Roth, *Die rechtsfähige Stiftung als Kapitalmarktteilnehmerin*, in: GEDÄCHTNISCHRIFT FÜR RAINER WALZ, *loc. cit.* note 35, p. 593.

<sup>59</sup> See *infra* IV A 2 b, duty of loyalty and conflicts of interest.

<sup>60</sup> Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.1.2.

<sup>61</sup> Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.1.2.

<sup>62</sup> Sections 15 of the Austrian Foundations Statute of 1993 (Stiftungsvorstand), *loc. cit.* note 43, p. 786 et seq. As to the US, see Brody in this book < manuscript p. 26 et seq. >

<sup>63</sup> *Infra* IV B 2.

<sup>64</sup> *Supra* note 55.

<sup>65</sup> See Brody in this book < manuscript p. 27 et seq. >

<sup>66</sup> Section 7.2 of the European Recommendation of 15 February 2005, *supra* note 55.

<sup>67</sup> See Brody in this book < manuscript p. 25 >

<sup>68</sup> Section 15, 27 of the Austrian Foundations Statute of 1993, *loc. cit.* note 43.

<sup>69</sup> S. Hartnick, *loc. cit.* note 24, p. 375 et s.

<sup>70</sup> Section 19 of the Austrian Private Foundation Statute of 1993, *loc. cit.* note 43, and M. E. Obernberger, Aufsichtsrat und Privatstiftung, AUFSICHTSRAT AKTUELL 3/2006, 20; similarly a number of German state foundations laws, cf. S. Hartnick, *loc. cit.* note 24, p. 380 et s.

<sup>71</sup> Section 8.13 of the Revised Model Nonprofit Corporation Act (1987), reprinted in Hopt/Reuter, *loc. cit.* note 13, p. 940.

<sup>72</sup> Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.1.1.

<sup>73</sup> See Brody in this book *infra* p. # < manuscript p. 14 >; but she rightly criticizes that in 19 percent of large nonprofits, members of management are serving on the audit committee.

<sup>74</sup> European Recommendation, *loc. cit.* note 55, Annex I 1.1. as to size.

<sup>75</sup> K. R. Vanderwarren, *loc. cit.* note 14, 77 CHICAGO-KENT LAW REVIEW 963 (2002).

<sup>76</sup> J. Mead, *loc. cit.* note 14, 106 MICHIGAN LAW REVIEW 881 (2008) at 890; Hartnick, *loc. cit.* note 24, p. 693 et seq. See also Mulligan, *loc. cit.* note 52, 105 MICHIGAN LAW REVIEW 1981 (2007) at 1996.

<sup>77</sup> T. Sprecher, *Neuerungen im schweizerischen Stiftungsrecht*, in: P. Forstmoser/G. G. Zindel/T. Sprecher/S. Abegglen/J. Baer, NEUERUNGEN IM SCHWEIZER WIRTSCHAFTSRECHT, Zurich 2007, p. 7 at 10 et seq.

<sup>78</sup> This is an exception from the general corporate law rule – which exists, for example, in Germany – that the auditor is not to be considered an organ of the corporation that he is supposed to audit since this is difficult to reconcile with his duty of independence. Cf. also M. E. Obernberger, *loc. cit.* note 70, p. 19.

<sup>79</sup> Sections 9 subsection 2 No 2, 20 and 21 of the Austrian Private Foundation Statute of 1993, *loc. cit.* note 43.

<sup>80</sup> S. Hartnick, *loc. cit.* note 24, p. 609, 689 et seq.

<sup>81</sup> S. Hartnick, *idem* at p. 695 et seq. mentioning the Austrian legislation on grant-seeking associations, but criticizing that the latter are subject to mandatory auditing only if they receive more than 1 million Euro per year.

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- <sup>82</sup> Brody in this book, *infra* p. # < manuscript p. 16 et s. >
- <sup>83</sup> Cf. H. J. Goldschmidt, *loc. cit.* note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 649 et seq.
- <sup>84</sup> K. J. Hopt, *loc. cit.* note 22, p. 254 et seq.
- <sup>85</sup> Section 5.6 of the German Corporate Governance Code.
- <sup>86</sup> For example, B. Büschi, *Board Management mit integriertem Aufsichtsratskonzept: Die kontinuierliche Qualitätsentwicklung und –verbesserung im Aufsichtsorgan*, in: Voggensperger et al., *loc. cit.* note 48, p. 359 at 377 et seq.
- <sup>87</sup> Cf. Brody in this book, *infra* p. < manuscript 15 et seq. >
- <sup>88</sup> Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.
- <sup>89</sup> S. Hartnick, *loc. cit.* note 24, p. 271 et seq.; a different division can be found in T. von Hippel, *loc. cit.* note 25, p. 61 et seq. See also for Switzerland A. Fischer, *loc. cit.* note 23, p. 645 et seq.
- <sup>90</sup> S. Hartnick, *loc. cit.* note 24, p. 336 et seq.; T. von Hippel, *loc. cit.* note 25, p. 149 et seq.
- <sup>91</sup> S. Hartnick, *loc. cit.* note 24, p. 429 et seq.; T. von Hippel, *loc. cit.* note 25, p. 94 et seq., 114 et seq.; Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.1.1.
- <sup>92</sup> H. L. Goldschmid, *loc. cit.* note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 647 contra Hansmann, but the latter has modified his position, cf. H. Hansmann, *A Reform Agenda for the Law of Nonprofit Organizations*, in K. J. Hopt/D. Reuter, *loc. cit.* note 13, p. 241 at p. 260. See also the report from practice reported by Brody in this book, *infra* p. # < manuscript p. 19 >.
- <sup>93</sup> Section 8.31 of the Revised Model Nonprofit Corporation Act (1987), reprinted in Hopt/Reuter, *loc. cit.* note 13, p. 943 et seq.
- <sup>94</sup> Section 181 of the Civil Code, cf. S. Hartnick, *loc. cit.* note 24, p. 362 et seq.
- <sup>95</sup> Recommendation 11; cf. Fischer, *loc. cit.* note 23, p. 664 et seq.
- <sup>96</sup> S. Hartnick, *loc. cit.* note 24, p. 421 et seq.
- <sup>97</sup> Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.1.1.
- <sup>98</sup> Brody in this book, *infra* p. # < manuscript 10 >; as to so-called designated bodies under the 2006 proposed revision to the Model Act *idem* at p. # < manuscript 22 >.
- <sup>99</sup> Brody in this book, *infra* p. # < manuscript 35 >; cf. also H. Hansmann, *loc. cit.* note 92, p. 261.
- <sup>100</sup> S. Hartnick, *loc. cit.* note 24, p. 429 et seq.; T. von Hippel, *loc. cit.* note 25, p. 94 et seq., 114 et seq.
- <sup>101</sup> Cf. A. Richter, *Gebot der zeitnahen Mittelverwendung oder Aussschüttungsgebot*, in: GEDÄCHTNISSCHRIFT FÜR RAINER WALZ, *loc. cit.* note 35, p. 559; W. R. Walz, *Stiftungsreform in Deutschland: Stiftungssteuerrecht*, in: K. J. Hopt/D. Reuter, *loc. cit.* note 13, p. 197 et seq.
- <sup>102</sup> T. von Hippel, *loc. cit.* note 25, p. 191 et seq., 107 et seq.
- <sup>103</sup> Cf. A. Schlüter/S. Stolte, STIFTUNGSRECHT, Munich 2007, ch. 5: Asset administration by the foundation, p. 113 et seq.
- <sup>104</sup> T. von Hippel, *loc. cit.* note 25, p. 114 et seq., 143 et seq.
- <sup>105</sup> S. Hartnick, *loc. cit.* note 24, p. 499 et seq.; T. von Hippel, *loc. cit.* note 25, p. 328 et seq. For corporate law see K. J. Hopt, *loc. cit.* note 28, RIVISTA DELLE SOCIETÀ 51 (2006) 906 at 911 et seq.
- <sup>106</sup> Section 8.30. General Standards for Directors, reprinted in Hopt/Reuter, *loc. cit.* note 13, p. 942. The Revised Model Act for Nonprofit Corporations of 1987 goes on with sections 8.31 Director Conflict of Interest, 8.32. Loans to or Guarantees for Directors and Officers; and 8.33. Liability for Unlawful Distributions.
- <sup>107</sup> Section 93 subsection 1 sentence 2 of the Stock Corporation Act (since 2005); for details see K. J. Hopt/M. Roth, in K. J. Hopt/H. Wiedemann, eds., GROSSKOMMENTAR ZUM AKTIENGESETZ, 4th ed., instalment 26, Berlin/New York 2006, § 93 Abs. 1 Satz 2, 4 nF AktG n.F. comment 10.
- <sup>108</sup> Section 8.30(e) of the Revised Model Act for Nonprofit Corporation of 1987 states: “A director shall not be deemed to be a trustee with respect to the corporation ...”, reprinted in K. J. Hopt/D. Reuter, *loc. cit.* note 13, p. 943. See also H. L. Goldschmid, *loc. cit.* note 6, JOURNAL OF CORPORATION LAW 1998, 632 at 643 et seq.
- <sup>109</sup> T. von Hippel, *loc. cit.* note 25, p. 72 et seq. As to the US and reform proposals, see Brody *infra* in this book, p. # < manuscript p. 23 et seq. >. See also K. J. Schiffer/M. Behring, *Haftungserleichterungen für Stiftungsorganmitglieder und sonstige „Helfer“?* ZEITSCHRIFT FÜR CORPORATE GOVERNANCE 2008, 70.
- <sup>110</sup> Sections 29 of the Austrian Foundations Statute of 1993, reprinted in K. J. Hopt/D. Reuter, *loc. cit.* note 13, p. 786 et seq. See also M. E. Oberberger, *loc. cit.* note 70, AUFSICHTSRAT AKTUELL 3/2006, 19.
- <sup>111</sup> T. von Hippel, *loc. cit.* note 25, p. 82 with references. See also with reform proposals H. J. Goldschmidt, *loc. cit.* note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 644 et seq.
- <sup>112</sup> Draft Statute of The European Foundation, *loc. cit.* note 26, Art. 4.1.1.
- <sup>113</sup> E. Brody in this book, *infra* p # < manuscript 36 >.

<sup>114</sup> As to board liability in associations and foundations under German law, see the comprehensive report by U. Burgard, *Organhaftung in Verein und Stiftung*, in: G. Krieger/U. H. Schneider, HANDBUCH MANAGERHAFTUNG, Cologne 2007, § 6, p. 107 et s.; idem, *Der Aufsichtsrat bei Verein und Stiftung*, GEDÄCHTNISSCHRIFT FÜR RAINER WALZ, loc. cit. note 35, p. 71 at 84 et seq.; R. Hüttemann/R. Herzog, *Organhaftung bei Non Profit Organisationen*, NON PROFIT LAW YEARBOOK 2006, 33; K. Kiethe, *Die Haftung des Stiftungsvorstands*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 2007, 810; D. Reuter, *Die Haftung des Stiftungsvorstands gegenüber der Stiftung, Dritten und dem Fiskus*, NONPROFIT LAW YEARBOOK 2002, 157; S. Schwintek, VORSTANDSKONTROLLE IN RECHTSFÄHIGEN STIFTUNGEN BÜRGERLICHEN RECHTS, Baden-Baden 2001, p. 96 ff.

<sup>115</sup> See among many contributions S. Hartnick, loc. cit. note 24, ch. 5 Enforcement of the Duties, p. 519-754, and ch. 6 Control by the Market for Fund-Raising, p. 755-916; T. von Hippel, loc. cit. note 25, ch. 3 Control and Enforcement, p. 213-380; K. J. Hopt, loc. cit. note 22, p. 243 at 250 et seq., 255 et seq.

<sup>116</sup> H. J. Goldschmid, loc. cit. note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 652. As to supervision of foundations in Germany, see J. Suerbaum, *Stiftung und Aufsicht*, DIE STIFTUNG 2008, 89.

<sup>117</sup> Cf. T. von Hippel, loc. cit. note 25, p. 653 et seq. as to the founder, 671 et seq. as to the beneficiaries. In the US, expansion of standing has long been advocated; cf. H. Hansmann, *Reforming Nonprofit Corporation Law*, 129 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 497 (1981) at 606 et seq. Critique and proposal of a right to complaint with the foundation supervisory agency, cf. D. Jakob, SCHUTZ DER STIFTUNG, Tübingen 2006, p. 341 et seq., 369 et seq.; idem, *Schutz der Stiftung – die Stiftung und ihre Rechtsverhältnisse im Widerstreit der Interessen*, in: J. Hager, ed., ENTWICKLUNGSTENDENZEN IM STIFTUNGRECHT, Baden-Baden 2008, p. 32 at 42 et seq.

<sup>118</sup> Cf. the Revised Model Nonprofit Corporation Act (1987) section 8.08-8.10, reprinted in K. J. Hopt/D. Reuter, loc. cit. note 13, p. 938 et seq.

<sup>119</sup> C. Kersting, *Die Kontrolle des Stiftungsvorstands durch Stifter und Destinatäre*, NON PROFIT LAW YEARBOOK 2006, 57 at 58 et seq., 67 et seq., 79 et seq.; D. Jakob, loc. cit. note 117, p. 474 et seq.

<sup>120</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 4.3: “The Founder of a European Foundation and also any subsequent donor of a significant contribution have the right to intervene with the State supervisory authority if the Board of Directors and/or the Supervisory Board fail to comply with their responsibilities; the State supervisory authority must produce a substantive statement on this intervention within 60 days.”

<sup>121</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 4.4: “Any person with a legitimate interest in, whether or not a beneficiary of, a European Foundation may submit a report to the State supervisory authority if the Board of Directors and/or the Supervisory Board do not comply with their responsibilities; the State supervisory authority must produce a substantive statement on this report within 60 days.”

<sup>122</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 4.5: “Donors, creditors, employees, tenants and other third parties whose own interests are affected by the activities of a European Foundation may notify the State supervisory authority if in their view the Board of Directors and/or the Supervisory Board are failing to comply with their responsibilities; the State supervisory authority has full discretion as to how best to respond.”

<sup>123</sup> Special interest doctrine in American law with influences by trust law (UTC 2000).

<sup>124</sup> Relator actions, cf. H. J. Goldschmid, loc. cit. note 6, JOURNAL OF CORPORATION LAW 1998, 631 at 65; T. von Hippel, loc. cit. note 25, p. 685 et seq.

<sup>125</sup> W. R. Walz, *Rechnungslegung für Nonprofit-Organisationen*, in: K. J. Hopt/T. von Hippel/W. R. Walz, loc. cit. note 2, p. 259 et seq.; idem, ed., RECHNUNGSLEGUNG UND TRANSPARENZ IM DRITTEN SEKTOR, Cologne 2004; S. Hartnick, loc. cit. note 24, p. 778 et seq.; T. von Hippel, loc. cit. note 25, p. 328 et seq.; K. J. Hopt, loc. cit. note 22, p. 243 at 252 et seq.; C. Ott, *Kontrolle und Transparenz von Nonprofit-Organisationen*, GEDÄCHTNISSCHRIFT FÜR RAINER WALZ, loc. cit. note 35, p. 505.

<sup>126</sup> S. Kalss/N. Aburumieh, *Corporate Governance im wirtschaftlich tätigen Verein im österreichischen Recht*, NON PROFIT YEARBOOK 2005, 125 at 148 et seq. For charitable foundations in Austrian law, see S. Kalss, *Die gemeinnützige Stiftung*, in: Studiengesellschaft für Wirtschaft und Recht, ed., *Das Recht der Non-Profit-Organisationen*, Wien 2006, p. 207 at 249 et seq.

<sup>127</sup> Draft Statute of The European Foundation, loc. cit. note 26, Art. 5.

<sup>128</sup> K. J. Hopt, loc. cit. note 22, p. 255 with the parallel of the less demanding rules for small and medium corporations under EU balance sheet requirements.

<sup>129</sup> T. von Hippel, loc. cit. note 25, p. 315 et seq.; K. J. Hopt, loc. cit. note 22, p. 252 et seq.

<sup>130</sup> S. Hartnick, loc. cit. note 24, p. 755 et seq.

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<sup>131</sup> Cf. for example the National Charity Seal of the American BBB Wise Giving Alliance and other accreditation activities, B. Wilke, *Transparenz im Spendenwesen: Siegel, Selbstregulierung, Watchdogs*, NON PROFIT YEARBOOK 2004, 181 at 187 et seq. See generally S. Hartnick, loc. cit. note 24, p. 832 et seq.

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