

Report on challenges and abilities of civil society organizations to access resources in Germany.

In Response to the Call for Inputs from the mandate of the Special
Rapporteur on the rights to freedom of peaceful
assembly and of association for his report to be presented at the
50th session of the Human Rights Council

Submitted on February 18th, 2022

by the Alliance "Legal Certainty for political advocacy"
(Allianz "Rechtssicherheit für politische Willensbildung")

I. State practices: key trends, challenges, and developments

1 What are the key trends, developments, and challenges affecting the ability of civil society organizations to access resources, including foreign funding, in your country, region, or globally?

Albeit there are a number of legislative frameworks relevant for civil society organizations in Germany (such as a law of associations), the most crucial when it comes to access to resources is the charity law (*Gemeinnützigkeitsrecht*) within the Fiscal Code (*Abgabenordnung*)¹. Civil society organizations may apply for a public benefit status (*Status der Gemeinnützigkeit*), granting both the organizations and their donors tax privileges. More importantly however, the public benefit status is crucial for many civil society organizations daily work and access to funding, as it serves as an unofficial seal of approval of an organizations work and is as such often prerequisite not only for the use of local infrastructure but more importantly for both public and private funding and donations.

Once a public benefit status is allocated, chances are high that it will be reallocated after three years. It can however be denied after the three year term, if the fiscal authorities find the grounds for the allocation have changed or – even more challenging for civil society organizations – it can be revoked retroactively, if the grounds for the public benefit status are being questioned.

The risk of having the public benefit status denied or revoked comes with high financial risks (back taxes on the one hand and a loss of donations on the other), a high bureaucratic effort, legal procedures but also a loss of public trust.

In the past years, more and more civil society organizations have faced uncertainties with regards to their public benefit status. Some have even decided to forgo the public benefit status, as they deem the risk of losing the public benefit status higher than the challenges inherent to not operating under public benefit status.

2 What legislative, administrative, policy or regulatory measures have been adopted in recent years in your country, region or globally that affect the ability of civil society organizations to access resources, including foreign funding?

While the cause for the aforementioned insecurities lies in a legal uncertainty in the German Fiscal Code (*Abgabenordnung*), the problem has been fostered by a number of rulings in the past years, foremost the ruling of the federal fiscal court² with regards to the denial of the tax-exempt status of the anti-globalisation network "Attac" in 2019³.

According to case law, public benefit civil society organizations are only allowed to engage in political matters if strictly necessary to pursue the public benefit purposes in-

1 § 51ff Fiscal Code; https://www.gesetze-im-internet.de/ao_1977/BJNR006130976.html#BJNR006130976BJNG001001301

2 <https://www.bundesfinanzhof.de/de/entscheidung/entscheidungen-online/detail/STRE201910035/>

3 <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/analysis-attac-decision/>

cluded in the Fiscal Code. Since this ruling, the tension seems to have grown, as more and more organizations report about insecurities and tendencies to withdraw from public debates in order to forgo the risk of losing their tax-exempt public benefit status.⁴

With the annual tax law 2020⁵ (*Jahressteuergesetz 2020*), the German government has adopted some minor changes to the charity law (*Gemeinnützigkeitsrecht*) but has failed to address the most crucial aspects. Although the extension of the list of public benefit purposes is more than welcome, it does not eliminate the problems many politically active civil society organizations face, especially in their functions as watchdogs and advocacy agents.

The amendments to the Tax Code Application Decree (*Anwendungserlass zur Abgabenordnung*) following the annual tax law 2020, have been published in January 2022 but yet again fails to address the most crucial aspects. It does clarify that civil society organizations do not risk their public benefit status, if they "sporadically take a stand on daily political issues" ("*vereinzelt zu tagespolitischen Themen Stellung nimmt*")⁶. These clarifications are important for the democratic society in Germany, as it assures, that e.g. sports clubs or climate change advocats may occasionally speak out about current political issues (e.g. participate or call for participations in an anti-racist demonstration).

Neither the annual tax law nor the Tax Code Application Decree have however addressed the most crucial uncertainties in the Germany charity law: A number of civil society organizations are still at risk due to an old-fashioned understanding of civil society. Rather than embracing an active civil society when it comes to urgent political matters as racism, climate change, gender equality, social justice and human rights, the German charity law de facto prohibits these actions. De jure, no organization is forced to attain the tax-exempt public benefit status, de facto most of them need it in order to access resources and funding (as explained above).

4 European Commission, 2021: Rule of Law Report, Country Chapter on the rule of law situation in Germany, p. 17;

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0706&from=EN>

5 https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_IV/19_Legislaturperiode/Gesetze_Verordnungen/2020-12-28-JStG-2020/4-Verkuendetes-Gesetz.pdf?__blob=publicationFile&v=2

6 https://datenbank.nwb.de/Dokument/500001_52/

3 What are the main features of these measures? Please describe, in particular:

- a) *Specific areas of regulation (civil society and non-governmental organizations, funding and taxation, counter-terrorism and anti-money laundering, national security and state sovereignty, foreign interference, transparency and aid effectiveness, public health and emergencies, such as the COVID-19 pandemic).*
- b) *Types of obligations, prohibitions or sanctions imposed on associations and organizations, if any.*
- c) *Administrative provisions or practices adopted in the implementation of these regulations.*
- d) *Enforcement bodies, oversight mechanisms, and available safeguards.*

As mentioned above the most important legislative framework for civil society organizations access to resources is the charity law (*Gemeinnützigkeitsrecht*). The tax-exempt public benefit status is a prerequisite both for access to local infrastructure and to public and private funding and donations. The Alliance "Legal certainty for political advocacy" has identified six problematic regulations⁷, the most pressing being:

1. Important public benefit purposes are missing: The public benefit status is granted to organizations pursuing one or more purposes listed in the Fiscal Code (*Abgabenordnung*). This list entails purposes such as sports, arts and culture, environmental protection and many more but misses purposes for those organizations who are crucial for a modern democracy, being engaged in human rights and basic liberties, social justice or peace.
2. Clarification that influencing the policy formation does not entail a risk for the public benefit status: Whilst it is not explicitly forbidden by law, the case law of the past years has raised a high legal uncertainty about how much – if any – influence on the policy formation is allowed with a public benefit status. This is especially challenging for those organizations, whose work is aimed at change – e.g. eradicating racism or fighting climate change – or protection of human rights and basic liberties.
3. Democracy clause: Although the aforementioned amendments to the Tax Code Application Decree (*Anwendungserlass zur Abgabenordnung*) have offered some clarification on this matter, they do not provide legal certainty as the Tax Code Application Decree is not binding for (fiscal) courts. Civil society organizations may still risk the loss of their public benefit status, if challenged in court – e.g. after a call for participations in an anti-racist demonstration.

7 <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/forderungen/>

- 4 How do these measures compare with international standards and recommendations?**
- 5 To what extent do these measures promote and facilitate organizations' access to resources, including foreign funding? Please provide concrete examples of good practices with respect to measures taken by States in this regard.**
- 6 What are, in your opinion, the main drivers influencing the adoption of these measures?**

The main driver fostering the uncertainties under which many civil society organizations have been working these past years has been the aforementioned ruling in the case of the public benefit status of the anti-globalisation network "Attac". It has been the most prominent case of a civil society organization losing its public benefit status but by far not the only one.⁸ With the uncertainties being discussed more prominently, reports about attempts of intimidation by political opponents have increased – especially from the (far) right. By our count the Alternative für Deutschland (AfD) has submitted at least fifteen parliamentary queries (both in the *Bundestag* and *Landtage*) on the legality of the public benefit status of specific civil society organizations in 2021. Albeit this number may seem small and there are usually no legal consequences to such queries, they might raise the fiscal authorities' attention and may thereby lead to legal consequences. Furthermore it is symptomatic for a concerning trend on the one hand and fostering a societal chilling effect on the other hand. Especially in the run-up to the federal elections in September 2021, many organizations – members and non-members of our alliance – approached us, being insecure on what actions they could take without risking their public benefit status. It is important to see, that the effects are more intense for smaller organizations, who don't have the financial and human resources to face the risk appropriately. Instead of risking their public benefit status by – for example – publicly analysing an election platform, raising demands for climate action or speaking out against anti-democratic and far-right tendencies, many organizations seem to adapt and silence themselves.

- 7 Have these measures been challenged through litigation or applications to the courts? Are there any regulatory reform efforts on the way? If so, please specify.**

After seven years, the legal proceedings in the case of the public benefit status of attac have reached an end with a final ruling of the federal fiscal court in December 2020. In March 2021 "Attac" has lodged a constitutional complaint⁹. The proceedings are still ongoing.

8 For a list of examples (in German), see here: <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/beispiele-fuer-gemeinnuetzigkeitsprobleme/>

9 https://www.attac.de/fileadmin/user_upload/Kampagnen/Gemeinnutz/downloads/210226_Verfassungsbeschwerde_final_geschwa__rzt.pdf

In terms of regulatory reform efforts, there had been first reform attempts with the annual tax law 2020, which were mainly blocked by the Christian Democratic Party (CDU) and the Christian Social Union (CSU) both in the Federal Parliament (Bundestag) and the Federal Council (Bundesrat). After the federal election in September 2021, there has been a power shift in the Federal Parliament and the Government, which seems to have led to a shift in policies, leading to a better understanding of the importance of civil society organizations for a modern democracy. The newly elected government is planning to modernize the charity law, in order to eliminate legal uncertainties¹⁰. We are however hesitant, as the details of such modernization are still unclear.

8 How has the adoption of these laws, regulations or policies impacted civil society organizations in your country, region or globally? Please indicate concrete examples.

As stated above, more and more organizations seem to refrain from speaking up publicly, in order to not risk their public benefit status. They seem to adapt and silence themselves and subsequently democracy is being silenced. In 2021 our member organization, the Gesellschaft für Freiheitsrechte has published a study in cooperation with Open Society Foundations, that shows that more and more organizations in Germany are avoiding to publicly take a political stance, due to legal uncertainties in the charity law.¹¹

9 What types of civil society organizations have been most impacted or targeted by these measures in your country, region or globally? Please indicate concrete examples.

The legal uncertainties have the highest impact on those organizations, who are acting as watchdogs or advocacy agents. As stated before there are a number of risks for them – from a missing public benefit purpose to uncertainties with regards to the scope of admissible influence on policy formation. Those organizations deemed politically uneasy or unwanted have been most impacted, as the public calls by political opponents to revoke or deny those civil society organizations public benefit status have increased rendering these organizations at least at a high risk.

10 See: https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf, p. 117

11 <https://freiheitsrechte.org/home/wp-content/uploads/2021/07/shrinking-spaces-in-germany-shrinking-spaces-in-europe.pdf>

- 10 To what extent has the COVID-19 pandemic affected civil society organizations' ability to access to resources in your country, region or globally? Have States in your country, region or globally adopted policies, good practices, and innovative approaches to ease and facilitate access to resources by civil society organizations during the health crisis? If so, please describe.**
- 11 What are recent examples of good practice and standards in CSO-led self-regulation, and transparency and accountability mechanisms in your country or region?**

The Initiative Transparente Zivilgesellschaft (ITZ)¹² was founded in 2010 by a number of civil society stakeholders. In 2020 the initiative reacted to the growing uncertainties for public benefit civil society organizations, opening up to civil society organizations who are (no longer) under the public benefit status. Today more than 1500 civil society organizations have committed to this transparency standard.

II. Donor practices

- 1 What are the impacts of donor requirements (positive and negative) in the ability of civil society organizations to access resources in your country, region or globally? Please specify types of donors in your answer (i.e., private philanthropy, development agencies, financial institutions).**

Some philanthropic foundations have reported challenges in their allocation practices. Operating under the public benefit status themselves, they are only permitted to fund other public benefit status organizations. If an organizations public benefit status is at risk, some foundations may refrain from funding said organization in order to not risk their own public benefit status. Inherently, if an organizations decides to forgo the public benefit status, it is at high risk to lose any access to private funding.

- 2 Have donors in your country, region or globally adopted policies, good practices, and innovative approaches to ease and facilitate access to resources by civil society organizations during the COVID-19 pandemic? If so, please describe.**

12 <https://www.transparency.de/mitmachen/initiative-transparente-zivilgesellschaft/?L=0>

III. Recommendations

- 1 What concrete measures should States do to facilitate access to resources by civil society organizations in your country, region or globally?**
- 2 What can other actors, including international organizations and the donor community, do to encourage and support States in fulfilling their obligations to facilitate access to resources to civil society organizations?**
- 3 What concrete measures should States and other stakeholders introduce to improve the financial sustainability of civil society organizations to ensure they can contribute in building back better during and after the COVID-19 pandemic?**