

Legal regulation of cryptocurrency and NFTs

Germany





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Introduction

There is an increasing number of charities across the world that have started accepting cryptocurrency as donations, including **UNICEF** and the **Salvation Army**. New platforms like **The Giving Block** and **DoInGud** are helping nonprofits to raise funds with cryptocurrency and non-fungible tokens ("NFTs").

To help charities better understand the opportunities and risks involved in working in this new context, PILnet with its partners launched a project about legal regulation of cryptocurrency and NFTs in different jurisdictions around the world.

The report below aims to consider:

- (a) The legality of cryptocurrency
- (b) Accepting cryptocurrency
- (c) Accepting NFTs and its proceeds
- (d) Issuing NFTs to raise funds

Disclaimer

PILnet, and partners participating in this research are not liable towards third parties for the accuracy of the information contained in the research about Cryptocurrency and NFTs. The information contained herein cannot be considered as legal advice. The research was carried out in 2022-2023 and responds to the regulatory framework in effect during this time period.

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1. Is engaging in blockchain technology legal in this jurisdiction?



The main use case for NGOs in Germany is the foundation (*Stiftung*). Besides this an NGO may be organized as an association (*Verein*) which is subject to a different legal regime. For the purpose of this questionnaire, we have focused on foundations (*Stiftungen*), unless stated otherwise herein.

Please note that the non-tax sections (sections besides section 5 and 6) reflect the civil law and (financial) regulatory law perspective. In case that an NGO makes use of the specific charitable (*gemeinnützigen*) regime for tax purpose, the answers might be different regarding this specific tax regime.

Under German law, engaging in Blockchain Technology is not illegal. In fact, the German legislator as well as the regulator, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – “BaFin”) are well aware of the potential of Blockchain Technology and are thus eager to support this going forward.

2. Is accepting cryptocurrency permitted for charities? If so, what legislation/regulation governs it?

2.1 What limits and restrictions exist in terms of the types of cryptocurrencies that a charity can accept? (For example: Is there a prohibition or restriction on Bitcoin (BTC), Ethereum (ETH) and/or stablecoins (e.g. USDT)? Is there any restriction on the amount of cryptocurrencies that a charity and NGO can accept?)

Under German law, there is no prohibition for NGOs to accept cryptocurrencies such as Bitcoin (BTC), Ethereum (ETH), or stablecoins like USDT.

NGOs are generally quite free in terms of what their assets must include. What an NGO may or may not accept, *i.e.*, invest in, depends primarily on the principles set forth in the NGO’s constitution (*Stiftungsverfassung*). If the NGO’s constitution (*Stiftungsverfassung*) does not provide for any restrictions on investments in cryptocurrencies, the NGO’s council (*Stiftungsvorstand*) may build up the NGO’s assets (*Stiftungsvermögen*) in its sole discretion.

However, NGOs are subject to the principle of wealth preservation (*Vermögenserhaltungsgrundsatz*). For NGO’s council (*Stiftungsvorstand*), this means that he/she must (i) stick to the NGO’s constitution (*Stiftungsverfassung*), (ii) inform him/herself about new forms of investments and, where required, (iii) obtain advice from third parties. In practice, this means that the For NGO’s council (*Stiftungsvorstand*) shall ensure a proper diversification of the NGO’s portfolio, for it to consist also of

loss-compensating assets. NGOs must not solely invest in speculative instruments. As crypto currencies' prices are highly volatile an investment in them is rather speculative. Where an NGO invests in crypto currencies, its portfolio must thus also consist of rather low-risk investments in order to compensate possible losses arising from holding crypto currencies.

This will not change once the European *Markets in Crypto-assets Regulation* ("MiCAR") has been finally adapted and entered into force. This is because MiCAR does not apply for the *acceptance* resp. *investments* into crypto currencies.

2.2 Are there any prescribed processes or restrictions in realising the value of cryptocurrencies?

2.2.(a). Is a charity or NGO permitted to open its own wallet(s) and exchange account(s) for receipt of donations in cryptocurrencies?

Yes. There are no restrictions as to who can open a wallet. Some Foundations already do that, for example [SOS Kinderdörfer](#), [Alzheimer Forschung](#) (German only), who advertise with taking donations in crypto currencies.

2.2.(a).(i). What exchanges are permitted and/or prohibited? (e.g., Coinbase, Crypto.com)

Crypto exchanges are not *per se* prohibited. In case (i) a crypto exchange's activity constitutes a regulated service under German regulatory law and (ii) such crypto exchange addresses the German market it generally requires a licence by BaFin. Provided that (i) the service to be offered in Germany is a financial service based on the European Directive 2014/65/EU (*Markets In Financial Instruments Directive II* – "MiFID II") and (ii) the respective crypto exchange holds a licence by the regulator of its home member state, it can use the so-called *European Passport*. It allows financial services providers to provide their services in each EU / EEA country without the need to apply for a licence in each state.

2.2.(b). Can a charity or NGO manage its own wallet(s) and exchange account(s) and the cryptocurrencies therein?

Yes, managing its own wallets and exchange or bank accounts does not trigger a licensing requirement or similar. The NGO should make sure to only use the services of a well-known and regulatory compliant wallet services provider.

2.2.(c). If a charity or NGO cannot directly manage cryptocurrencies, how are charities and NGOs able to convert cryptocurrencies to fiat? (For example: Does the charity or NGO need to engage with a third-party vendor/intermediary?)

N/A

2.2.(d). Can a charity or NGO use cryptocurrencies directly for its transactions?

Generally, yes. However, not specifically with respect to crypto currencies, all transactions by the NGO must be within the scope of its foundation purpose (*Stiftungszweck*)

2.2.(e). Can cryptocurrencies be used as payment for goods or services provided by the charity or NGO?

Yes.

2.2.(f). How should the charity or NGO record and account for the digital assets held?

As a rule, digital assets/cryptocurrencies must be treated as donations in-kind (*Sachspenden*). For details – especially any possible tax consequences, we make reference to the tax-specific parts below in section 5 and 6 below.

2.3. Do the company's governance documents allow the charity or NGO to deal with crypto assets?

2.3.(a). Is dealing with cryptocurrencies and NFT's consistent with the charity or the NGO's charitable purpose?

Yes, provided, that it does not violate the NGO's principle of wealth preservation (*Vermögenserhaltungsgrundsatz*). In this respect, we make reference to our statement above under 3.1.

2.3.(b). Does an officer of a charity or NGO need to seek any approval or obtain any authority to open and manage the charity or NGO's wallet(s) and exchange account(s)?

No.

2.3.(c). Do the existing governance documents provide sufficient oversight for the management of digital assets?

This is to be assessed in respect of the governance documents of the respective NGO.

2.3.(d). Does the charity or NGO need to report digital assets in audits and financial reports?

Yes, provided that the NGO's main business is a commercial activity. CSOs (*zivilgesellschaftliche Organisationen*) may, in principle, also conduct a commercial activity.

2.4 How does the jurisdiction's anti-money laundering/counter-terrorism financing (AML/CTF) regime (if any) address cryptocurrency donations?

As a general rule NGOs are not obliged persons (*Verpflichtete*) under German AML law, unless they engage in a business activity that falls within business activities defined by German AML law (for example financial services, payment services).

2.4.(a). Does the receipt of cryptocurrencies by a charity or NGO need to be reported in compliance with the AML/CTF regime of your jurisdiction?

No.

2.4.(a).(i). Can donations be made anonymously? If not, what disclosure requirements are present in relation to donor identity and the donations value?

Yes.

2.4.(a).(ii). If a donation exceeds a certain amount, does the charity or NGO need to do due diligence? If so, how?

No.

2.5. Is accepting NFTs permitted for charities and NGOs? If so, what legislation/regulation (if any) governs it?

Yes, it is permitted. There is no specific legislation. Please note that there does not exist any law that explicitly allows accepting NFTs. Instead, there is no regulation which prohibits accepting NFTs. Therefore, it is permitted.

2.5.(a). What limits exist in terms of the proceeds that can be derived from the sale of NFTs donated? (For example: Can proceeds be converted to cryptocurrencies (e.g. BTC, ETH or stablecoins), or is conversion confined to your jurisdiction's own digital or fiat currency?)

No limits are set by law and proceeds can be converted into cryptocurrencies and fiat currencies.



2.6. Does the receipt of NFTs by a charity or NGO need to be reported in compliance with the AML/CTF regime of your jurisdiction?

No. Please note, however, that this is different for political parties.

2.6.(a). Can donations be made anonymously? If not, what disclosure requirements are present in relation to donor identity and the NFTs value?

Yes. Please note, however, that this is different for political parties.

2.7. Are there any prescribed processes and/or restrictions in realising NFTs and converting it to fiat?

No.

2.7.(a). If a charity can auction/sell NFTs themselves, how can this process be legally undertaken?

2.7.(a).(i). Are there restrictions on how NFTs can be held by a charity or NGO, including in particular the length of holding of the NFT?

No.

2.7.(a).(ii). What platforms can NFTs be sold on? Are there any prohibited sites/mediums?

Depending on the structure both the NFTs and the platform's services in detail, the platform might require a licence by BaFin.

3. Is issuing NFTs to raise funds permitted for charities? If so, what legislation/regulation (if any) governs it?

3.1. Are there any restrictions on how a charity or NGO can create and sell NFTs or NFT collections?

This depends on the structure of the NFTs in detail. Issuing NFTs to the public may trigger a prospectus resp. whitepaper obligation under the (i) German Securities Prospectus Act (*Wertpapierprospektgesetz* – “WpPG”) in conjunction with Regulation (EU) 2017/1129 (“Prospectus Regulation”), (ii) German Investment Products Act (*Vermögensanlagengesetz* – “VermAnlG”) or – in the future – (iii) under

MiCAR. Further, NFTs may constitute shares in an investment fund which triggers a (i) licence / registration obligation for the company managing the entity which raises capital in order to distribute NFTs to investors and (ii) a prospectus obligation or obligation to publish an information memorandum pursuant to the German Capital Investment Code (*Kapitalanlagegesetzbuch* – “KAGB”).

3.1.(a). Are charities and NGOs able to collaborate with third party partners to create NFTs?

Yes.

3.1.(b). What functions and features can a charity or NGO include in the NFTs they create and sell (for example, functions and features that resembles that of securities/ investment contracts)?

NFTs are not expressly regulated under German law. BaFin just recently emphasized that it follows a *substance-over-form* approach.

Depending on the structure of the NFT in detail, it can constitute either of the below:

- security (*Wertpapier*);
- investment products (*Vermögensanlage*);
- share in an investment fund (*Anteil an einem Investmentvermögen*);
- unit of account (*Rechnungseinheit*); or
- crypto asset (*Kryptowerte*)



Provided that an NFT constitutes one of the above – and thus a financial instrument (*Finanzinstrument*) –,

- the public offer of such NFTs may trigger a prospectus obligation and
- certain services offered in relation to the NFT might constitute a financial / investment service (*Finanz-/Wertpapierdienstleistung*).

A prospectus requirement under German regulatory law for the issuance of the NFTs comes into consideration if the NFTs

- constitute financial instruments in the form of either of the following:
 - shares in and investment fund pursuant to KAGB,
 - securities pursuant to WpPG and Prospectus Regulation and/or
 - investment products pursuant to VermAnlGand
- are offered / to be sold to individuals/entities in Germany.

The provision of certain services to German customers triggers a licence obligation under the German Banking Act (*Kreditwesengesetz* – “KWG”) or the German Investment Firm Act (*Wertpapierinstitutsgesetz*– “WpIG”). Here too, depending on the services in detail, these may constitute

- investment broking (*Anlagevermittlung*) pursuant to section 2 para. 2 no. 3 WpIG,
- contract broking (*Abschlussvermittlung*) pursuant to section 2 para. 2 no. 5 WpIG,

- investment advice (*Anlageberatung*) pursuant to section 2 para. 2 no. 4 WpIG,
- operation of multilateral trading facility (*Betrieb eines multilateralen Handelssystems*) pursuant to section 2 para. 2 no. 6 WpIG,
- operation of organized trading facility (*Betrieb eines organisierten Handelssystems*) pursuant to section 2 para. 2 no. 7 WpIG,
- proprietary trading (*Eigenhandel*) pursuant to section 2 para. 2 no. 10 WpIG,
- principal broking business (*Finanzkommissionsgeschäft*) – section 2 para. 2 no. 1 WpIG,
- financial portfolio management (*Finanzportfolioverwaltung*) pursuant to section 2 para. 2 no. 9 WpIG, or
- crypto custody business (*Kryptoverwahrgeschäft*) pursuant to section 1 para. 1a sentence 2 no. 6 KWG.

Further, NFTs may constitute e-money (*E-Geld*) within the meaning of the German Payment Services Supervision Act (*Zahlungsdienstaufsichtsgesetz – “ZAG”*), which triggers a licence requirement as well. E-money (*E-Geld*) pursuant to section 1 para. 2 sentence 3 ZAG and administrative practice of BaFin e-money is

- any monetary value,
- stored electronically, including magnetically,
- represents a claim against the issuer,
- issued on receipt of funds,
- for the purpose of making payment transactions within the meaning of section 675f para. 4 sentence 1 of the German Civil Code (Bürgerliches Gesetzbuch – BGB),
- which is also accepted by natural or legal persons other than the issuer.

Additionally, in case the NFTs do not fall under one of the abovementioned regimes, it can be subject to MiCAR in the future – in respect of both the issuing (whitepaper obligation) and services (licence obligation).

3.1.(c). Can charities and NGOs design their NFTs so that they have real-world benefits?

Yes.

3.2. What proceeds are charities and NGOs able to accept from issuing and selling their own NFTs?

3.2.(a). Can charities and NGOs only accept proceeds from the initial sale of the NFT?

No.

3.2.(b). Are charities and NGOs permitted to gain royalties from subsequent sales of NFTs by third parties?

Yes.

3.3. Do NFTs sales need to be reported by a charity or NGO in compliance with the AML/CTF regime of your jurisdiction?

No, unless the NFT sales are executed as part of a business activity of the NGO.

3.3.(a). Are initial and subsequent purchasers of the NFT issued able to remain anonymous?

Initial sale - yes

Subsequent sale – yes, unless the seller is subject to the AML rules.

4. Are there tax implications for donations of cryptocurrency or NFTs? Are there obligations to pay tax for charities who sell NFTs for fundraising purposes?

4.1. Has the tax authority in your jurisdiction issued any guidance about the taxation of digital assets, including cryptocurrencies and NFTs?

The German Federal Ministry of Finance (*Bundesministerium der Finanzen*) issued the letter dated 10 May 2022 regarding the income taxation of crypto currencies and other tokens.

It also issued the letters dated 27 February 2018 and 3 May 2021 regarding the VAT-treatment of exchanges of crypto currencies into fiat money or other crypto currencies, usage of crypto currencies as a means of payment as well as VAT-taxation of crypto exchange platforms.

There are currently no official guidelines regarding the taxation of NFTs.

There are currently no special regulations in regard to donations of digital assets to charities and NGOs.

4.2. Is a donation of digital assets to charities or NGOs considered a taxable event for the donor in your jurisdiction?

Depending on the circumstances and the potential type of tax in issue the donation can be considered a taxable event in Germany:

VAT: To the extent the donor qualifies as an entrepreneur in the meaning of German VAT and the respective asset forms part of its business for VAT purposes, a donation is generally treated as “supply

of goods (*Lieferung*)” or “supply of services (*sonstige Leistung*)“ in the meaning of VAT, i.e., the donated assets are subject to German VAT. However, such treatment as a taxable event presupposes that the assets or its components entitled to an input tax deduction or that the assets were produced within the donor’s business for VAT purposes.¹

Income Tax (Corporate and Personal Income Tax / Trade Tax): If digital assets form part of a business in the meaning of German tax, the donation may, depending on the facts, trigger income tax. The reason is that, depending on the chosen evaluation method regarding the donated assets (i.e., fair market value vs. book value), hidden reserves, built up in the donated digital assets, have to be realized upon the donation. Depending on the value of the donated assets, the realized hidden reserves cannot be compensated (in full) by the tax-deduction granted due to the donation (cf. Point 5.2 (a)), resulting in a net tax-burden.

4.2.(a). Are tax deductions available for the donor in respect of donations of digital assets?

Yes, donations of digital assets, e.g., crypto currencies and NFTs, to charities and NGOs are regarded as donations in kind². Their value can be used for a tax deduction for income tax purposes if

- they are donated to promote tax-privileged purposes³,
- the donation is made to
 - a legal person under public law,
 - a tax-privileged⁴ legal person under private law or
- an EU/EEA-entity, which would be tax-privileged, if it generated domestic, i.e., German, income,
- and the donor receives a donation receipt⁵.

If aforementioned requirements are met, the donor can – depending on the value of the donation – deduct the donation up to the total amount of

- 20% of his income or
- 4% of the sum of the total turnover and the wages and salaries spent in the calendar year.

In the case of an individual person donor the donation can be deducted as “special expenses (*Sonderausgaben*)”⁶ from their “total amount of income (*Gesamtbetrag der Einkünfte*)”⁷.



¹ Section 3 para. 1b no. 1 and para. 9a no. 1 of the Germany Value Added Tax Act (*Umsatzsteuergesetz*).

² Section 10b para. 3 of the German Personal Income Tax Act and section 9 para. 2 sentence 2 of the German Corporate Income Tax Act (*Körperschaftsteuergesetz*).

³ Section 52 to 54 of the German Tax Code (*Abgabenordnung*).

⁴ Section 10b para. 1 sentence 2 of the German Personal Income Tax Act and section 9 para. 1 sentence 1 no. 2 sentence 2 of the German Corporate Income Tax Act.

⁵ Section 50 para. 1 sentence 1 of the German Income Tax Ordinance (*Einkommensteuer-Durchführungsverordnung*).

⁶ Section 10b para. 1 sentence 1 of the German Personal Income Tax Act.

⁷ Section 2 para. 4 of the German Personal Income Tax Act.

In the case of a corporation donor the donation can be deducted as business expenses⁸ from its business income.

In addition to the above-mentioned deduction, an individual person can deduct donations into the “asset stock (*Vermögensstock*)” of a tax-privileged⁹ foundation. In the case of such donation, the donor can deduct up to EUR 1 million over a period of 10 years as special expenses from their total amount of income (in the case of spouses who are assessed jointly EUR 2 million).¹⁰

4.2.(b). Is there a requirement for the donor to keep certain records or obtain valuations regarding the donations of any digital assets?

To be able to use the donation value for a tax deduction for income tax purposes, the donor has to keep the donation receipt.

- If the donor is obliged to keep accounting records¹¹, e.g., because he qualifies as a “merchant”, and the donation is from his commercial assets, the donor has to keep, e.g., the accounting records and the records regarding the inventory (including the donated assets) and the donation receipt for ten years.¹²
- If the donor is an individual person without an obligation to keep accounting records, he only has to keep the donation receipt (and the additional information regarding the evaluation basis of the assets) until one year after the notification of the relevant tax assessment.¹³

Other than that, the donor is not required to obtain valuations. However, the assumed value must be substantiated and proven by the donor in the case of an opposition procedure or a lawsuit, since the value is subject to review by the financial authorities and the financial courts. In an opposition procedure or a lawsuit, a formal valuation/ an expert opinion might be required to prove the assumed value of the donated assets.

4.3. Are there Capital Gains Tax (CGT) or other tax implications arising at the time of donation for the charity or NGO in your jurisdiction?

Generally not at the time of the donation. If, however, the received assets are sold by the charity or NGO at a later point in time, the realized profits can be subject to Corporate Income Tax and Trade Tax if the sale is qualified as part of an ordinary business activity (*wirtschaftlicher Geschäftsbetrieb*) and not as a tax-privileged special-purpose business (*Zweckbetrieb*)¹⁴ (cf. Point 5.4).

⁸ Section 9 para. 2 sentence 2 of the German Corporate Income Tax Act.

⁹ Section 52 to 54 of the German Tax Code.

¹⁰ Section 10b para. 1a of the German Income Tax Act.

¹¹ Sections 140 and 141 of the German Tax Code.

¹² Section 147 para. 1 to 4 of the German Tax Code.

¹³ Section 50 para. 8 sentence 2 of the German Income Tax Ordinance.

¹⁴ Sections 64 to 68 of the German Tax Code.

4.3.(a). Is there a requirement for the charity or NGO to record donations of digital assets received?

Yes, based on general rules. The charity's or NGO's actual management has to aim exclusively and directly at the fulfillment of tax-privileged purposes and to be in accordance with the charity's or NGO's statutes. This has to be documented by means of proper records, which include the entity's income, expenses as well as copies of donation receipts.¹⁵ In the case of crypto currencies and NFTs, i.e., donations in kind, the records have to provide information regarding the calculation-basis of the donation value, which the charity or NGO confirmed in the donation receipt.¹⁶ These records have to be kept for ten years.¹⁷

4.3.(b). Is the charity or NGO required to value the digital assets, including NFTs, at the time of donation? If so, are there any prescribed valuation methods?

Yes. In the case of donations of crypto currencies and NFTs, i.e., donations in kind, the charity or NGO has to confirm the value of the donated assets on the basis of the information provided by the donor. For this reason, the donor has to provide all the information necessary to determine the value of the donated assets.

In general, the value of a donation in kind does correspond to the fair market value.¹⁸ In certain cases, e.g., donations from the business assets or from the private assets within the period in which a sale would trigger private sales tax¹⁹, the donation value can correspond to the value at the time of the removal plus VAT (in the case of a removal from business assets) or the amortized acquisition or production costs (in the case of a donation from the private assets, where the donated assets built up hidden reserves but the period for a tax-free private sales transaction was not exceeded).²⁰

In the case of crypto currencies, the value of the tokens is generally determined by the current value listed in the token exchange platforms. In the case of NFTs there are currently no official guidelines to determine, e.g., the fair market value.

The financial authorities and the financial courts set high requirements for the proof of the value of the donated assets. The donation value confirmed by the charity or NGO in the donation receipt is subject to review by the financial authorities and the financial courts.

4.3.(c). Is there a requirement for the charity or NGO to issue receipts or written recognition to donors? If so, is there an established process that must be adhered to or information which must be disclosed (for example, the date of receipt, the number and type of asset received, and the market value at the time of receipt)?

¹⁵ Section 63 para. 3 of the German Tax Code and section 50 para. 7 sentence 1 of the German Income Tax Ordinance.

¹⁶ Section 63 para. 1 and 3 of the German Tax Code.

¹⁷ Section 147 para. 1 to 4 of the German Tax Code.

¹⁸ Section 10b para. 3 sentence 3 of the German Income Tax Act.

¹⁹ Section 23 para. 1 sentence 1 no. 1 and 2 of the German Personal Income Tax Act.

²⁰ Section 10b para. 3 sentences 2 to 4 of the German Personal Income Tax Act and section 9 para 2 sentence 2 and 3 of the German Corporate Income Tax Act.

Yes. For a donation to be tax-deductible on part of the donor, the charity or NGO has to issue a donation receipt in accordance with the officially prescribed forms, which differ depending on the recipient and the kind of donation²¹.

In the case of a donation of crypto currencies or NFTs, i.e., a donation in kind, the necessary information, which have to be disclosed in the donation receipt, includes:

- Recipient of the donation
- Name of donor
- Value of the donation
- Purpose/Usage of the donated assets
- Day of the donation
- Description of the donated asset, including all circumstances necessary to determine the value of the donation in kind (kind of assets, acquisition costs, age, time between acquisition and donation, etc.).

4.4. Are there any CGT or other tax implications for the charity or NGO arising in your jurisdiction, if the charity or NGO plans to dispose of or transact with the digital asset subsequently?

Depending on the circumstances there might be tax implications for the charity or NGO, if the charity or NGO plans to dispose of or transact with the digital asset after the receipt of the donation (cf. Point 5.3):

In general, the assets donated in kind have to be used directly²² for the tax-privileged purposes of the charity or NGO. Since the sale and subsequent usage of fiat money for the promotion of the tax-privileged purposes represents an “indirect” use of the assets, the sale of the received assets might represent an ordinary business activity (*wirtschaftlicher Geschäftsbetrieb*)²³. The income derived from such activities is generally subject to Corporate Income Tax and Trade Tax, if the activities do not classify as a tax-privileged special-purpose business (*Zweckbetrieb*).²⁴

Whether a business activity classifies as a special-purpose business, depends on the fulfilment of certain restrictive requirements²⁵, which can only be determined based on the facts of the individual case.

An exception from the generally required “direct” use of the donated assets for tax-privileged purposes, applies in the case of donations into the asset stock of a tax-privileged foundation (cf. Point 5.2 lit. (a)): Under certain prerequisites a foundation can sell the donated assets without thereby establishing an ordinary business activity. This requires that the fiat money, gained through the sale of the donated assets, becomes part of the “assets which are bound to the public good (*Grundstockvermögen*)”.

²¹ Section 50 para. 1 sentence 1 of the German Income Tax Ordinance.

²² Sections 57 and 63 para. 1 and 3 of the German Tax Code in conjunction with section 10b para. 1 sentence 1 of the German Income Tax Act and section 9 para. 1 sentence 1 no. 2 of the German Corporate Income Tax Act.

²³ Section 64 para. 1 and section 14 of the German Tax Code.

²⁴ Sections 64 to 68 of the German Tax Code.

²⁵ Sections 66 to 68 of the German Tax Code.

To the extent the charity or NGO qualifies as an entrepreneur in the meaning of German VAT, the sale of and the transaction with digital assets can represent a taxable “supply of services (*sonstige Leistung*)” in the meaning of VAT, i.e., the sold assets can be subject to German VAT in accordance with the general principles. Whether the sale of a given asset is subject to German VAT, can only be determined based on the facts of the individual case.



5. What is the best practice or guidance?

5.1. Is there non-binding guidance (if any) issued by any regulatory or government authority or industry association in your jurisdiction in

relation to best practices relating to acceptance and issuance of cryptocurrencies and NFTs?

N/A

5.2 What resources are available for entities and individuals to seek further guidance?

N/A

5.2.(a).(i). Is there a system for public and/or private rulings and decisions?

There is a possibility to apply for a (chargeable) binding ruling²⁶ by a tax office relating to the tax treatment of not realized facts, i.e., the ruling has to be issued before the planned activities, e.g., acceptance of NFTs as a donation or sale of donated assets, are performed. The binding ruling can be issued for Income Tax, i.e., Corporate and Personal Income Tax and Trade Tax, as well as VAT purposes.

For VAT purposes (only), there is also the (non-chargeable) customs tariff information (*Zolltarifauskunft für Umsatzsteuerzwecke*). By applying at the Education and Science Centre of the Federal Revenue Administration (*Bildungs- und Wissenschaftszentrums der Bundesfinanzverwaltung*) or the tax authorities of the federal states (*Bundesländer*), a taxpayer can receive (non-binding) information, whether a supply or an intra-community acquisition (*innergemeinschaftlicher Erwerb*) falls under the general 19% VAT-rate or the reduced 7% VAT-rate for German VAT purposes.²⁷

²⁶ Section 89 of the German Tax Code.

²⁷ Section 12 of the German Value Added Tax Act.

5.2.(a).(ii). If so, are these decisions binding on the relevant authority (for example, the Commissioner)?

If the application for a binding ruling meets all necessary requirements, especially regarding form and content, the tax office cannot diverge from its binding ruling, if the facts are fulfilled as described in the application for the binding ruling.²⁸

However, the binding ruling loses its binding effect, if the regulations, on which basis the ruling was issued, change at a later point in time.²⁹ Under certain circumstances³⁰, the binding ruling can also be annulled or altered by the tax office, e.g., if the ruling was not in accordance with the applicable regulations or the legal opinion, in regard to the legal question in issue, changes in the jurisprudence or the fiscal authorities.

A customs tariff information for German VAT-purposes is non-binding.

5.3. Has there been any recent legal cases or other guidance that can help interpret how cryptocurrencies and/or NFTs are treated in accordance with your jurisdiction's existing regulatory framework?

- The letter by the German Federal Ministry of Finance dated 10 May 2022 describes the tax treatment of crypto token from the income tax point of view.
- The letters by the German Federal Ministry of Finance dated 27 February 2018 and 3 May 2021 contain rules regarding the VAT-treatment of exchanges of crypto currencies into fiat money or other crypto currencies, usage of crypto currencies as a means of payment as well as VAT-taxation of crypto exchange platforms.
- The German Federal Fiscal Court (*Bundesfinanzhof*) issued the judgement dated 14 February 2023 (IX R 2/22) relating to crypto token taxation.

5.3.(a). If so, what do the judgment(s) suggest?

The judgement by the German Federal Fiscal Court suggests that currency token (in this case BTC, ETH and XMR) are classified as (“other”) assets, which has also been suggested by the German Federal Ministry of Finance letter dated 10 May 2022 but has been controversial until the judgement.

The principles laid down in this judgement regarding the classification of crypto token as (“other”) assets should also be applicable to NFTs.

²⁸ Section 2 of the Tax Information Ordinance (*Steuerauskunftsverordnung*).

²⁹ Section 2 para. 3 of the Tax Information Ordinance.

³⁰ Section 4 of the Tax Information Ordinance and Section 3.6 of the German Tax Code Application Decree.

Legal regulation of cryptocurrency
and NFTs in Germany

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199 Water Street,
11th Floor New York, NY
10038 U.S.A.

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