In the “Trusted Health Ecosystems” project we are creating a concept and a product vision for a national health platform of the future. This text is part of the overall concept which is published at www.trusted-health-ecosystems.org.

Ownership: Public or private?

When establishing a national healthcare platform, it is crucial to identify a suitable legal structure that fulfills all the necessary requirements and effectively supports the ecosystem in which it operates. In terms of ownership, a number of different options are available, each involving a variety of advantages and disadvantages. The first question to arise at this point is whether the platform should be operated by a public or a private-sector actor.

The challenge

The tasks and services involved in a national health platform are complex and diverse. It is therefore absolutely essential that the platform ecosystem be set up in such a way that it can address each task and manage each service in a flexible manner, including any future tasks and services not yet identified today. Herein lies the challenge associated with finding the optimal legal structure for such an ecosystem. In any effort to do so, the following aspects must be taken into account:

Alignment with the common good

In principle, the ecosystem should not be commercially oriented. Instead, it should operate on a not-for-profit basis. All forms of revenue generated within the ecosystem should be used to extend the system itself and develop it further.

Flexibility

The ecosystem needs to be able to perform as yet unidentified tasks. It should therefore be open to ongoing development and innovation. In addition, both state and non-state actors should be able to work together side-by-side in the ecosystem.

Transparency

The actions, decisions and financing of the ecosystem, particularly when it fulfills a legal or public service mandate, should be transparent to the general public.

Considering these requirements, two key questions arise regarding the organizational form of the ecosystem:

- Should an existing legal structure be utilized or should a new legal structure be created?
- Should the legal structure be rooted in public or private law?

While utilizing an existing legal structure is a possibility, creating new legal structures would be more appropriate, given the need for innovation and multifunctionality within the ecosystem. Regardless of whether the ecosystem is governed by public or private law, it is important to distinguish between legal forms with and without legal personality. Legal forms organized under public law, which include the type of public institution known in *Germany as an Anstalt des Öffentlichen Rechts*, are privileged in a number of ways, for example with regard to their financing. On the other hand, they are also subject to stricter legal obligations than companies organized under private law, for example, in terms of the transparency of their decision-making. In addition, enterprises organized under public law are only permitted to integrate private actors uinder certain instances, which would make it even more difficult to achieve the goal of implementing the most inclusive ecosystem possible. With public enterprises, the focus is also generally on the realization of a public-oriented goal or public-service mandate, which contrasts significantly to primarily for-profit enterprises.

Irrespective of the question as to whether the ecosystem's structure should come under public or private law, we can generally distinguish between legal forms that have their own legal personality under the law and those that do not. Legal forms that do not have their own legal personality include, for example, partnerships *(Personengesellschaften)* and those municipal agencies known in Germany as *Regiebetriebe*, which are publicly owned and operated. Considering the allocation of multiple complex tasks within an ecosystem, it becomes apparent that legal forms lacking independence are unlikely to be suitable as potential ecosystem structures. This is particularly important as stakeholders need the ability to independently undertake legal actions, including entering into contracts with service providers. On the other hand, corporations *(Körperschaften)* are recognized as independent legal entities with the capacity to hold rights and obligations. The

legal capacity to hold rights and obligations will thus constitute an indispensable prerequisite for the structure of the ecosystem.

Background

In principle, a distinction can be made between two forms of legal association: on the one hand, partnerships – e. g. the civil-law partnership – and, on the other hand, corporations – e. g. the association with legal capacity, the stock corporation or the limited liability companies. In general, there are two forms of legal association, namely partnerships (e. g., a *Gesellschaft bürgerlichen Rechts* or "GbR" under the German Civil Code) and corporations *(Körperschaften)*, which include associations that have been granted legal capacity, stock corporations and limited liability companies.

Partnerships *(Personengesellschaften)* are generally not granted full legal capacity, which means they are restricted in their ability to acquire and exercise rights. In addition, they are at their core focused on the natural persons behind the partnership. This factor tends to make it more difficult for actors to move in and out of a company. In other words, considering the overarching objective of the national health platform in Germany, the reasonable conclusion here would be that partnerships are fundamentally unsuitable as a structural form for the ecosystem.

Corporations *(Körperschaften)* are permanent associations of persons for the purpose of achieving a function that goes beyond the individual. In contrast to partnerships, they operate independently of any changes with regard to individual members. Most corporations are legal persons, which means they can be bearers of rights and obligations, that is, they can enter into contracts. Corporations can also be organized under both private and public law.

Public corporations *(Körperschaften des öffentlichen Rechts)* are associations created by the act of a sovereign state and tasked with carrying out a public service. These corporations are owned by their members, who have a significant influence on policy and decision-making. Membership can be voluntary, but in some cases it can also be compulsory by law.

Organizational forms under public law are not available to everyone, however. Instead, they serve exclusively to fulfil a public task or statutory mandate. Accordingly, corporations under public law have certain unique powers and privileges. In particular, they can exercise public authority within the scope of their respective statutory mandate.

The downside of this privileged public position is a relatively low degree of flexibility, at least in practical terms. For example, as government or quasi-government institutions, they are obliged to comply with fundamental rights. Indeed, corporations under public law are frequently rooted in a legal basis. This means that any

change in orientation, competency or task may require an adjustment to their legal basis.

Public law institutions *(Anstalten des öffentlichen Rechts)* are aggregations of material resources (e. g., buildings, equipment) and personal resources (personnel) brought together for the purpose of managing a public institution. They are legal persons to whom certain tasks have been assigned, whether by law or by statute, and who have also been entrusted with fulfilling a public mission. As a rule, these public institutions and / or their services are placed at the disposal of citizens. Some examples of institutions under public law in Germany are public broadcasting corporations, universities and savings banks. These public law institutions have their own legal personality that allows them to carry out their activities independently.

Foundations *(Stiftungen)* can be organized under both private and public law. In general, foundations are designed to enable the management of assets for the benefit of specific purposes. Foundations under public law are usually created by the state via some kind of law or decree, which makes their establishment and subsequent development a rather bureaucratic process. It is also relatively difficult to integrate private-sector actors, which can be financed by a foundation, but only integrated into its decision-making processes to a limited extent. A foundation under public law is financially dependent on public budgets and grants. In practical terms, this means that it is comparatively difficult to secure a foundation's long-term financing and thus its long-term operation. Indeed, the performance of such a foundation is likely to be directly dependent upon each new government's budget.

"For the role of operator, having the status of a legal person under private law provides flexibility and makes it possible for private and state actors to work alongside one another."
Prof. Dr. Laura Schulte

Organizational forms under public law thus offer very little versatility and are therefore not well-suited to serve as operators of a national health platform. They are frequently rooted in legislation, which means that any increase in their tasks or competencies may require a time-consuming amendment to the law. Furthermore, all forms of organization under public law are directly obliged to comply with fundamental rights.

The participatory rights of third parties, such as service providers in the health care sector, can also be partially derived from a public law institution's binding obligation to comply with fundamental rights. Furthermore, public institutions are subject to certain requirements when it comes to any competitive action they undertake, and some of these rules may be stricter than those that apply to

non-governmental actors (see also The state as a provider of information: What is the government allowed to do?). And, finally, it is often difficult to integrate private actors into organizational forms operating under public law.

It should be noted, however, that state actors – which include federal, state and municipal governments as well as their individual subdivisions – can also take advantage of organizational forms under private law. In practice, this means that if and when government agencies are participants in the ecosystem, it does not automatically follow that the ecosystem must have a legal structure under public law. The potential legal forms for the ecosystem under private law in Germany include an association *(Verein)*, a limited liability company *(GmbH)* and a stock company *(Aktiengesellschaft or AG)*.

Overview – Legal structures under private law in Germany

Association (Verein)

In Germany, a *Verein* is considered to be a voluntary, long-term association of several persons who come together in pursuit of a particular purpose. In principle, state actors and private-sector actors can work side-by-side in a *Verein*.

In the case of a *Verein*, it is only possible to limit liability vis-à-vis third parties to a certain extent. In particular, we should take note here of the general personal liability of the members of the executive board – including the entirety of their private assets – vis-à-vis third parties, at least to the extent that the Verein is held responsible for damages to third parties. The question of how the ecosystem would be financed in the form of a *Verein* raises some additional challenges; above all, it is likely that membership fees would be insufficient to provide the project with a continuous flow of adequate financial means, especially in its initial phase.

Limited liability company (GmbH)

A GmbH is a limited liability company that has its own legal personality and acts as a legal entity via its own corporate bodies. In principle, the liability of a GmbH is restricted to the level of company assets. Shareholders in a GmbH can be natural persons or legal persons. Although the shareholders have a share in the GmbH's assets, they do not assume any personal liability as a result of their participation in the company.

Limited liability company (non-profit GmbH)

A non-profit GmbH is a special form of limited liability company. A non-profit GmbH combines the business advantages and framework of a GmbH with the advantages of non-profit tax law, thus making it an attractive legal form for the

social sector. However, the earnings generated by the company may be used solely in the service of achieving the company's non-profit objectives.

Stock company (Aktiengesellschaft or AG)

A stock company known as an *Aktiengesellschaft* (AG) typically unites a large number of shareholders who have invested their capital in the company in return for dividends taken from the income it generates. The profit-driven mandate of an AG is simply not in line with the non-profit objectives of the ecosystem.

Stock company (non-profit stock company)

German law also recognizes companies known as *gemeinnützige* AGs or gAGs, which are stock companies not aimed at making a profit. The focus on non-profit objectives – such as the promotion of science and research, public health, user information and consumer protection – is rewarded in the form of tax breaks in favour of the gAG. The downside of the special tax status of the gAG is the relatively strict set of regulations associated with non-profit tax law. It should be noted, in particular, that a gAG's non-profit status would be jeopardized if more than half of its capital were used to finance its administration and fundraising, or if the commercial business operations of a gAG were to enter into competition with non-advantaged, for-profit businesses of the same or similar type to a greater extent than is unavoidable when fulfilling the tax-privileged purposes.

Otherwise, the legal requirements determining the organization of a gAG correspond to the provisions applicable to a regular AG. In particular, the gAG also has an executive board, a supervisory board and an annual general meeting. The executive board is responsible for the gAG's management, which must be aimed towards the exclusive and direct fulfilment of the legally defined objectives of the gAG.

Holding company

It is possible for the ecosystem's individual services to be operated by different companies *(Gesellschaften)*, each with a different legal form which, however, could be brought together under the common umbrella of a holding company *(Holdinggesellschaften)*. A holding company is a structural form whose main purpose is to hold an interest in one or several legally independent companies on a long-term basis.

There are two distinct types of holding companies that could function as "umbrella organizations" for the ecosystem under consideration here: an operative holding and a management holding. An operative holding is comparable to a parent company *(Mutterkonzern)* upon which subsidiaries are dependent in terms of strategy and personnel. In contrast, a management holding has no operational business of its own, but still determines the strategic objectives of its subsidiaries.

The most significant advantage of this type of holding is flexibility, as each subsidiary is able to develop strategies for its own field of business. As a legal structure, the holding company is not regulated by German law and is therefore not bound to a specific legal form. In fact, holding companies are frequently operated in the legal form of a limited liability company (GmbH) or stock company (AG).

Conclusion

In order to effectively pursue its objectives and have the legal capacity to act, the ecosystem must have the ability to bear rights and obligations. This means that any legal structure that does not have legal capacity should be automatically ruled out as an option. Partnerships, for example, do not meet the requirements of a participatory infrastructure for the health care system and should not be considered as a legal entity with ownership of the prospective national digital ecosystem.

While a structure under public law is technically possible, it would pose challenges for private-sector actors when it comes to participating in the project as a whole. To achieve the broadest possible level of participation and a high degree of flexibility, the most ideal organizational framework would therefore involve a legal structure under private law. This would offer a relatively large degree of flexibility with regard to structural adjustments and the cooperation of both private and state actors on the project.

Furthermore, considering the diverse range of functions performed by the ecosystem, a holding structure appears to be an ideal choice. Under this structure, a parent company would manage subsidiaries, each of which could undertake different tasks within the ecosystem. This allows for efficient coordination and management of the ecosystem's various functions.

Prof. Dr. Laura Schulte

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