



The new foundation law is here - what opportunities does the 2023 foundation law reform create?

# Introduction & Outline

# Speakers

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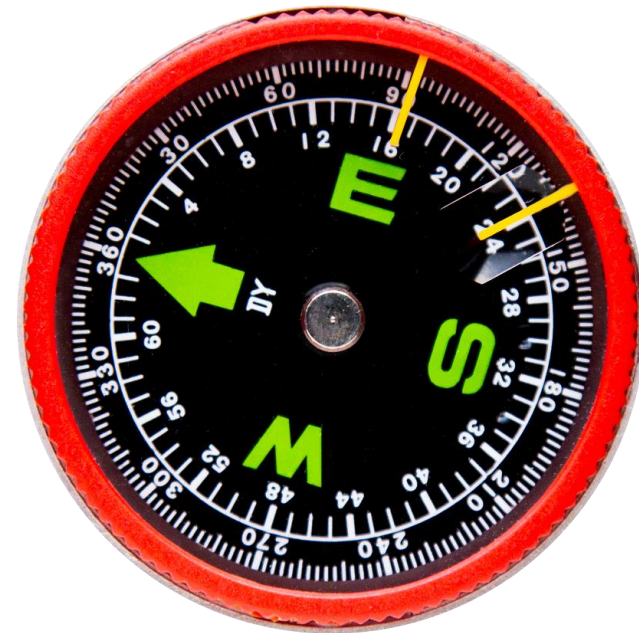
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# Outline

- I. Introduction
- II. Overview: the essentials of the 2023 foundation law reform
- III. The foundation as an instrument of asset and company succession
- IV. Q&A



# Introduction

## Historical background of the 2023 reform



### General Background

- Despite absence of predicted “foundation boom”, **popularity** of foundations **still high**
- **Number of civil law foundations** (*rechtsfähige Stiftungen*) with legal capacity has **risen sharply since 2000** to a roughly 25,000
- **Around 90%** of the foundations currently in existence pursue **charitable/non-profit purposes**



### Reasons For Reform

- **Confusing legal situation and overlap / concurrence** of the provisions of sec. 80 et seq. German Civil Code (*Bürgerliches Gesetzbuch – BGB*) and the 16 different foundation laws of the German federal states
- **No major changes in foundation civil law since 2002**
- Problem of “**economically distressed foundations**”: relocations and mergers of foundations across state borders therefore relatively complicated



### 2023 Reform

- Against this background: regular **reminder of the need for reform by practitioners and associations**
- **From 2014: Start of legislative work** on a comprehensive **reform of the civil law governing foundations**
- After tough discussions, **foundation law reform finally passed on June 24, 2021**
- After adoption of the amendment to the foundation law, **work also begins on consequential amendments to the respective state foundation laws**
- Reform enters into force on **July 1, 2023**

# 2023 Foundation Law Reform – the essentials at a glance

## 2023 Foundation Law Reform



### The reform's essentials at a glance

- Simplification of the confusing canon of regulations through creation of a nationwide uniform, conclusive foundation law. Centralization of foundation law in the amended secs. 80-88 BGB.
- Codification of the principles developed by case law and doctrines on sec. 80 et seq. BGB developed over the course of time.
- 2023 reform concerns in particular changes in the following 5 areas:
  - (1) Clarification of the regulations on the **liability of the foundation bodies/organs**
  - (2) Codification of the regulations on the procedure for **amendments to the foundation's articles of association**
  - (3) Clarification of the regulations on **foundation capital**, in particular on the handling of *so-called* reallocation gains
  - (4) Writing down of a uniform "foundation conversion law" (key words: "merger by way of absorption" (*Zulegung*), "merger by way of new incorporation" (*Zusammenlegung*))
  - (5) Introduction of a **nationwide central foundation register** as per January 1, 2026

In addition, at the **state level: reform of the supervisory system** and the **responsibilities** of the foundation supervisory authorities.



## The 2023 Reform's Changes/Novelties In Detail (1)

### Topic: "Liability and Remuneration of Members of Foundation Bodies"

- Prior to the reform: the yardstick for the actions of the foundation's bodies = observance of the "due care required in the course of business" („im Verkehr erforderliche Sorgfalt")
- Based on sec. 93 para. 1 sentence 2 German Stock Corporation Act (*Aktiengesetz – AktG*), the **business judgment rule** is now anchored in sec. 84a para. 2 sentence 3 BGB.
- Accordingly, the following applies: no breach of duty on the part of the acting member of the governing body if, in compliance with the statutory requirements/statutes, he/she could reasonably assume that he/she was acting for the benefit of the foundation on the basis of appropriate information.

- In practice, in this respect, the **creation of a careful documentation situation** with regard to decisions, *e.g.* of the foundation's board of directors, is all the more recommended.
- It should also be noted that, in accordance with sec. 84a para. 3 sentence 1 in conjunction with sec. 31a BGB, members of governing bodies acting without remuneration are generally only liable for intentional and grossly negligent acts/conduct.
- The above liability principle may, however, be limited or excluded – both for honorary and remunerated members of governing bodies.

- As previously only provided for the foundation boards, through regulation in sec. 84a para. 1 sentence 2 BGB now clarified that all board members are in principle unpaid.
- If the members of the executive bodies are to be remunerated for their activities, there must be a basis for this in the foundation statutes, sec. 84a para. 1 sentence 3 BGB.

## The 2023 Reform's Changes/Novelties In Detail (2)

### Topic "Amendments to the Articles of Association"

- **Clarification of the material requirements for amendments to the articles of association**, sec. 85 BGB, and **clarification of the procedure for amendments to the articles of association**, sec. 85a BGB.
- According to the provisions of the newly amended sec. 85 BGB, the following applies in principle: **The deeper the intervention in the existing articles of association of the foundation, the higher the effectiveness requirements to be met.** In this respect, differentiation between three categories/case groups of amendments to the articles of association:

**(1) Changes to the purpose of the foundation (*Stiftungszweck*), sec. 85 para. 1 BGB**

**(2) Amendments to so-called formative (*prägende*) provisions of the articles of association, sec. 85 para. 2 BGB**

**(3) Amendments to other provisions of the articles of association, sec. 85 para. 3 BGB**

- To be noted already at the time of foundation formation: The admissibility of subsequent amendments to the articles of association within the meaning of sec. 85 para. 1-3 BGB can be restricted or extended by appropriate stipulations in the foundation agreement, sec. 85 para. 4 BGB.

## The 2023 Reform's Changes/Novelties In Detail (2)

### Topic "Amendments to the Articles of Association"

#### 1. Change of purpose of the foundation

- As **intervention of the highest level, changes and restrictions to the foundation's purpose** are (only) permissible if either the original purpose can no longer be fulfilled permanently and sustainably or if the previous purpose of the foundation endangers the common good, sec. 85 para. 1 sentence 1 no. 1, 2 BGB. Restriction of purpose always permissible, in particular, if the foundation does not have sufficient funds for the sustainable fulfillment of the foundation's purpose and cannot acquire such funds in the foreseeable future.
- Conversion into a turnover foundation (*Verbrauchsstiftung*) possible, sec. 85 para. 1 sentence 4 BGB

#### 2. Amendments to formative provisions

- **Examples:** Name, registered office, method of fulfilling the purpose, management of the basic assets.
- Amendments to such provisions are only permissible if circumstances have changed significantly after the foundation was established and the amendment is necessary to adapt the foundation to changed circumstances, section 85 para. 2 BGB.
- When the foundation is established, it can be defined in the foundation deed which regulations in particular are to be regarded as formative.

#### 3. Amendments to other provisions

- Refers to all other provisions of the articles of association that are neither considered "formative" nor relate to the purpose of the foundation.
- Amendments to such regulations are permissible if this serves to fulfill the purpose of the foundation, sec. 85 para. 3 BGB.

## The 2023 Reform's Changes/Novelties In Detail (3) Topic „Foundation Capital“

In continuation of the principles developed in this regard, now **statutory definitions of the individual components of the foundation capital** in the new **sec. 83b BGB**:

### Fixed Foundation Assets (*Grundstockvermögen*)

- Includes assets dedicated at the time of the foundation's establishment, subsequent endowments, and any other assets dedicated to form part of the basic assets.
- Subject to the principle of asset preservation (*Kapitalerhaltungsgrundsatz*). Important: No further specification of the principle. Definition of an asset preservation concept therefore remains an important task when drafting articles of association.

### Other Foundation Assets

- Includes other foundation assets, is not subject to the principle of asset preservation.
- May be used to fulfill the purpose of the foundation. For charitable foundations: Requirement to use funds in a timely manner to be observed, sec. 55 et seq. German Tax Code (*Abgabenordnung – AO*).

In addition, a very practice-relevant amendment on the handling of so-called **reallocation gains** (*Umschichtungsgewinne*):

- For a long time, there was a **dispute under foundation law as to whether profits from the reallocation of foundation assets** should be allocated to the foundation's basic assets or **whether they may be used to fulfill the foundation's purpose**.
- Now **clarification** through **new provision** in **sec. 83c para. 1 sentence 2, 3 BGB** that such profits may be used for the **fulfillment of the foundation's purpose** – provided this is not excluded by the articles of association and provided that the preservation of the basic assets is guaranteed.
- From a practical point of view/in particular in the case of the establishment of a new foundation, it is nevertheless still recommended to include clarifying provisions on the handling of any reallocation gains.

## The 2023 Reform's Changes/Novelties In Detail (4)

### Topics “Foundation conversion law” / “Termination of foundation”

- On the basis of the legal situation applicable prior to July 1, 2023, inconsistent regulations on the prerequisites for termination of the foundation and for the institutes for “merger by way of absorption” (*Zulegung*) and “merger by way of incorporation” (*Zusammenlegung*) foundations. Coexistence of sec. 87 BGB (old version) and state regulations.
- Against the background of the high number of economically distressed foundations (among other things due to the previous low-interest phase), however, there is a practical need for legally secure mergers of foundations
- Due to the inconsistent regulatory framework, however, mergers of foundations across national borders have so far been associated with considerable implementation difficulties and coordination efforts.
- Now: Requirements for **dissolution** (*Auflösung*) and **termination** (*Aufhebung*) of a foundation finally regulated in sec. 87, 87a BGB. In addition, sec. 86-86i BGB now codify for the first time the institutes of “merger by way of absorption” and “merger by way of incorporation” for existing foundations.

#### Dissolution / termination of foundations, sec. 87, 87a BGB

- Pursuant to sec. 87 para. 1 sentence 1 BGB, the executive board shall initiate the dissolution of the foundation if it is finally no longer able to fulfill its purpose on a permanent and sustainable basis.
- **Subsidiarily**, the competent **foundation supervisory authority** may **terminate** the foundation by way of termination if the requirements for dissolution pursuant to sec. 87 BGB are met and the board of directors fails to decide on dissolution in due time.
- Dissolution and termination to be understood as “*ultima ratio*”-**instruments**; priority to be given to amendment of the articles of association and “merger by way of absorption” or “merger by way of incorporation”.
- The provisions of sec. 87, 87a BGB are mandatory, *i.e.* they cannot be restricted or excluded by the articles of association.
- Special case of dissolution: in sec. 87b BGB now own special provision for **foundation insolvency**; in practical terms, however, no change in content compared to the previously existing legal situation.

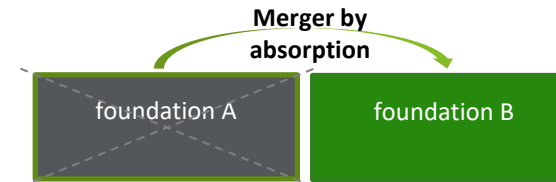
## The 2023 Reform's Changes/Novelties In Detail (4)

### Topics "Foundation Conversion Law" / "Termination of Foundation"

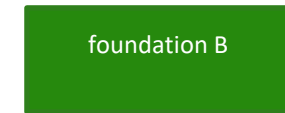
#### Merger By Absorption, sec. 86 BGB

- **Transfer of the foundation's capital as a whole** by way of universal succession from the **transferring foundation to the already existing receiving foundation**.
- Suffices that purposes of transferring and acquiring foundation essentially correspond; **no identity of purpose required**.
- Procedure: Conclusion of a **written supply contract, approval by foundation supervisory authority**.

Before



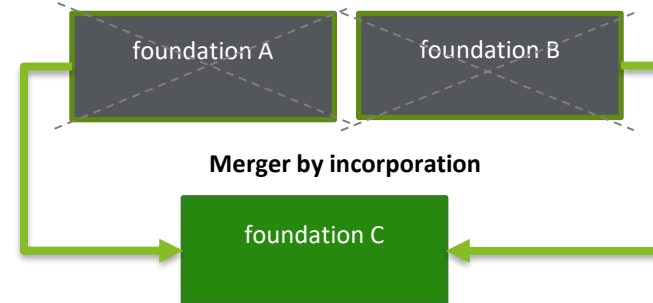
After



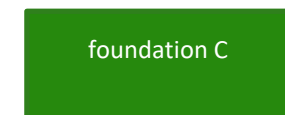
#### Merger By Incorporation, sec. 86a BGB

- Transfer of the foundation's capital as a whole by way of universal succession **from at least two transferring foundations to a newly established foundation**.
- The procedure and formal requirements are essentially the same as those for the addition.

Before



After



## The 2023 Reform's Changes/Novelties In Detail (5) Topic „Creation of a Central Foundation Register”

- Central “genuine” novelty of the amendment: creation of a **nationwide central foundation register effective January 1, 2026.**
- **Federal Office of Justice** (*Bundesamt für Justiz*) as the body **responsible for keeping the register.**
- **Entries** in the foundation register **only have declaratory effect**, *i.e.* entry is not a prerequisite for the effectiveness of the fact to be entered in each case (*e.g.* effectiveness of the establishment of the foundation is still linked to the foundation agreement and recognition by the supervisory authority).
- **Publicity effect** of entries in the foundation register (as in the case of entries in the commercial register, sec. 15 para. 1 German Trade Act (*Handelsgesetzbuch – HGB*), *i.e.* a fact can only be countered by the foundation against third parties if this fact has been entered in the foundation register.
- After entry in the register of foundations, the foundation in question must bear the suffix “**e.S.**” or (in the case of consumer foundations) “**e.VS.**”.
- According to sec. 2 German Foundation Register Act (*Stiftungsregistergesetz – StiftRG*), facts to be entered are, for example:
  - Name, seat and date of recognition of the foundation,
  - Name, date of birth, place of residence, power of representation of directors,
  - Amendments to the articles of association made after registration,
  - Dissolution of the foundation etc.

- In principle, **anyone** is permitted to inspect **the foundation register.**
- **Important restriction:** The documents submitted to the foundation register can only be viewed if access to the documents has not been restricted or excluded on the basis of a legitimate interest of the foundation or third parties, sec. 15 para. 1 sentence 2 StiftRG.

### Advantages of the foundation register

- Should make it **easier for the foundation to participate in legal transactions**, since extracts from the register can be used as proof of the existence and representation of the foundation.
- The lengthy process of **obtaining certificates of representation**, which has been necessary up to now (especially for notarizations), is **no longer required**, which should also considerably relieve the foundation supervisory authorities.

## The 2023 Reform's Changes/Novelties In Detail (6)

### Excursus: Adaptations of the state foundation laws

- As a result of the amendment to the law governing foundations, civil law relating to foundations is now governed **conclusively and uniformly throughout Germany by sec. 80 et seq. BGB.**
- Since the federal government has made use of concurrent legislation (*konkurrierende Gesetzgebung*) in this respect, state foundation laws must be limited to procedural and supervisory issues. In this respect, there is a **need for adaptation/amendment of state foundation laws.**
- Despite lead time of 2 years, implementation of the amendment at the state level has been very slow in some cases. As of today: no implementation in Berlin, Saxony, Saxony-Anhalt, Saarland, Thuringia, Rhineland-Palatinate, among others.

#### Example „Bavaria“ / „BayStG“

- Law amending the Bavarian Foundation Law (*Bayrisches Stiftungsgesetz – BayStG*) **passed on July 24, 2023, entered into force on August 1, 2023.**
- Follow-up adjustments against the background of the amendment to foundation law / standardization and centralization of foundation civil law at the level of sec. 80 et seq. BGB.
- Supervision by the foundation supervisory authority is limited to the cases provided for in sec. 80 et seq. BGB, *i.e., e.g.* recognition of the foundation (sec. 80 para. 2 BGB), amendments to the articles of association (sec. 85a para. BGB), mergers (sec. 86b para. 2 BGB).
- Only particularly far-reaching structural measures are still subject to approval, *e.g.* amendments to the articles of association (sec. 85a para. 2 BGB), mergers (sec. 86b para. 2 BGB) and dissolution (sec. 87 para. 3 BGB).
- **Particularly relevant for practice: deletion without replacement of the previous rule under Art. 19 BayStG for foundations under private law.**



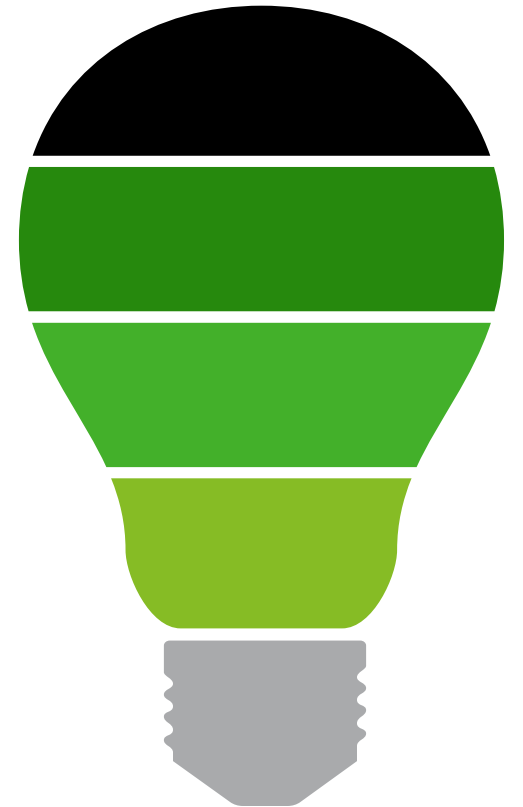
## The New Foundation Law After The 2023 Reform – Interim Conclusion

### Positive

- Standardization of foundation civil law on the basis of sec. 80 et seq. BGB creates legal certainty, should increase the attractiveness of the legal form “foundation”.
- Foundation register facilitates participation of foundations in legal transactions.

### Need for improvement

- Introduction of a lifetime amendment power for founder(s) still desirable.
- There are still some uncertainties with regard to the handling of the revised state foundation laws.
- Introduction of foundation register to start only in early 2026.



# The Foundation

## – A Suitable Instrument For Business And Asset Succession?

# Which Motivations Typically Speak For The Establishment Of A Foundation?



## The Three Main Groups Of Motivations

### (1) Charitable/Non-Profit Motives

- **Private person as founder:** giving something back to the general public/society (“doing good”), long-term maximization of public welfare promotion
- **Company/Association, etc.:** Fundraising, marketing

### (2) Securing company and asset succession

- Wish to **maintain the independence of the (family)-business**
- To preserve one's own life's work or the assets built up by the family over many generations and to provide the family with long-term financial security (“**asset protection**”).

### (3) Tax considerations, such as the prevention of exit taxation

# What Motivations Typically Speak For The Establishment Of A Foundation?



## Charitable/Non-Profit Foundations (1)

- **Selfless, exclusive and direct promotion of charitable, benevolent or ecclesiastical purposes (sec. 51 AO)**
- **Examples of charitable purposes:** promotion of science and research, education and upbringing, art and culture, sports, youth and elderly welfare
- **Tax Benefits**
  - Income tax exemption – exception: economic business operations
  - Inheritance tax/gift tax exemption (sec. 13 para. 1 no. 16 German Inheritance and Gift Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz – ErbStG*))
  - various exemptions/concessions for other types of tax (*e.g.* Value Added Tax Act)
  - Issue of donation receipts – special expenses deduction
  - Acceptance of asset stock donations, sec. 10b para. 1a EStG – increased special expenses deduction
  - retroactive inheritance tax exemption, sec. 29 para. 1 no. 4 ErbStG
- **Establishment**
  - No special characteristics under civil law – as a legally capable or dependent foundation
  - Articles of association and actual management must meet requirements of sec. 52 et seq. AO must be fulfilled
  - Obtain confirmation of formal compliance with the articles of association from the tax office
  - Determination notice according to sec. 60a AO – authority to issue donation receipts

# What Motivations Typically Speak For The Establishment Of A Foundation?



## Charitable/Non-Profit Foundations (2)


- **Essential specifications**
  - Appropriation of funds
  - Timely use of funds
  - Asset seizure clause – asset commitment
- **Tax declaration:** Frequency (generally every three years), delimitation of the 4 spheres (non-material sphere, special-purpose business, asset management, business-as-usual sphere)
- **Economic business operation** (*wirtschaftlicher Geschäftsbetrieb – wGB*)
  - for own economic activity
  - But also corporate investments (partnership, corporation)
- **Family care** with the help of the charitable foundation
  - Third party solution: A maximum of one third of the foundation's income may be used to support the founder/relatives (sec. 58 no. 6 AO)
  - Quota (reservation) usufruct of the income from the participation in the company – transfer of encumbered assets
- **Special features of the charitable foundation compared to other legal entities** (*see above*)
  - Sec. 62 para. 4 AO (savings reserve)


# What Motivations Typically Speak For The Establishment Of A Foundation?




## Family Foundations In Business Succession

### General Considerations

 Bundling of family assets: unified management and investment, avoidance of micro-holdings for larger families (multiple generations).

 Family foundation as (part of) family charter: specification of values/guidelines/principles by founder in articles of association

 Long-term livelihood/wealth security for all family members through beneficiary status

# What Motivations Typically Speak For The Establishment Of A Foundation?



## Family Foundations In Business Succession

### Inheritance and gift tax

- In principle, the transfer of assets to the family foundation is subject to inheritance and gift tax (tax exemption for charitable foundations not applicable)
- Subsequent inheritance of natural persons does not trigger inheritance tax for family foundation assets
- Inheritance tax every 30 years: fictitious inheritance for all assets of the family foundation
- Testators with larger business assets or shareholdings should bear in mind that the inheritance and gift tax relief of 85% or 100% can only be granted in full for preferential assets of up to EUR 26 million (subject to further conditions). The heirs could therefore be hit with a tax claim for which they have to use up to 50% of the value of their private assets and the other non-tax-privileged inherited assets (*“Verschonungsbedarfsprüfung”*).
- This problem can be counteracted by transferring the company shareholdings to a family foundation. If the foundation only receives the business interests as tax-privileged assets, in some cases it can even be granted almost complete tax exemption on application and subject to further conditions. It must be ensured that the business assets do indeed consist predominantly of favored assets. We will be happy to advise you on this!

# What Motivations Typically Speak For The Establishment Of A Foundation?



## Family Foundations In Business Succession

### What is behind the term “exit taxation”?

- Pursuant to sec. 6 of the Foreign Tax Act, the hidden reserves of a significant participation in a corporation (participation quota of at least 1%) are generally taxed upon departure as if the shares had been sold by the natural person (shareholder).
- This can trigger an unexpectedly high income tax burden without the taxation being offset by a corresponding flow of liquidity.



## Welche Motive sprechen für die Errichtung einer Stiftung?



### Family foundations in business succession

#### How can a foundation help avoid exit taxation?

- A foundation, as a non-member legal entity without shareholders, can help secure assets and provide flexibility in the event of a move abroad.
- For this purpose, the shares in the corporation must be transferred to a foundation with legal capacity with its place of management in Germany.
  - ➔ Germany continues to have the right of taxation
- This transfer is usually exempt from income tax and in some cases also from gift tax (see slide 23).
- As a result, taxation under the Foreign Tax Act does not apply in the event of a departure, as the original shareholder is no longer the holder of a substantial interest.
- The foundation can be structured as a family foundation or a charitable foundation.

# Q&A



**Thank you**  
for your attention

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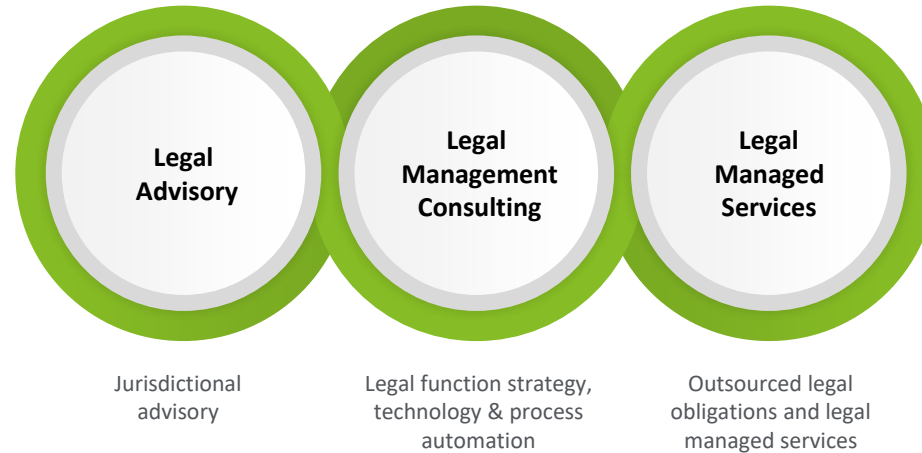
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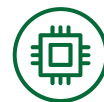
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