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Civil Society under the Treaty of Lisbon: Relationship between National Public Benefit Organizations and European Union Policy?

Lia C.R.M. Versteegh

Abstract

The active involvement of European citizens became a new form of democracy in the Treaty of Lisbon of 2009 by the introduction of a whole new chapter dedicated to this purpose. There is an article that obligates the Commission to give serious consideration to the demands of one million citizens from a significant number of Member States. The treaty also provides for a better role of NGOs such as foundations and associations. However, there are uncertainties concerning the definition and the nature of the concept of civil society of which NGOs may be regarded as typical. The European Union gives as leading principle of civil society the concept of voluntariness. Currently, the legal typology of NGOs in the European Union is determined by national laws of the Member State. The present forms of NGOs show great differences regarding formal requirements. There is a variety of legal forms available in EU Member States for public benefit organizations as typical civil society organizations. In the concept of European Union governance there are different concepts about which role civil society could or ought to play in Europe's governance structure. One of these concepts is that the European Union cooperates with the national civil society institutions through partnership agreements. However, the European Union provides no indication of ways to measure whether an organization can be considered as a public benefit organization. Also, the supervising competences in the EU Member States are different. As a result of these the participatory democracy in the EU does not reflect the power of Europe's civil society.

KEYWORDS: civil society, national public benefit, European union policy, Treaty of Lisbon

1. Introduction

The Treaty of Lisbon has recently been introduced in the European Union. It consists of two parts, i.e. the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).¹ The first part deals with shared concepts among the European Union Member States and observes European values. The second part deals with the functioning of the European Union and is based on the principle of equality of Europe's citizens. Article 10 of this treaty states that the functioning of the Union shall be founded on representative democracy as established in the TEU. However, citizens and their representative associations are given the opportunity to make their views known and publicly exchange ideas on all subjects of Union action. To that purpose, Article 11 of the treaty gives European institutions the capacity to maintain an open, transparent and regular dialogue with representative associations and civil society.

Historically, there is great diversity in the regulations regarding NGOs among Member States of the European Union. Moreover, there is no common institutional structure for NGOs within the European legal framework. Also, no coherent national legal concept exists on the idea of participatory democracy. Every European Union Member State has its own views on the establishment of civil society organizations. As to NGOs in the European context, until recently only publications without legislative authority have published the ideas of European experts about possible regulations for associations and, where appropriate, for foundations functioning across EU countries.² Organizations the EU has actively worked on include the EU Mutual Society and the EU Association.

The main aim of this article is to look at European Public Benefit Policy regarding civil society organizations and the national supervisory systems relevant to these organizations. Also considered is the other legal system in Europe: that of the Council of Europe, which provides Recommendations for NGOs operating in its Member States.

The United Nations (UN) acknowledges the consultation status of NGOs. This gives them the right to participate in resolutions and deliberations within the

¹ The Treaty of Lisbon was signed on 13 December 2007 and entered into force 1 December 2009. It amends the Treaty on European Union (TEU) (= Treaty of Maastricht) which still is called Treaty on European Union and the Treaty establishing the European Community (TEC) (= Treaty of Rome) which is renamed the Treaty on the Functioning of the European Union (TFEU). Both treaties have the same legal rank. (Article 1 TEU).

² COM (91) 273 final-SYN 386 of the Commission of the European Community; Klaus Hopt, c.s. (eds.), *The European Foundation, a New Legal Approach*. Verlag Bertelsmann Stiftung, Gütersloh 2006.

Economic and Social Committee (ECOSOC) of the UN. However, the position of NGOs according to UN standards is not the subject of this article.

2. The Need for Citizen Participation

Until the Amsterdam Treaty of 1997 the creation in Europe of economic and social objectives was considered to be of prime importance for peace, political freedom, economic performance and social cohesion. The EU in the post-Amsterdam period can be described as a new type of political entity that expresses the need for new and visionary ideas and a joint effort to implement them. Given the major challenges the expansion of the EU in 2004 has posed for European integration, the importance of establishing a common European identity based on a common value system is now a major goal.³ All this is grounded in the idea that the European Union should provide governance on one level, while the citizens and citizens' organizations would function on different levels, primarily those of the European Union's Member States. Matters of common interest in the European Union are not automatically supported by the citizens of the European Union. Greater engagement of nationals in European issues and the inclusion of citizens in the process of decision-making could not be realized without new mechanisms for democracy within the European Union. The active involvement of European citizens should create a new form of democracy. An entirely new chapter was dedicated in the 2009 Treaty of Lisbon to this purpose. Thus, the treaty explicitly acknowledges the dimension of participatory democracy which consists of participation in the democratic life of the Union.

Paragraph 4 of Article 11 of the Treaty on the European Union (TEU) is called The New Citizens' Initiative Right. This allows a million citizens to address themselves directly to the Commission and bring forward new proposals on European items. The Commission is obligated to give serious consideration to demands made by a million citizens from "a significant number of Member States". The question is, what is meant by "a significant number of Member States"? Did the drafters of the Treaty want to ensure that initiatives be sufficiently representative of a Union-wide interest, and that local initiatives be avoided? How to collect signatures is not clear; potentially they could be collected electronically. Another uncertainty is how the Commission will respond to the initiatives of the million citizens. The requirements in terms of admissibility and substance are not stated, neither is the timeframe for submitting an initiative nor the process to be followed.

³ OJ C 329, 17.11.1999, pp. 2-11.

3. Consultation of Civil Society

European citizens wishing to organize themselves in civil society organizations must use existing national civil society organizations, such as foundations and associations. A civil society organization's operation in cross-border situations could become a model for coordination with the EU. As a result of earlier developments, the treaty of Lisbon states that civil society will play an important role in the European Union. According to its Article 11, European institutions must maintain an open, transparent and regular dialogue with representative civil society associations. The term "civil society" is designed to indicate those organizations to which people belong voluntarily, outside the influence of the authorities, the market, and family and friend relations. In addition, it stands for political and social ideals, such as the commitment of citizens to a public cause, the increase of social self-rule outside formal politics, and the reinforcement of community spirit.⁴ In legal terms civil society falls under the subsidiarity principle of the European Union. This means that the European Union should only act within those fields of competencies attributed to it and presupposes that the EU intervenes where necessary and withdraws where actions may be taken at national or regional levels.⁵ The 2009 Lisbon Treaty grants a new position to European citizens as participants of European democracy through broad civil dialogue between citizens and citizens' organizations in the European Union. The initiative started in 2001 when the European Commission offered help to non-EU and young EU countries to become familiar with the organizational structures of civil society.⁶

The results of these proposals for change can be seen in paragraph 3 of Article 11 of the Treaty of Lisbon. In that paragraph, the European Commission is given the task of carrying out broad consultations with the parties concerned to ensure that the Union's actions are coherent and transparent.⁷

⁴ P. Dekker, *De oplossing van de civil society. Over vrijwillige associaties in tijden van vervagende grenzen.* (Den Haag: Sociaal en Cultureel Planbureau, 2002.) p. 10.

⁵ K.A. Armstrong, "Rediscovering Civil Society: The European Union and the White Paper on Governance. *European Law Journal*, Vol. 8, No. 1 March 2002, p. 110-111

⁶ Opinion of the Economic and Social Committee on "Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper, OJ C 193, 10.7.2001, nr. 4.8.

⁷ Article 11 para3 Lisbon Treaty states: The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Articles in the Treaty also provide an enhanced role for NGOs, such as foundations and associations, in the European integration process. They do not imply that the European Union has any formal jurisdiction over their legal position. The main questions are: which organizations are considered as participants of European civil society and which principles of NGO-law apply under European Union law? To find answers to these questions it is necessary to look at the development of cooperation between the European Union and civil society in recent years.

4. European Legal Institutions for Civil Society Organizations?

The aim of the Treaty of Lisbon, to provide an improved role for NGOs within the European context, stems from various political debates and initiatives within Europe after the introduction of General European Corporate Law in the late 1990s, such as when the for-profit European Company was established.⁸ The Commission has a legal basis to intervene at the Member State level. The argument against creating a European organization for nonprofit activities is that EU institutions should not interfere in areas that could conflict with possible domestic legal traditions.⁹ The inclusion of the principle of participatory democracy in the Treaty of Lisbon implies that parties possibly affected by a decision should be involved in the opinion-forming process. Article 11 of the TEU covers a range of patterns for consultation and discussion but does not indicate a clear distinction between civil dialogue and lobbying.¹⁰ The policy of open access to the Commission is meant to provide the Commission with fresh information, private actors can fulfill that role.¹¹ Institutionalization of civil dialogue and imposition of minimum requirements should qualify organizations as partners for such dialogue with the Commission. To this purpose, the establishment of European civil society organizations could help to distinguish between civil dialogue and lobbying.

⁸ Legal initiatives for Commission action to establish European civil society organizations should find a Legal basis in the European Treaties.

⁹ J. Kendall & Laurent Fraisse, "The European Statue of Association: Why an obscure but contested symbol in a sea of indifference and skepticism?" Third Sector European Policy Working Papers, number 11. London School of Economics and Political Science, p. 8.

¹⁰ D. Obradovic, "Civil Society and the Social Dialogue in European Governance", in: Yearbook of European Law 2005, Volume 24, pp. 261-237, p. 262.

¹¹ I. Michalowitz (2004), "Lobbying as a two-way strategy: interest intermediation or mutual instrumentalisation?" in Andreas Warntjen and Arndt Wonka, (eds.), Governance in Europe: The Role of Interest Groups, Baden-Baden: Nomos, p. 81.

A legal basis for the establishment of a European Association is found in the anti-discrimination article on the grounds of nationality. This legal basis could provide a European Statute of Association¹² as an instrument against discrimination toward nonprofit entities. The background to the proposed European Statute of Association was to enable associations to take advantage of the single market in the same way as companies can. This initiative has failed to make any progress for almost fifteen years.¹³

The Communication on promoting the role of voluntary organizations and foundations in Europe¹⁴ resulted in a public consultation on the difficulties foundations face when operating cross-border, on a possible European Foundation Statute, and how such a Statute might affect donors' and founders' attitudes. In 2007 the Commission launched an in-depth assessment of the feasibility of a European Foundation Statute. Consultations of concerned parties are still continuing.

Other European instruments designed to help civil society organizations are the Statute for a European Cooperative Society (SCE)¹⁵ and the European Mutual Society.¹⁶ The Statute for a SCE was adopted in 2003 by the Council¹⁷ and is meant to satisfy its members' needs and/or the development of their economic and social activities through one or more SCEs and/or national cooperatives.¹⁸

A proposal for a European Mutual Society presented by the Commission in 1993 specified "an autonomous association of persons (legal entities or natural persons) united voluntarily, whose primary purpose is to satisfy their common needs and not to make profits or provide a return on capital". It was to be managed according to solidarity principles among members participating in corporate governance. The Commission withdrew this proposal due to the lack of

¹² Proposed Statute for a European Association

¹³ The delay is related to the process that included the European company (Societas Europaea) and cooperatives statutes. When the European company statute was adopted, there was new attention for this Draft Statute.

¹⁴ The role of voluntary organizations and foundations in Europe. COM (1997) 241 final – 06.06.1997.

¹⁵ Statute for a European Cooperative Society, Council Regulation (EC) No 1435/2003 of 22 July 2003.

¹⁶ European Commission Proposals COM (91) 273/V and VI final.

¹⁷ Regulation on the Statute for European Cooperative Society, Regulation (EC) No 1435/2003.

¹⁸ See, Note 11, Article 1 para 3.

interest in a large number of Member States. For the same reason, the European Statute on Association was withdrawn in 2006.¹⁹

Although legal instruments are expected to offer advantages in cross-border activities of NGOs, the process of accepting legislation for civil society organizations has been arduous and until now the drafts presented have failed to be accepted by EU institutions. Instead the Directorate-General for Employment and Affairs in Brussels developed “civil dialogue” with civil society organizations alongside the “social dialogue” with employers and trade unions.²⁰

Another important factor is the interest in the Open Method of Coordination, a method of decision-making based on mutual agreement on policy objectives by Member States. This method of decision making has been officially accepted in addition to the tradition legal way of decision making,²¹ the community method. According to this method, NGOs could be involved in a process of decision-making by the EU as part of the reinforcement of European democracy. This method is formally non-binding but normatively potentially important. It is seen as “soft law” since it does not provide sanctions and does not allow challenges for non-compliance.²² The method is aligned with a form of “participatory democracy” for elected NGOs evident from the European Employment Strategy,²³ and from cooperation with NGOs at the European level such as the European Network against Racism (ENAR) and the European Anti-Poverty network (EAPN).

However, in 2009, the European Parliament adopted a Resolution on Social Economy, proposing a special legal framework for the promotion of the social economy. Although the social economy is not universally accepted as a distinctive sector throughout the European Union, the proposal mentions the need

¹⁹ Follow-up to the European Parliament Resolution on Social Economy, adopted by the Commission on 21 April 2009, A6-0015/2009/P6_TA-PROV (2009) 0062, p.3.

²⁰ Obradovic, o.c., p. 272; the subject of “social dialogue” is part of the Treaty of Lisbon and has been established between the European level management and labour. The treaty endows associations representing employers and employees at the European level, the so-called social partners, with law-making and law- implementing powers.

²¹ April 2009.

²² D.M. Trubek & L. G. Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination”, *European Law Journal*, Vol. 11, No. 3, May 2005, p. 343.

²³ European Employment Strategy, decided at European Council Luxembourg Summit, Extraordinary European Council Meeting on Employment 20 November 1997.

for recognition of European statutes for associations, mutual societies and foundations.²⁴

5. Common European Features of Civil Society Organizations

The formal reference in the Treaty of Lisbon to civil society and civil dialogue suggests that the concept of civil society was developed within the Treaty framework. However, the Commission developed the concept outside the treaty structure. Civil dialogue is characterized by a consultative and advisory function.²⁵

Cooperation between the European Commission and civil society started in 2001 when the European Commission concluded Protocols on co-operation with the Economic and Social Committee (ESC) and the Committee of the Regions (CoR) in order to reinforce its function as intermediary between organized civil society (ESC) and regional bodies (CoR). In order to create European participatory democracy, all relevant interests in society had to have an opportunity to express their views. Civil society organizations were considered important for European participatory policy. The Commission saw the specific role of these organizations as closely linked “to the fundamental right of citizens to form associations in order to pursue common purposes, as highlighted in Article 12 of the European Charter of Fundamental Rights.”²⁶ However, no common use of the term “civil society organization” exists.

According to the Commission only the features of NGOs active in the “third sector”, in this case the non-governmental and non-economic²⁷ field, count in the concept of European civil society. In its list of common features for NGOs the Commission stipulates that their aim is to generate impersonal benefit; they do not distribute profits or surpluses to members or management; and they are

²⁴ Follow-up to the European Parliament Resolution on Social Economy, adopted by the Commission on 21 April 2009.

²⁵ European Commission (1996), “Progress report on the implementation of the Medium-Term Social Action Programme 1995-1997”, Social Europe, Supplement 4/96, p. 17; European Commission (2000), “commission discussion paper ‘The Commission and non-governmental organizations: building a stronger partnership’”, COM (2000), point 1.3.3.

²⁶ Communication from the Commission: Towards a reinforced culture of consultation and dialogue – Proposals for general principles and minimum standards for consultation of interested parties of the Commission. COM (2002) 277 final, p. 5 not 5: “everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters (....)”.

²⁷ Non-economic field deals with activities that are meant for the public good and the organizations aim is not to make a profit.

voluntary, i.e., that there is usually an element of voluntary participation in the organization. They are also expected to have formal statutes setting out their mission, objectives, and scope and accountability to donors. NGOs are independent in particular from governmental and other public authorities and political parties or commercial organizations.²⁸

In order to be able to cooperate with NGOs in the European Union, the Commission established an expert group called CONECCS to maintain information on civil society organizations active at the European level. This organization became operational in 2002.

Article 11 of the Lisbon Treaty assumes open, regular and transparent relationships in the EU with representative associations. However, there are not yet common requirements for NGOs in the European Union nor common minimum requirements for NGOs operating in cross-border situations within the European Union. Due to the subsidiary principle, the European Commission is not competent to give rulings concerning NGOs operating at the European level. For the legal requirements and purposes of NGOs we need to look at the legal structures of NGOs in the different European Member States.

6. National Features for NGOs influenced by the Council of Europe²⁹

From the perspective of the European Union many organizations might be considered NGOs.³⁰ The place of voluntary organizations in EU Member States depends on national traditions and the dominant ideology regarding the position of civil society. In some countries the traditions are liberal³¹, whereas in other countries the civil society traditions started with the end of dictatorship in Central and Eastern Europe.³² Until now, in western and eastern European communities, the leading principle of civil society is the concept of “voluntariness”.

Currently, the legal framework of national NGOs needs to be formalized for further cooperation within the European Union. The present forms of non-governmental organizations in the European Member States show great

²⁸ European Commission, “Promoting the Role of Voluntary Organizations and Foundations in Europe”. COM 1997/024 final.

²⁹ NGO law in European Union Member States differ enormously. It just mentions some remarkable examples without documenting in detail all the differences.

³⁰ See note 28.

³¹ England and the Netherlands

³² We can think of the Czech Republic, Hungary, Poland and Slovakia.

discrepancies regarding formal requirements. These include notions such as legal forms, governance issues, registration and supervision, transparency and liability of board members. European continental law countries are familiar with membership associations, such as associations and non-membership organizations, including foundations. The French legal system influences Western European continental law countries. This differs from the common law system existing in Anglo-Saxon countries such as the United Kingdom and Wales. Common law countries make no distinction between these types of organizations. In common law countries different legal forms for public benefit organizations are available.³³

All European Member States acknowledge the European Convention of Human Rights of the Council of Europe in which the freedom of association and expression are recognized as fundamental principles. Limitations to these freedoms will be interpreted differently by the various national Member States. Finally, the European Court of Human Rights dealing with cases on freedoms and restrictions, guarantee a minimum level of uniformity among Member States. A general restriction is that NGOs have to operate within the limits of a democratic society. This restriction meets the requirements of the Recommendations of the Council of Europe³⁴ and can be seen as an alternative version of the restriction in Article 11 of the European Convention which states that the State may restrict the freedom of association if it is necessary in a democratic society for the protection of public health, order and safety and the rights of third parties.

7. Concept of Public Benefit in European Union Member States

The term “public benefit” refers to a special status for an organization. The practice of public benefit has historical roots: In England it dates back to 1601 when the English Statute of Charitable Uses was introduced. It was meant to list charitable sources and activities, and to distance them from misuse. Poverty and care for the sick and disabled, the building of bridges, maintenance of roads and other public benefit subjects were seen as charitable purposes. Regarding public benefit purposes, a great variety of legal forms exist in the EU Member States, ranging from those with an altruistic purpose (Belgium) to a purpose in conformity with the charity law (England), and including a broad range of

³³ The establishment of a charity differs according to the legal form of the charity. Charitable trusts can be established by gift or by bequest through written document. Charitable companies are established by local authorities and companies with non-commercial purposes get established according to the company law regulations.

³⁴ See Recommendations Council of Europe, Recommendation nr. 11.

subjects, relevant as long as they are meant for general interest and not for private gain. Sometime economic purposes are either not permitted or are allowed under certain conditions.³⁵ A general restriction is that the profits of the public benefit organization may not be allocated to its members or directors.

Recently, the notion of public benefit has been expanded. In civil law countries the public benefit status may be required to obtain certain privileges or benefits for the organization. The essential aim is to promote public benefit activities. The Eastern European countries of Hungary and Poland enacted specific laws on public benefit.³⁶ In other countries tax law lists public benefit activities and defines fiscal privileges for public benefit organizations pursuing public benefit purposes. Tax exemptions may take a variety of forms such as exemptions on organizations' income, tax incentives for organizations' donors, and VAT relief. For instance, in the Netherlands and Germany, acquiring public benefit status is determined by the objectives and activities of the organization. The essentials deal mainly with the pursuit of specific ends, the activities of the organization not consisting of economic activities further than the scope of the objects or purposes stated in its articles of association. These conditions will have different consequences for the participants of public benefit organizations.³⁷ In the context of European policies requirements of members of the organization are just characteristics and do not serve yet as a minimum standard for voluntary organizations and associations.

The authority competent to qualify approval of the establishment of a public benefit organization is dependent on the laws of the Member State awarding the public benefit qualification.

8. Legal Forms of Public Benefit Organizations in European Union Member States

Various legal forms of public benefit organizations exist within the European Union. Public benefit NGOs deal with the common good and national laws may

³⁵ This is the case in Greece where economic activities are supported for the realization of the purpose of the NGO. The same situation exists in Russia. There the government may put limits on the types of economic activities in specific laws.

³⁶ Poland enacted a Law on Public Benefit Activities and Volunteerism in 2003; Hungary established a law on Public Benefit Organizations in 1997. See note 46 and note 48.

³⁷ For the founders and the members of the governing body, it will mean that they should not be the main receivers of the activities carried out by the entities. For the trustees, the representatives according to the articles of association and the members of the governing body it will imply the stipulation not to be remunerated.

stipulate formal requirements in order to protect property for the common good. Fear of control of property may engage competence for the authorities to limit certain transactions of public benefit NGOs. It is not clear how governmental interference should be characterized. It could be seen as a restriction necessary for public order or in the interest of the general public. The extent of restrictions can be derived from the judgments of the European Court of Human Rights in Article 11 of the ECHR.

The Treaty of Lisbon gives no clarity to the relationship between formal criteria of NGOs in the Member States and the idea of participatory democracy in the European Union. The fulfillment of certain formal criteria as described by the European Commission, will give NGOs admittance to cooperation within the European Union. It is also not clear which purposes of NGOs will guarantee participation under the Lisbon treaty and which criteria will guarantee cooperation between NGOs in cross-border situations. Some European Member States are well known to have the restriction that NGOs should be used solely for the public benefit. This, for example, is the case with the law for foundations with a public benefit purpose in Italy.³⁸ In other Member States NGOs can be used for public benefit purposes as well as economic purposes. Foundations and associations may qualify for public benefit according to a specific law that makes them NGOs with special public benefit status. (This is usually the case in Belgium³⁹, Hungary⁴⁰, the United Kingdom⁴¹ and Poland⁴².)

³⁸ The public benefit NGOs in Italy have special laws stating particular requirements for granting the particular legal status; some of these requirements are common to most legal forms, while others are peculiar to a particular one. The common requirements are: to pursue solidarity and/or collective purposes, express exclusion of dividend distribution or distribution of other benefits in favor of members or of beneficiaries of services/activities. There are also laws regarding not for profit organizations, which will not be dealt with in this article.

³⁹ For a foundation it is possible to request the recognition as a foundation serving a public interest, if the foundation aims at realizing projects of philanthropic, philosophical, religious, scientific, artistic, pedagogic or cultural nature according to Article 27 para 4 NPO- law.

⁴⁰ In Hungary foundations and associations may qualify for public benefit or prominently public benefit status according to the regulations of Act No 156 of 1997 on public benefit organizations. Public benefit or prominently public benefit status does not constitute a different legal form for the foundation or association.

⁴¹ An NGO whose purposes are for the public benefit may attain charitable status, although public benefit is not itself sufficient. The NGO must also exist to promote a charitable purpose. See Case law: *Williams' Trustees v IRC* (1947) AC 447 (HL).

⁴² All associations and foundations may apply for a status of Public Benefit Organization according the rules and procedures listed in the Law on Public Benefit Organizations and Volunteerism, adopted in 2003.

Or the public benefit status of the NGO may be determined by supervising authorities⁴³.

However, the economic activities of public benefit NGOs are restricted by individual national laws. The pursuit of ends should be focused on the general interest and a certain amount of the yields and revenues should be assigned to those ends; also, the activities of these organizations should not consist of economic operations beyond the scope of their objectives or purposes as stated in the Articles of Association.⁴⁴ Another general restriction is that the profits for public benefit activities may not be allocated to the members or directors of a public benefit NGO.

In its 2003 Action Plan the European Commission launched a proposal aimed at assessing in depth the feasibility of a European Foundation Statute.⁴⁵ The proposal expressed the wish to be more explicit about the rules desirable for the internal structure of NGOs. Until now, no formal proposal for a European Foundation Statute has been made.

9. Public Benefit as Focal Point for Participation of NGOs in European Governance

According to the European Union, promoting public benefit activities is one of the most common purposes of civil society throughout Europe. Apart from general remarks on the subject of the European Governance in the White Paper on Governance⁴⁶ and in Commission documents, there is no common idea on public benefit expressed in the European legal framework. On the one hand a tension exists between civil society as a sphere of participatory democracy and the dynamic view of subsidiarity on the other. In the context of EU governance there are different concepts about which role civil society could or ought to play in Europe's governance structure. One of the concepts is that civil society is not a matter of Europe's competences as part of traditional constitutional boundaries,

⁴³ For instance in, Germany, Greece, the Netherlands, Spain, Sweden

⁴⁴ Generally, the organization should not aim to make profit, the assets of the organization should be spent according to the purpose of the organization, annual reports and accounts should be made submitted to the responsible tax authority.

⁴⁵ European Commission, A proposal for a European foundation, the Bertelsmann Stiftung, Gütersloh, in: the European Foundation. A New Legal Approach, Edited by Klaus J. Hopt, W. Rainer Walz, Thomas von Hippel and Volker Then, Cambridge: University Press, 2006; another result is the recommendation for a European Statute by the European Foundation Centre (EFC).

⁴⁶ European Commission, European Governance: A White Paper, COM (2001) 428 final.

but that the European Union cooperates with civil society institutions through structures such as partnership agreements and voluntary cooperation programs.⁴⁷ It performs within diverse national structures and traditions of national Member States. As a consequence, legal public benefit situations differ in Member States. This view means that we should embrace a pluralistic concept of European civil society and a societal public benefit atmosphere dependent on national, constitutional and social traditions. The normative case for civil society and public benefit in the European Union is to be maintained at the national level.

10. Recommendations of the Council of Europe

The European Union provides no way to measure if an organization can be considered a public benefit organization. However, in the context of law it is possible to look at the Council of Europe's Recommendations and prescribing principles for public benefit organizations on the subject of public benefit law. The Council of Europe has adopted public benefit rules in its Recommendations for NGOs. These Recommendations state there is no universal definition of Non-Governmental Organizations. An extremely diverse body of activities is acknowledged as belonging to the principles of public benefit.⁴⁸

According to the Recommendations there are a variety of names for NGOs such as associations, foundations, nonprofit corporations, societies, charities and trusts. There is no requirement for special authorization except that these organizations are "subject to any licensing or regulatory requirements generally applicable to the activities concerned."⁴⁹ It is obvious that the Recommendations do not distinguish among NGOs with a public benefit status and NGOs without a public benefit status. As a consequence, a special legal form for NGOs with a public benefit status is not required, neither is accreditation nor case-by-case recognition of the public benefit character of the NGO.

There are countries in the European Union that adhere to the vision of an NGO with a special public benefit status, such as Hungary and Poland; in the countries that do not adhere to this vision⁵⁰, the absence of a special benefit status requires tax law to set the requirements for recognition as a public benefit

⁴⁷ J. Morison (2000), "The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society" 27 (1), *Journal of Law and Society* 98, p. 103

⁴⁸ Recommendations, CM/Rec (2007) 14, adopted by the Committee of Ministers on 10 October 2007, Basic Principles, Paragraph 1, para 11.

⁴⁹ See last note, o.c., para 14.

⁵⁰ See note 42

organization. Then, the control of public benefit organizations is in the hands of tax authorities that have discretionary powers and are not bound to objective standards, whereas the judiciary seeks normative solutions. From the point of view of organizational freedom, it is important that these authorities should limit their supervisory powers to legitimacy control. What becomes clear is that differences in interpretation of activities of a NGO by tax authorities will lead to diversification in the application of national law, since criteria are left to national laws.

Moreover, differences in tax systems among the European Union Member States also exist and the Recommendations of the Council of Europe do not include any proposal for a general tax system in the European Union or a common legal system.

11. National Supervision on Public Benefit NGOs

The legal framework establishing legitimacy of State supervision in Europe has been established by the European Convention on Human Rights (ECHR) of the Council of Europe and not by the European Union. The subject of freedom of association according to Article 11 of the ECHR is of particular importance in issues of governmental supervision. As NGOs enjoy the rights provided by the ECHR, state involvement may only restrict those rights when provided by law, accompanied by sufficient guarantees against abuse, and when it is necessary in a democratic society to protect the interests involved.⁵¹

In practice, European Union Member States are familiar with one or another form of State supervision. Motives or justifications for State supervision include the protection of the assets attributed to NGOs for a cause of public interest. Another reason, as is the case in Germany, is that the assets of a foundation are used for desirable purposes and to ensure that irresponsible behavior or abuse by the founder is avoided.

At the national level within the European Union there are judicial mechanisms that enforce compliance with national legal obligations applicable to NGOs. These instruments and sanctions are meant to correct behavior of NGOs and their members.

Supervision of public benefit organizations can be regulated through the constitutive document of an NGO. This is called Internal Supervision. Another form of supervision is External Supervision which is exercised by a public authority designated by law. Some EU Member States prefer NGOs to be supervised by fiscal authorities in compliance with (national) tax law. In other cases, supervising authorities may consist of a body of the executive branch of

⁵¹ The interests are the interests of founders, official, donors and creditors of NGOs.

government, or an authority independent of the government, or not exclusively charged with the supervision of NGOs. Supervision may also depend on the ‘philanthropist’, or the ‘public benefit’ status of the association, society or foundation. This is the case in Greece. In England⁵² and Spain⁵³ the supervising authority is a special Commission that is more or less politically independent. Supervisory authorities that are politically independent in various countries are the court or the public prosecutor. In general, supervision is regulated according to the circumstances.⁵⁴

12. National Public Benefit Organizations Operating in Cross-border Situations

Although the Council of Europe recognizes foreign legal organizations in connection with domestic laws, there is no recognition of foreign legal entities and there are no rules concerning cross-border operating NGOs in the European Union. Since freedom of association should also be exercised by non-national people, any limitation on this right must be compatible with the Convention of the Council of Europe.

There is no official European standard for the recognition of cross-border operating non- governmental organizations. Case law of the ECJ of the European Union illustrates the position of NGOs operating in cross-border situations. In the so-called Stauffer case,⁵⁵ the ECJ determined that freedom of establishment of the foundation was not applicable to the Italian-based foundation because the foundation’s residence in Germany was not a permanent one even though the services additional to the building of the foundation were provided by a German agent. Under the heading of “free movement of capital/investments in real estate” the ECJ undertook to judge the case. However, it was not competent to decide whether the Italian foundation was comparable to a tax-exempt German foundation in this specific case and circumstances. This inability meant that the final decision was left to the national courts to decide and interpret national tax law. As the ECJ stated that the compatibility test should be used, the importance of appropriate criteria to perform this test should be considered. It became clear in

⁵² The supervising authority is the Charity Commission

⁵³ The supervising authority is the Protectorate.

⁵⁴ In this respect we can think of the granting of approval for certain acts. We can think of the acceptance of a donation or the amendment of the articles of association. The approval can be given by the minister of justice, which is the case in Belgium. Also, the supervision on the organization can be in the hands of the public prosecutor. In Czech Republic supervision is divided between the ministry of interior and the courts.

⁵⁵ Court of Justice, 14 September 2000, C-386/04, Stauffer Case

this case that the court suggested to the German national judges that the Italian standards of tax-exempt foundations were not adequate. In the Persche case⁵⁶, the ECJ decided that the donation to a foundation could be seen as an inheritance and that cross-border inheritance falls into the scope of the free movement of capital. Therefore, in order to know whether the foreign foundation is comparable to a residential foundation, additional information and tests are required.

National authorities should be able to judge the case from information given by foreign based authorities. In this respect, many difficulties could arise. This case law of the ECJ forces national judges to build their opinion on limited information or no information at all.

The ECJ's competences in cross-border operating public benefit foundations are limited. Uncertainties arising from its case-law are left to the domestic judges to interpret. Therefore the concept of public benefit in public benefit organizations operating in cross-border situations cannot be expected to be uniform, nor can the fiscal conditions for tax facilities. Thus, within the framework of the European Union, cross-border operating organizations may only demonstrate national public benefit standards without any guarantee for beneficiaries and donors involved in the public benefit activities across borders.

13. Concluding Remarks

The Treaty of Lisbon advocates active involvement of citizens and civil society organizations as participating actors in the governing structures of the European Union. Article 11 of the Treaty on participatory democracy signals a transparent and regular dialogue of EU institutions with representative associations and civil society.

First, regarding the participation of individual citizens, there should be a structure for the initiatives of a million citizens. However, it is not clear how the signatures of these citizens are to be collected, nor which requirements exist in terms of admissibility and substance. The meaning of individual participation is left to future rulings. Secondly, in the Lisbon treaty, cooperation with European Institutions by civil society as a whole is seen as “participatory”. However, it will not be a simple issue to deal with this vision, as the European Union provides no clear criteria according to which organizations can be selected for cooperation. In a broad sense, in the European Union numerous organizations might be considered to be NGO organizations as long as the features of NGOs can count which are active in the “third sector”, i.e., in the non-governmental and non-economic field.

⁵⁶ Court of Justice, 27 January 2009, C-318/07, Persche Case

The absence of a European legal form for NGOs and a definition of public benefit make it essential to look at non-governmental organizations operating at the national level. This implies that the European Union should adhere to a pluralistic concept of European civil society in relation to public benefit purposes.

At the European level, the principles of the Council of Europe could be considered, prescribing minimum principles for public benefit organizations, as in the 2007 Recommendations on the subject of public benefit. Regarding supervision of national public benefit organizations, EU Member States sometimes show a preference for supervision of NGOs in compliance with tax law while the supervision of activities of the organization is left to other supervisory authorities independent of government, these authorities being either exclusively or not exclusively charged with the supervision of public benefit organizations.

The striking differences among national NGOs may provoke varied reactions in the acceptance of public benefit status of foreign NGOs, as well as in the way supervision is exercised by foreign national authorities. The concept of participatory democracy in the European Union will be a diffuse and heterogeneous concept with respect to the participation of both citizens and NGOs. The subsidiarity principle will hinder the acceptance of uniform measures in the European Union in connection with European associations or foundations for public benefit. In individual cross-border situations, the ECJ, until now, has decided cases based on freedom of capital movement. These judgements may lead to new concepts of public benefit law. The need to strengthen the power of civil society as the participatory instrument for representative democracy may well provide impetus to the formation of alternative regulations.

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