The acknowledgement of civil society organizations by the EU

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Introduction

Civil society is flourishing all over the world. In some countries they are being encouraged to exist more than in other countries. Generally, civil society is understood to be constituted by informal groups and formal organizations that citizens are free to choose to join. Civil society is the area in which collective social goals are identified and pursued. It should also provide an infrastructure for the representation of citizens. What is common for civil society is its independence from the market and the State. Overall, civil society organizations (CSOs) play an important role as intermediaries between citizens, the market and the state as independent actors. The roles and functions of civil society differ among countries. In this lecture I restrict myself to legal aspects of civil society in the European Union (EU). European norms and views are important for the fundamental rights in the EU; The European Convention of Human Rights (ECHR) is the dominant source of human rights in the European Union. The ECHR provides for fundamental rights for individuals and for organizations, such as the freedom of association and the freedom of establishment. The main questions of my lecture are: is the EU important for the regulation of civil society and/or for promoting civil society in EU-countries and if so, in what way does the importance of the European Union expresses itself?

Historical development

Since 2009, there is a renewed Treaty of the European Union (TEU) in which the EU acknowledges civil society organizations in several dimensions which are described in Article 11 TEU. There are several dimensions in this article.

1. The first dimension deals with the development of a civil dialogue in European civil society and the right of interest groups to participate outside the institutional sphere.
2. The other dimension is the current position of CSOs in the sphere of EU law. This dimension deals with case law generated by the European Court of Justice (ECJ) concerning the right of CSOs and their donors to invoke market freedoms and the implications thereof.
3. The third dimension relates to the efforts of the European Commission to create further opportunities for CSOs to participate in social and economic life throughout the single market by regulating to provide a statute for specific European legal forms for CSOs.
4. The fourth dimensions gives the rights to one million citizens who are nationals of a significant number of Member States to take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

We shall look at the first three dimensions, leaving the fourth outside of the discussion. About the first dimension, the dimension of civil dialogue, we can say that the European Union has demonstrated itself to be able to renew itself in an impressive way: from the start of the European Union the European Union was meant as an economic Union and the European “citizen” was only meant as a market citizen. The interest of the European Commission in civil society organizations occurred when far-reaching changes in society, such as globalization, began to occur. To that purpose the European Commission introduced a so called White Paper on European Governance in 2001, in which the need for a common European Identity was expressed, based on common values, in addition to the traditional major socioeconomic goals and the opening up of the policy-making process to involve more people and organizations in shaping and delivering EU policy. The participation of European citizens of civil society organizations had been initiated with this White Paper in which the European Commission gave “weight to the interaction between civil society and civil society organizations and European Public institutions.” This should be considered as a remarkable new step in the development of civil society organizations in the European Union.

Though, according to the European Commission the concept of civil society also involved the dimension of subsidiarity, which supposes a range of levels in the process of taking legal measures. This principle dictates that power should only be shifted to the EU level when member states are not able to achieve the same results at the national level. As a result of this, the European level will only be the right level when issues cannot be handled adequately at the national level. This approach changed a little with the introduction of the Treaty of Maastricht in 1992, when social dialogues was radically institutionalized in the European Union by the introduction of a so called social paragraph in that treaty. By the introduction of the paragraph, involvement and participation of civil society institutions became part of social dialogue for the European Commission.

**Case-law of the Court of Justice (ECJ)**

The second dimension is to be found in the case law of the ECJ. Case law generated by the ECJ concerning the right of Civil Society Organizations (CSOs) and their donors to invoke market freedoms and the implications thereof started with the question whether public benefit organizations could be exempted from value added tax in EU member states. The ECJ decided that is for national authorities to decide, “in accordance with Community law, in the light in particular of practice which organizations should be recognized as ‘charitable’
within the scope of Article 13 of the sixth Directive on charging value added tax considering the principle of equal treatment which takes - according to the ECJ - the form of the principle of fiscal neutrality. It became clear that the position of charitable organizations has not been fully clarified under European Union law in terms of European tax directives.

In the light of ECJ case law, two situations can be differentiated in cross-border situations of CSOs and their taxation. The first concerns the treatment of a foundation by its State of residence that prohibits the foundation from investing or spending money in another country. The other situation is when a member state places limits on a foreign foundation within its territory. The second situation touches on the area of tax facilities. Member states tend to be reluctant to grant tax privileges to foreign public benefit foundations active within their territory. The ECJ has given guidelines on the very subject in two important cases, the so called Stauffer case and the Persche case. In the Stauffer case de ECJ decided on different treatment for resident and non-resident public benefit foundations. The question put before the ECJ in this particular case concerned the meaning of two of the fundamental market freedoms, freedom of capital and freedom of establishment, the applicability of fundamental freedoms to real estate investments by, inter alia, civil society organizations and whether there was any justification for the restrictions presented in the case. The ECJ decided that the fundamental freedoms were applicable and restrictions on the fundamental freedoms could not be justified in the area of taxation of public benefit organizations. As the ECJ states, the compatibility test should be used which leaves room to national tax authorities to judge the foreign organization in the same way as national organizations. According to the ECJ, treating a recipient civil society organization differently simply because its seat and actual place of management is located in another member state is not consistent with the freedom of capital. In the Persche case the ECJ decided that a donation is not covered by the ambit of freedom of establishment of the Treaty on the Functioning of the European Union, since it is covered under Article 63 TFEU that deals with the freedom of capital. According to Directive 88/361 gifts and endowments and inheritances and legacies should fall into the ambit of freedom of capital, Article 63 of the TFEU. In that respect the ECJ concluded that a donation is not covered by the ambit of freedom of establishment and that the non-discrimination rule was considered applicable to foreign CSOs. The case law of the ECJ forces national judges to base their judgment on potentially limited information if the board of the foreign based foundation does not provide national judges with the required information. However, even if the required information is available, it will be quite a challenge to compare the situations of specific foundations in two or more member states. The ECJ’s focus on the compatibility test as the main item leaves room for national judges to consider whether a donation to a resident foundation is taxable.

Difficulties faced by civil society organizations operating across borders have made the EC to understand the need for a set of minimum requirements for civil society organizations, such as tax facilities. Also, in the interests of EU civil society and its citizens, the European
Commission acknowledges the need to enable European foundations of general interest to be established.

5. Statute for specific European legal forms for civil society organizations

Regarding the third dimension the question is whether the European Union acknowledges specific legal forms for civil society organizations? The idea of developing legal forms for civil society organizations started with the debate over a European Company Statute in the early 1960s. Cross-border activities regarding CSOs introduced the need to establish a European Civil Society Organization. It proved not to be easy to develop a common form for cross-border operating civil society organizations since existing national laws are based on historically developed national organizations. Some legal definitions of national CSOs vary according to legal traditions, such as common law with its emphasis on trusteeship or civil law with its distinction between membership based entities and non-membership-based entities.

To harmonize the differences between cross-border operating organizations, the European Commission launched a feasibility study on the need for a European Foundation Statute in 2006. Earlier, in the 1990s, some draft regulations of European organizations for non-profit organizations were presented, such as the Statute for a European Association (ESA) and the statute for a European Mutual Society. The draft regulations were withdrawn due to a lack of political will. Generally, the introduction of a European form for organizations that are not subject to company law has not been accepted without questions and discussions. There have been many legal discussions on the very subject, for instance, differences between the Member States own rules concerning non-profit organizations are seen as obstacles to harmonizing the law on non-profit organizations. The high level group on company law recommended the adoption of a model law for a Statute for European Association, based on Article 352 of the TFEU. However, this article describes that legislations must be passed by a unanimous vote on the European Council. The proposal has never been transposed into a European Regulation. Other legal forms for European societies are the European Cooperative Society (Societas Cooperative Europae). This legal form was created to remove the need for co-operatives to establish a subsidiary, for instance a daughter company in each Member States in which they operate, and to allow them to move their registered office and head office freely from one Member State to another, keeping their legal identity and without having to register or wind up any legal persons. ¹ This legal form is not applicable on civil society organizations. A proposal for a Council Regulation on the Statue for a European Foundation was presented by the European Commission in February 2012 in order to facilitate the cross-border activities of public benefit purpose foundations. The idea was to make it more convenient for them to support public causes across the EU. To that end, the European Foundation has been recommend as a comprehensive and effective solution for all

tax issues related to cross border charitable donations and fundraising for public benefit CSOs that exist under home country control. The result is the proposal for a European Foundation Statute, which emphasizes public benefit purpose entities that undertake activities in other member states or intend to do so. The main idea is that national CSO can be converted into an FE or that national public benefit organizations merge to form an FE. For CSOs operation cross border, the proposal offers a clear framework. It is revolutionary that the European Commission has opted for a legal method of decision-making rather than taking a judicial route, and by doing so, the Commission has officially acknowledged the legal value of non-profit organizations in the European Union. The proposal has not been accepted. In the end, there is still no common European legal form for (cross border operating) European civil society organizations.

Could the European Commission dictate which European legal form should be accepted for civil society organizations? The main problem for the European Commission is the question of whether the EU principle of subsidiarity is applicable on the case of CSOs. The European Commission tried to convince the EU member State by using the so-called Open Method of Coordination. This is a system of co-ordination and consultation between the social partners within the framework of the European Union. This method aims at the actions of member states on a voluntary basis through common agreements between the parties involved, the European Commission and the member states as the interested parties. The results of the negotiations and agreements are included in the Commission’s guidelines, which are to be transposed into national policies. Comparison of best practices is part of the method. However, regarding CSO, it is to claim to represent civil society because their endorsement of civil society has not been established.

We might be waiting until the European Commission uses a stricter attitude, by acting according to a new European Governance instead of using the Open method of coordination, which is seen as a soft law method. This new method of governance was used by the EU when attempting to respond to the economic crisis which began with the financial crisis of 2008. This crisis developed into a sovereign debt crisis. With such a delicate legislative activity has come a rhetorical reconstruction of the EU’s governance response: there seemed to be a return or revival of the ‘Community’ method used for the specific subject of finance where European policymaking had apparently left the Community method behind. Regarding lawmaking procedures for CSOs could new European Governance be used, indicating a combination of enforceable rights and juridical remedies, in fact a method to encourage implementation of an array of measures and learning.

**Conclusion:**

Regarding the above-mentioned we can say, the EU is important for the regulation of civil society and for promoting civil society in EU countries. The EU has developed enormously

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2 Proposal for a Council Regulation on the Statue for a European Foundation (FE), COM / 2012/035 final – 2012/0022 (APP). This proposal has been withdrawn on 07/03/2015.

3 Official recognition of the system came with the Maastricht Treaty in 1993 for the purpose of macro-economic policies. It has become an important method for implementing EU strategies.

4 The Community method is often treated as a synonym for rules based governance, so called hard law governance.
from a market Union into a Union for EU citizens. However, the forming of a common legal form for civil society organizations has not yet been accepted in a Regulation. Currently, the EU recognizes several legal forms for civil society organizations operating cross-border. The initial steps for individuals of civil society organizations are taken in the sphere of fiscal measures by the ECJ; the withdrawal of the Regulation of European Civil Society Foundation cannot be marked as the end in the search of a common legal form. The European Commission is aware of the possibilities of the Open Method of Coordination. A stricter method of decision making might be useful in order to regulate the legal position of European (cross border operating) CSOs. We are waiting when and how in the near future a Regulation for European civil society organizations can be welcomed.