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THE LEGAL REGULATION OF THE THIRD SECTOR IN THE EUROPEAN UNION

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ABSTRACT

This article analyzes present legislation system on NGOs within the European Union; these are considered as private, voluntary and sef-governing organizations. It is analyzed first the role and types of NGOs organizations taking into account the differences between countries members and the fact that there is not harmonizing direction related to the law on ONGs. Second, the recognition of the legal personality and equal treatment of NGOs is also considered. After, the paper considers some specific aspects of law on NGOs in eleven European countries (legal forms and purposes; establishment and registration; and external supervision). The article concludes emphasizing on present diversity and difficulties to harmonize the legal map of NGOs.

KEYWORDS

European Union, legal diversity, NGOs, voluntary, private organizations, harmonization.

1. INTRODUCTION

In this contribution I want to sketch the situation of the legislation within the European Union with regard to NGOs. It is more an exploration than a summary. In the next paragraph some remarks are made about the roles NGOs are playing in the EU-countries. In paragraph 2 the focus is on the law that is of importance for NGOs in the European Union. There are not many rules of the EU-treaty directly applicable on NGOs. On the other hand several Conventions of the Council of Europe, in which the EU-countries participate, and other documents of the Council are very crucial for the legislators in the EU-countries. In part. 3 is described in how far recognition and equal treatment of foreign NGOs within the EU is realized. In par. 3 the following subjects of Third Sector-law in 12 EU-countries will be discussed: the legal forms and their characteristics, the establishment, including the eventual role of the government, and the supervision on NGOs. The subjects will be dealt with thematically. The different solutions that are chosen by the countries are, if applicable, evaluated on the basis of the European Convention of Human Rights and the Recommendation of the Committee of Ministers of the Council of Europe of 2007.[1] The contribution ends with some conclusions.

The Third Sector is in this contribution understood as the (group of) voluntary private (or non-governmental) organisations that are self-governing and do not distribute profits to its members, board-members etc.[2] 'Voluntary' is in fact already included in 'private'; the organisations must have voluntary participation. For that reason professional associations are excluded,[3] while political

[1] Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the legal status of nongovernmental organisations in Europe (10 October 2007).

[2] Conform Ary Burger and Paul Dekker, The non-profit sector in The Netherlands, SCP The Hague, (2001), p. 5. Slightly different: Recommendation 2007(footnote 2), Explanatory memorandum, nr.18.

[3] Conform Recommendation 2007, Explanatory Memorandum, nr. 21.

parties[4] as well as trade unions are included. The last type of NGOs may have even more protection than other voluntary organisations.[5]

The characteristic 'self-governing' implies that the management board may take its decisions independently and is not subject to the approval of government. In some old member states of the EU the relation between some voluntary organisations and the government is so close that it is disputable if the voluntary organisation (or the government) is still independent. A certain independency between NGO and government is however characteristic for the Third Sector. That certain private organisations are in fact dominated by government may be legitimate, but these organisations are then not considered to be part of the Third Sector.

2. SOME REMARKS ON THE THIRD SECTOR AND ITS ROLE IN SOCIETY

The types of organizations that are covered by the term Third Sector (NGOs) are very diverse in size, form, purpose and societal importance.

Their character may vary from being a vehicle for communication between segments in society and public authorities, the advocacy of change in law and public policy, the elaboration of professional standards etc."[6] The organisations are often intermediaries between the citizens and the state and they are of considerable value for the citizens to learn democracy on small scale. As intermediaries they have a better feeling for the real needs of the people than governmental agencies and they may play therefore an advocacy role. The role of voluntary organisations in social and political life in a specific country strongly depends of the national tradition, legal culture and the dominant ideology regarding Third Sector. Also the ideologies in Europe are different: in some countries, or better under some governments –but they can change-, the liberal, in others the communitarian and in still others the republican (socialist) view is dominant. It can be expected that countries with different ideologies have different norms regarding the place of the Third Sector in society (and in relation to the state). In this contribution I can not explore more on this subject. I will focus here on the legal framework of NGOs. The political mainstream at the moment of the framing of the law is of course important with regard to the rules for the establishment and supervision, but mostly these rules will not change per new government.

From outside, the European Union may seem to be a unity in many aspects, from inside the differences between the countries involved –also in the area of the Third Sector- are in any case not less apparent than the similarities.

[4] Different: Recommend 2007 principle 1 NGO's do not include political parties. In the Explanatory memorandum to the Recommendation is explained that they are excluded as they are generally subject to separate provisions (nr. 20.).

[5] See the ILO-treaty of San Francisco of 1948.

[6] Open meeting of contracting parties to the European convention on the recognition of the legal personality of international ngo's (ets no, 124), second meeting Strasbourg 20-22 March 2002 [MM ONG (2001) 1 Rev. 3], preamble par. 6.

3. THE EU AND THE THIRD SECTOR

As such the regulation of the Third Sector is not one of the aims of the European Union. That does not say that the European Union is not interested in the Third Sector. It apparently is interested in a flourishing Third Sector, as the EU promotes not only free trade but also democracy. In democracy the existence of a healthy Third Sector is a sign of the high level of democracy a society has. There have been several meetings on European level on the role of Third Sector, by which it becomes clear that the EU, as well as the Council of Europe intents to promote a democratic society in which non governmental organisations have an important place in social and political life, including *inter alia* the provision of educational, social and health services to the public.[7] At an Open meeting, organized by the Council of Europe, with representatives from all parts of Europe[8] this was formulated as follows: "Considering that the existence of many NGO is a manifestation of the right of members to freedom of association and of their host country's adherence to principles of democratic pluralism".[9] The EU-Commission wants to maintain an open dialogue with NGOs and has not introduced an accreditation system in which certain NGOs have consultancy status.[10]

There are however, contrary to the situation regarding companies, no harmonizing directives with regard to the law on NGOs. There have been trials to make a regulation about the European association by the Commission itself[11] and a proposal about a European foundation by legal experts,[12] but these proposals have not lead to law in force. Interestingly there has yet been issued a regulation on the European Cooperative Company.[13] The economic necessity –and the lobby- for such a regulation was apparently greater than for regulations regarding NGOs. In this contribution I will not deal with the cooperative societies, although it is clear that by their member-structure and non-capital assets they form a special category of companies and have close connections with associations.

The EU- rule on the freedom of establishment is applicable to NGOs insofar as they have economic activities.[14] Thus in a direct way non-commercial NGOs can not enjoy this freedom from the EU-treaty.

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[7] See f.i. The communication of the European Commission: Promoting the role of voluntary organisations and foundations in Europe, COM/97/0241/final, and " The role and contribution of third sector organisations in the building of Europe", a report from the Social and Economic Committee of the EU, PB C 329, 17/11/1999. p. 2.

[8] Open meeting (footnote 7).

[9] Paragraph 7 of the preamble of the document mentioned in footnote 7.

[10] Commission's Communication on "An open and structured dialogue between the Commission and Special Interest Groups, JO C 63 of March 1993; Communication of the Commission: To a vigorous culture of consultation and dialogue, COM (2002) 704, def.

[11] COM (91) 273 final-SYN 386-391.

[12] See Klaus J. Hopt, w. Rainer Walz, Thomas von Hippel, Volker Then (editors), The European foundation, A new legal approach, Verlag Bertelsmann Stiftung, Gütersloh, 2006.

[13] Regulation of the Council of the EU of 22 July 2003, nr. 1435/2003, L.207.

[14] See art.48 EU-Treaty.

The legislation of EU-countries has not only to take into account what is issued by the EU, an important framework for it is given in the European Convention on Human Rights (ECHR).[15] For NGOs especially the freedoms of association, of privacy and of non-discrimination are important. These rights are protected under article 8, 11 and 14 of this Convention, in which all EU-member states participate. The ECHR provides for a normative framework that determines under what conditions a restriction on a fundamental right is allowed and justified. This restriction must be prescribed by law.[16] The restriction has to be "necessary in a democratic society in the interest of national safety or public safety, public order or the protection of public health, good morals or the protection of rights and freedoms of others."[17] This 'necessity' test implies an evaluation of the proportionality of the restriction.[18] In the interpretation of what is necessary in a democratic society the states have a certain margin of appreciation.[19]

The specific strength of the European Convention on Human Rights lies in the fact that it gives standing to citizens and NGOs to bring a case against a member state to the European Court on Human Rights in Strasbourg. Moreover, the judgements of the courts are binding on the member states. Thus the ECHR provides for effective protection of human rights and fundamental freedoms.

The Committee of Ministers of the Council of Europe has in the past and recently in 2007 issued principles with regard to the legal status of NGOs. They can be seen as guidelines for the participating countries, also with regard to their legislation, developed on the basis of the ECHR , the case-law of the European Court of Human Rights and other international documents on human rights.[20].

[15] The convention was concluded on 4 November 1950; it entered into force 3September 1953. Source: Jacobs &White, The European Convention on Human Rights, 4th edition, 2006.

[16] In order to qualify as a rule prescribed by law, the rule must be i) of a general nature; ii) based in the national law of the member State; iii) sufficiently clear; iv) made publicly known; v) contain safeguards against misuse. Also a restriction may not be imposed retroactively.

[17] See Erik Denters and Wino J.M. van Veen, Voluntary organizations in Europe: The European convention on human rights, International Journal of Not for profit Law; see also http://hudoc.echr.coe.int .

[18] See Handyside v. UK, 7 December 1976, 1 EHRR 737, Sunday Times v. UK, 26 November 1991, 14 EHRR 229, Barthold v. Germany, 23 March 1985, 7 EHRR 383; comp. Sigurjónsson v. Iceland, 30 June 1993, 16 EHRR 462.

[19] Compare Refah Partisi (Welfare Party) v. Turkey, 13 February 2003, 37 EHRR 1.

[20] See preamble Recommendation 2007 (footnote 2).

4. RECOGNITION AND EQUAL TREATMENT OF FOREIGN (EU-) NGOS ?

Although NGOs (as far as they have not a commercial aim) do not enjoy the freedom of establishment according to the EU-treaty, there are anyway two bases for the recognition of the legal personality of a foreign (EU)-NGO in EU-countries.

Several countries adhere to the incorporation-theory with regard to foreign legal persons, which means that foreign NGOs are recognized as legal persons, when they are established according to the rules in the country where they are incorporated.

Several countries belong to the contracting parties of the European convention on the recognition of the legal personality of international non-governmental organisations on March 22 2002.[21]

The newest Recommendation (2007) of the Council of Europe with regard to NGOs states regarding foreign NGOs –independent of the application of the Convention on the recognition of legal personality of international NGOs- that they can be required to obtain approval in a manner consistent with the provisions for local NGOs. They should not have to establish a new entity for this purpose.[22] For countries that adhere the real seat theory with regard to foreign legal persons and who not participate in the European Convention of 2002 this will be quite a change when they implement this principle.

Because of lack of time I will not discuss the actual situation in the EU-countries. This subject asks for a thorough research, also with regard to the question whether foreign NGOs are treated equally in the EU-countries. The theory (idealism) in this area seems to be far more developed than practice.

From the perspective of the ECHR not only the formal recognition of foreign NGOs is important, also the equal treatment of NGOs should be practice. On a conference in 1998 was stated: " A foreign NGO should receive the same rights, powers, privileges, and immunities enjoyed by domestic NGOs as long as the foreign NGOs' activities are consistent with the public order in the host country."[23]

The existence of foreign EU-NGOs in other EU-countries confronts the national law with the law of the other EU-country. This may stimulate more comparison and eventually, dependent of the treatment of foreign EU-NGO, the use of NGO-types of other EU-countries.

[21] Council of Europe, MM ONG (2001) 1 Rev. 3. Convention no. 124.

[22] See principle 45.

[23] The legal status of non-governmental organisations and their role in a pluralist democracy, 23 - 25 March 1998, Palais de l'Europe http://www.coe.int/T/E/NGO/public/Convention_124/_Meeting_reports/The_legal_status_of_non-governmental_organisations_and_their_role_in_a_pluralist_democracy.asp

5. SOME SPECIFIC ASPECTS OF LAW REGARDING THIRD SECTOR-ORGANISATIONS IN A SELECTION OF EU-COUNTRIES

In this paragraph I will give an overview of the different legal solutions with regard to the Third Sector that are made in a selection of countries in the European Union. Most information stems from country-reports that are made by legal experts of 11 EU-countries: Belgium, Czech republic, Germany, Hungary, Italy, The Netherlands, Poland, Spain, Sweden and the United Kingdom.[24] France, about which I collected information on another occasion, is added.[25]

There are many aspects that can be described. In the country-reports that were delivered for the conference mentioned earlier information was given on many aspects, following a questionnaire we had designed. In this contribution I will only cover a few subjects.[26] It will however be very clear how different the laws regarding the Third Sector are in the concerned EU-countries. On the conference the confrontation of the participants with the abundance of differences lead in the first place to curiosity to the solutions of other countries and then to the question if the solutions of the own country are the best (one is anyhow most used to them).

The overview shows that there are many legitimate solutions regarding the legal aspects of the Third Sector. In only a few cases the law is apparently contrary to the ECHR; in some more cases the law is contrary to the principles that are issued by the Ministers of the Council of Europe.

The following aspects will be compared:

1) the legal forms and possible purposes;
2) the establishment and registration, including governmental involvement at the establishment;
3) external supervision on Third Sector organisations by government, court or other agency.

These are just a few of the aspects that are reported on the questionnaire.

[24] They were produced for the project and conference mentioned in footnote 1.The rapporteurs were: Marleen Denef and Griet vanden Abeele (Belgium), Katharina Ronovska (Czech repulblic), Peter Luxton (England and Wales),, Thomas von Hippel (Germany), Kalliroi Pantelidou with help of Evangelos Karamakis (Greece), Nilda Bullain (Hungary), Gian Paolo Barbetta an Cristina Vaccario (Italy), Helen Overes (The Netherlands), Thomasz Perkowski (Poland), Jose Luis Pinar (Spain), Carl Hemström and Magdalena Giertz (Sweden). We received also a report on Russia (Irina Novichenko). The reports can be reached through www.civilsocietyineurope.nl

[25] Compare Tymen van der Ploeg and Wino van Veen, Juridische aspecten van de non-profitsector, p. 17 ff. in Ary Burger and P. Dekker (editors), Noch markt, noch staat, SCP the Hague 2001.

[26] A book with the contributions for the conference and evaluations is planned to be published.

5 .1. Legal forms and possible purposes of NGOs

The form. Without an adequate legal form an organisation can not operate in society. To adequately operate in society, NGOs benefit from having legal personality.[27] That does not say that it should not be possible to operate without legal personality.[28]

A common distinction between legal forms for NGOs in –continental-Europe is between associations and foundations.

The characteristic of *associations* is that the organisation has members with voting rights in the general meeting. The power of the general meeting varies around the EU.

In general one of the characteristics of a *foundation* is that it has an endowment with which its purpose can be realized.[29] The criteria for the size of the amount is rather different. Some countries have a fixed amount (Belgium regarding public foundations, France) or a fixable amount (Sweden, connected to a period of 5-6 year), in others the rule is that there have to be sufficient assets (Germany, Hungary, Italy), while Poland has only the requirement that there is an endowment, while The Netherlands does not require an endowment at all According to the principles of the Council of Europe certain endowment requirements are justified. When the criterion is the sufficiency for the purpose, which is controlled by the government, there may be the danger of discretionary decision making.

Some countries have next to the (normal) association and foundation, some *more specific forms*: in Belgium, the international not for profit association; in Czech Republic the fund and the public benefit institution, both types of foundations; in France the association with recognized public utility. In Greece the not-for-profit partnerships (with legal personality!) is much used. Aside I mention the existence of several forms of social cooperatives in Italy, Poland and Spain but they do not fit into this format.

A special place in the EU have the countries of the *common law tradition*. They do not have the distinction association-foundation of the continental legal systems. England and Wales, which is taken as example, uses as legal forms for NGOs the unincorporated association, the charitable trust, the company limited by guarantee and the friendly society. Only the last two forms have legal personality.

[27] Recommendation 2007, principles 7: NGO's with legal personality should have the same capacities are generally enjoyed by other legal persons.

[28] Recommendation 2007, principles 3: NGO's can be either informal bodies or legal persons. See also Explanatory memorandum nrs. 23 and 24.

[29] See Recommendation 2007, principle 18: Any person should be able to establish an NGO by way of gift or bequest, normally leading to a foundation, fund or trust, and principle 31: In case of non-membership based NGOs there can also be a requirement of proof that the financial means to accomplish their objectives are available.

The freedom of association implies that NGOs may operate *without legal personality*.[30] On this point however it is not clear if all countries concerned are in conformity with the ECHR. This is from the legal regulations only clear for Belgium, France, Germany, Greece, Italy and England and Wales. In the other involved systems the association without legal personality is not a recognized form. This may mean that it is allowed to organize informally and that this informal organisation is considered to be a contract. The question is if the organizers may operate in society and in legal matters under a common name. I do not know exactly how this is treated in other countries, but in The Netherlands it is very unclear in how far informal organizers can claim that they have just a contract and are not an informal association.[31]

The purpose. With regard to *foundations* there are several countries that reserve this form for *public benefit* purposes. This the case for Czech Republic, France, Italy[32] and Spain. In other countries are special types of foundations for public benefit (Belgium and Greece)[33] or can foundations acquire public interest-status (France, Hungary and Poland)[34]. In other countries are no restrictions regarding foundations related to the public benefit.

For the English *charities* the condition is that they have a charitable purpose, which does not cover fully the public benefit-purpose.

Charities may only engage in *political activities* when they are ancillary to its charitable purpose. For NGOs that are no charities this restriction does not exist.[35].

In half of the countries involved (France, Italy, The Netherlands, Poland, Spain, Sweden, England and Wales) *associations* can have all sorts of purposes, also *commercial(economical)*. It is of course important that there should be in case of commercial associations no unfair competition of NGOs with companies, and likewise there have to be safeguards to prohibit profit-making by directors, members, etc.[36]

Half of the countries involved has restrictions with regard to economic activities (Belgium, Czech republic,[37] Germany, Greece and Hungary) of associations. This commonly means that they may still perform some economic activities, but only when they are related to their non-economic purpose.

[30] See Recommendation 2007, principle 3: NGOs can be either informal bodies or legal persons. See also Explanatory memorandum nrs. 23 and 24.

[31] Compare Dijk-Van der Ploeg, Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij, 5th edition, 2007, p. 45-47.

[32] In Italy this is also true for associations.

[33] This also exists for associations in Greece: philanthropist association.

[34] This status can also be acquired by associations in these countries..

[35] These NGOs do not enjoy tax benefits.

[36] This is called the non-distribution constraint. See Recommendation 2007, principle 9.

[37] With regard to foundations and funds.

For foundations economic activities are in most countries only allowed, when they are ancillary.[38]

Remarkable is, looking to the practice in the EU-countries, that the Recommendation 2007 the Committee of Ministers states rather generally, that NGOs should be free to engage in any lawful, economic activities in order to support their own not-for-profit activities.[39] This is only in a few countries practice for all NGO-forms.

That in a country there are different forms, all with their own limitations, is as such not threatening the freedom of association, as long as in total the regulation does not restrict the eligible objects and activities for the NGOs other than on the ground of conflict with public order, public safety etc.[40]

5.2) Establishment and registration[41]

Also a lot of difference can be observed with regard to the establishment of NGOs with legal personality. First the situation for *associations* is described.

In a few countries a notarial deed is required for a formal association: Germany, Italy and The Netherlands.[42] In other countries a written document is satisfactory.

Apart from Sweden and the informal association in the Netherlands, however, the associations with legal personality –and their articles of association- in all countries concerned have to be registered.

The registration may be performed at a governmental agency, the court or the Chamber of Commerce.

In case the registration takes place at a *governmental agency* (Belgium[43], Czech Republic France[44] and Italy)[45], the government also checks if the establishment and the articles of association are conform the law.

[38] In Germany and The Netherlands there is not this restriction.

[39] Principle 14; see also explanatory memorandum nrs. 40-42.

[40] Compare Recommendation 2007, principles 11-12, and explanatory memorandum nr. 34-36.

[41] From American perspective, registration at the state administration is the most important moment for becoming a corporation (legal person). The registration is a weak form of a charter by which the Crown grants legal personality. The granting of legal personality may only be performed by the sovereign; the legal person is seen as a legal fiction. In continental Europe registration has not (always) this legal status.

[42] In Belgium this is optional.

[43] This applies only to the International Not for Profit Association.

[44] The normal associations with legal personality are registered at community-level, the association with recognized public utility is registered at the Ministry of Interior, after positive advise of the State councel..

[45] Until 2000 the registration and supervision were in the hands of the courts.

In other countries (Germany, Greece, Hungary, Poland and Spain) the *court* registers the associations with legal personality and checks more or less intensive their conformity with the law.[46]

The *Chamber of Commerce* registers associations[47] and foundations in The Netherlands –without checking-. In Sweden only commercial associations have to be registered, at the Chamber of Commerce.

The establishment of associations is dependent of the will of the establishers. There are remarkable differences in the *number of establishers* that is required It ranges from 2 or 3 via 7 (Germany and 15 (Poland) to 20 (Greece).

Looking to Recommendation 2007, principle 17, in which as usual number is set two or more – and if more, do not set a level that discourages establishment-, the promotion of the Third Sector is mostly served by a small number: 2 or 3. The continuation of a the requirement of a higher number than f.i. 3 needs to my idea an explanation.

Mostly the law sets rules on the minimum content of the articles of association[48], which is controlled at the establishment. The articles of association have, according to civil law-measures, to include rules on the composition of the management board, the powers of the management board, the regulation regarding representative power, the rights and duties of the members, the powers of the general meeting (at least the appointment and dismissal of (most of the) members of the management board, the amendment of the articles of association and the dissolution).[49]

In this contribution I will not deal with the wide variation of legal requirements with regard to the internal organisation of associations and foundations. The legislation of NGOs regarding this aspect varies from nearly no explicit legislation to rather detailed regulation.

Apparently, because *foundations* have more to do with economy because assets are put aside for a specific purpose and are withdrawn from the regular economic activities, the government is often involved in the establishment of foundations. This is true for public benefit foundations in Belgium, foundations in Germany, France, Greece and Italy and Spain. When the government is involved, a public registration may lack (Germany, France).

[46] In Greece the not-for-profit partnership has to be registered at the court.

[47] This applies to formal associations; informal associations obtain automatically legal personality, be it that the informal association has limited legal capacity.

[48] By Anglo-American lawyers is made very clear to me that "statutes", which is used in continental law and in the documents of the Council of Europe, is not a correct word for the document in which the purpose and rules for the specific legal person are laid down. The term 'articles of association' should be used, also in case of foundations.

[49] The Recommendation 2007 is on these points less mandatory. See principles 19 and 20. I cannot work this point out here.

In other countries involved, like Hungary and Poland the courts are involved in the establishment of foundations. The courts keep a register.

The foundation is established in the Netherlands before the notary public. The foundation has also to be registered at the chamber of Commerce.

For the establishment of charitable trusts and unincorporated associations in *England and Wales* a written document is sufficient. The companies limited by guarantee need to be registered at the Registrar of Companies. The registration of charities of all forms is with the Charity Commission.

In Greece, the not-for-profit partnership has only to be registered at the court.

Something has to be said about *governmental interference* with the establishment of NGOs from the point of view of the freedom of association. It is clear that this freedom may be at stake in case the government is involved in the establishment of voluntary organisations and acts only on the basis of its own authority (discretion).[50] As such the freedom of association is not at stake when the government only controls if the establishment is in conformity with the law. To avoid misuse of governmental power this governmental agency should anyhow be separate from governmental agencies that decide on subsidies to NGOs, service-contracts etc.[51]

Most freedom is guaranteed when there is no governmental control at the establishment and the government only issues the rules for establishment. Control by a court and a Chamber of Commerce, can be good alternatives for government control. Control only by a notary public, who mostly also drafts the articles of association, as happens in The Netherlands, seems to me a too weak form of control.

It is important, based on art. 6 ECHR, that the applicants can appeal from negative decisions of the agency that decides about the acquisition of legal personality.[52] In the countries involved this appeal is possible indeed.

5.3. External supervision

Introduction. External supervision should be preferably *a supplement to internal supervision*. In associations the internal supervision is exercised by the general meeting of members and in many countries foundations of some size have a supervisory body, although the law mostly does not prescribe such a body.

[50] Compare Recommendation 2007, principle 28.
[51] See Recommendation 2007, principle 36 and 39.
[52] Recommendation 2007, principle 38.

As a general rule there are not many regulations regarding external supervision on associations as generally is trusted that the supervisory power of the general meeting of members concerning the management board protects the interests of the members and the association in a satisfying way.[53] In some countries however also rules regarding exterior supervision for associations exist (Greece (philanthropic associations), Italy, Spain (associations with public utility).

For foundations is mostly no legal requirement to have a supervisory board. To protect the interests of the founders and the general interest the law indicates an exterior agency that supervises foundations.

The supervisory authority may be a governmental body, an independent body (England and Wales: the Charity Commission) or a court.[54] From the perspective of control, it is clear that a governmental or independent body with a supervising task with regard to NGOs can have more continuing control than a court, that is dependent of appeals to it .

From a private law (Third Sector) perspective it is important that supervision of NGOs is restricted to control related to the (un) lawfulness of the purpose or activities of the NGO and that the supervision is exercised in an objective way. Or to say it in another way: the control should be limited to legitimacy-control only and not extend to efficiency-control. This last control is suspicious –i.a.- in the light of the right to property taken with the freedom of expression. The objectivity seems to be best guaranteed when the supervision is exercised by the court or an independent authority.

In quite a few countries the supervision is exercised by *the government*: France, Germany (regarding foundations (state authorities), Greece, regarding philanthropic associations and public benefit foundations, Italy with regard to all NGOs, Spain[55] and Sweden, both only regarding foundations,.

In some countries NGOs need approval of certain important acts of the (management) board of the (association and) foundation. In Belgium, France and Spain the NGO needs governmental approval for accepting donations above a certain amount of euro's and for the acquisition and sale of estate. For these last transaction also approval of the government is required in Greece. The origin of this seems to be that the state should protect the country against wealth in the dead hand. It would be interesting to do research to the effect of this rule in comparison to countries without this rule.

[53] Members can eventually invoke a court to annihilate decisions when, to their notion, these interests are damaged.

[54] I do not discuss the supervision by selfregulatory bodies.

[55] In certain matters the foundation has to address the court.

A rather extensive supervision on NGOs is exercised by the *Charity Commission* in England and Wales with regard to charities. The Charity Commission functions more like a father, giving advises and punishments to NGOs than as an external supervisor. This type of supervision is unique.

The *court* has supervisory power in Czech Republic and The Netherlands (on request of the public prosecutor),in Poland (on request of the relevant Ministry) with regard to foundations, in Germany with regard to associations, in Hungary and Poland with regard to associations and foundations.

In some of the countries not only the public prosecutor, but also *interested persons* may start proceedings before the court: Czech Republic, England and Wales, The Netherlands Poland. They may request for measures against mismanagement in foundations. From the perspective of supervision in a court-system this has clearly added value. Of course always the question has to be solved who has enough interest to get standing for court.

An important extra possibility to fight illegality or unreasonableness in NGOs is to give members or (other) interested persons a claim to ask the court to declare decisions of NGO-bodies nul or annihilate them.[56] Apart from this special regulation for legal persons there is the possibility to sue the members of the management board or other body of the NGO or the NGO on the basis of tort.

Access to information. For the supervising authority it is important that it has access to information that is necessary to determine whether the NGO operates according to the rules or not.[57] On this point transparency of NGOs is basic, as well respect for the right to privacy by the authority who inspects NGOs.

In most countries the NGO has to fix an *annual balance sheet* and statement of income and expenditure. Mostly this must be published in the relevant register for that type of NGOs or must be available.[58] Such a requirement is not contrary to the right to privacy.[59]

Interesting is to see the great differences regarding the necessity of a *list of members*. Associations in Belgium, Hungary and Spain should keep registers of members, while this is not required in the other countries. In fact this requirement, as far as this implies the right of the supervisory agencies (or third parties in general) to have access to it, may be in conflict with the *right to privacy*[60]. Of course such a register is adequate for the operation of the NGO itself.

[56] See Sweden and The Netherlands.

[57] See Recommendation 2007, principle 68: NGOs can be required to submit their books etc. to inspection by a supervising agency where there has been a failure to comply with the reporting requirements or where there are reasonable grounds to suspect that serious branches of the law have occurred or are imminent.

[58] This is not the case in Czech Republic, Germany, Greece and Hungary(both regarding normal associations and foundations), The Netherlands and Sweden concerning small associations and foundations, Italy, Poland and Spain with regard to (non-commercial) associations..

[59] Remarkably the Recommendation 2007 does not contain principles about the publication of annual accounts etc. as such. The 'transparency' principles (nrs. 62 ff.) only deal with the situation where public support is given.

Foundations are sometimes required to keep a *register of donors* –or donations. This is the case in Czech republic, Hungary [61] and only with regard to large unusual donations in England and Wales. It seems plausible that in the framework of the struggle against money laundering and terrorism the rules regarding the registration of donations (or donors) will become more strict.[62]

According to the right to privacy (art. 8 ECHR) , access to books, records, bank-accounts and/or the premises of the NGO without a prior consent from a court –on the basis of well founded suspicion of criminal activities- is generally not allowed.

The supervisory powers regarding NGOs do not interfere with the powers of the public prosecutor and the criminal courts in case there is serious suspicion of criminal offences. When the civil/administrative authorities are confronted with activities that are criminal they have to inform the criminal authorities.

Sanctions. There is some variation in the sanctions in case of acts of NGOs against the law or articles of associations. On one side there are the sanctions *against the NGO itself*, like a fine,[63] the amendment of the articles of association –regarding foundations-[64] , the appointment of members of the management board in case of vacancies,[65] and the dissolution of the NGO.[66]

According to Recommendation 2007 of the Council of Europe the dissolution of NGOs with legal personality can be caused by a decision of the members meeting or of the governing body (in case of a foundation) or in the event if bankruptcy, prolonged inactivity or serious misconduct by a court decision.[67] There are however some examples where in certain circumstances this principle is not followed: Czech Republic: Minister of Interior regarding associations; the Netherlands: the Chamber of Commerce in case of not meeting the conditions for registration. In Italy as far as I could see the government may take the decision to dissolve NGOs.

[60] In Spain explicitly is referred to the application of the Data Protection Law.

[61] The requirement to keep the donation contracts available applies also to associations.

[62] In the Netherlands the government wants to avoid explicit legislation about this but it has cared for the introduction of rules on this point in the rules for fundraising organizations which are supervised by a private self-regulatory body (CBF: Central Office for Fundraising).

[63] Compare Recommendation 2007; principle 72.states that in most instances the appropriate sanction is the requirement of rectification and else: criminal, civil or administrative penalty.

[64] See Belgium (under exceptional circumstances), Czech Republic, Germany, Hungary, Italy, The Netherlands. England and Wales: cy-pres rule with regard to charities.

[65] Germany (urgency board for associations), Czech republic, Hungary, The Netherlands and Poland regarding foundations.

[66] Where in Czech republic the Ministry of Interior decides about the dissolution of an association, it is in Belgium and Greece the court that on request of the public prosecutor decides about this.
In The Netherlands not only the court may dissolve the NGO, also the Chamber of Commerce may dissolve them incase of non-payment of the annual fee and of not informing the Chamber of the actual members of the management board. This is meant to delete non-active legal persons from the register. This is however not in conformity with principle 74 of the Recommendation 2007.

[67] Principle 44 and principle 74.

On the other side there are sanctions *against the board members*, like suspension and dismissal of the members of the management board in case of acting against the law and the articles of association and in case of (financial) mismanagement. This is generally introduced.

An important directive for the execution of sanctions is that the sanction is proportional to the breach of the law (or the articles of association) and subject to review by an independent court.[68] This judicial review is practice in the involved countries.

6. CONCLUSION

The legislation on NGOs within the European Union is very diverse. Even countries that have a comparable economic and social level have often rather different rules. In some countries the government is rather heavily involved, while in other countries (also new EU-members) the courts are the registration and supervising authority. One would expect that in the course of time the task of the government will be transferred to the courts, but that is not necessarily the case. Much is dependent of politics. The change of government in Italy has caused a development the other way around from court to government.

Until now there have not been taken successful steps towards some harmonization. The framework of the European convention for Human Rights gives a minimum level, which mostly seems to be reached. When one looks with a view on the principles accepted by the Ministers of the member states of the council of Europe in 2007, to the practice in the involved countries there are quite a rules of NGO-law that do not conform these principles. These principles are not even very detailed.

Apparently NGO-law has such strong roots in the history and culture of a country that big changes can not be expected unless there would be strong evidence that the NGO-law is contrary to the ECHR. Maybe the Recommendation 2007 may also exert some influence.

Presumably a serious development in the NGO laws in the European Union will appear when NGOs are operating in different countries and the foreign EU-NGOs are treated equally by the authorities. Such a development may bring NGO-organizers to compare NGO-laws of different countries and choose the most fitting to establish the NGO. In that case the EU-countries may find reasons to amend their NGO-law. I am not sure that then the most appropriate rules will be designed or that EU-countries will just try to attract NGOs or maybe better to make the establishment of NGO for its own citizens more attractive.

[68] See Recommendation 2007, principle 10.